THE SUFFOLK LAWYER
THE OFFICIAL PUBLICATION OF THE SUFFOLK COUNTY BAR ASSOCIATION
DEDICATED TO LEGAL EXCELLENCE SINCE 1908 www.scba.org Vol. 27, No. 9– May 2012

Blinded by Love

Joint Tenancy and the Never-Married "Widow"

By Lance R. Pomerantz

Spring is in the air, and the attorney's thoughts drift invariably toward that staple of modern romance, the joint tenancy with right of survivorship. Fortunately, the Appellate Division has provided us with two stories of love gone wrong, and the real estate consequences that follow in its wake. Here, dear hearts are our cautionary tales:

Trotta v. Ollivier

For the first time in any New York appellate court, the Appellate Division, Second Department, recently decided that the executor of the deceased joint tenant cannot sue the surviving joint tenant to recover one-half of payments made by the decedent for the purchase and upkeep of the property. *Trotta v. Ollivier,* 2011 NY Slip Op 8349 [91 AD3d 8] (2nd Dept., November 15, 2011).

In 1992, Susan Leone and Charles Ollivier took title to the real estate as joint tenants with right of survivorship ("JTWROS"). Between 1992 and 2008 Susan expended $226,500 from her own funds for acquisition, closing and construction costs, insurance, repairs, utilities and the like. She and Charles lived together for some time as an unmarried couple, until Charles "moved to another address." Susan died unexpectedly in 2008 and Trotta was appointed executor of Susan's estate. Trotta's lawsuit alleged that Charles did not contribute to the purchase and carrying charges of the property or, if he ever did, his contributions were not equal to those of Susan. The lawsuit sought, *inter alia,* reimbursement from Charles for one-half of Susan's expenditures, pursuant to RPAPL §1201. That section provides that "[a] joint tenant or a tenant in common of real property, or his executor or administrator, may maintain an action to recover his just proportion against his co-tenant who has *received* more than his own just proportion, or against his executor or administrator" (emphasis supplied).

The court pointed out that Susan, while alive, never sought to partition or otherwise sever the JTWROS, or to seek an equitable adjustment of the expenditures. When she died, Charles became the sole owner of the premises. While the statute makes no mention of money, the court held that the purpose of RPAPL §1201 is only to provide a right to recover *monies* (i.e. not intangible, in-kind or indirect benefits) "received" by the co-tenant that exceed his or her proportionate share.

> "The statutory focus upon monies 'received' by the co-tenant, rather than upon expenses 'paid' by the tenant, suggests that the right of recovery is limited to rents and income generated by jointly held property. The absence of language in RPAPL 1201 extending the right of recovery to expenses 'paid' by a tenant beyond his or her equitable share means, under the doctrine of *expressio unius est exclusio alterius,* that the legislature, by inference, intentionally omitted or excluded joint tenant expenditures from the scope of the statute."

While equitable apportionment of past expenditures is routine in the divorce context, an unmarried joint tenant should take steps to protect her investment following the dissolution of the relationship. At the very least, she should understand the consequences of her failure to do so.

Northern Trust, NA v. Delley

It's a familiar story: Boy meets Girl. Boy is in contract to buy a parcel of real estate. Boy tells Girl "Marry me and I'll add your name to the contract as a purchaser." Girl accepts proposal, closing occurs and the deed reads: "Boy and Girl, as joint tenants with right of survivorship." Sadly, the wedding never takes place. Eventually, Boy, his judgment no longer compromised by the beauty of his beloved, brings an action pursuant to Civil Rights Law §80-b. That section permits an action for "rescission of a deed to real property when the sole consideration ... was a contemplated marriage which has not occurred ..." In the alternative, the statute permits the court to award damages in lieu of rescission. Tragically, before judgment is rendered, Boy dies.

Lance Pomerantz

Girl, presumably devastated by the untimely demise of Boy, takes comfort in knowing that, as surviving JTWROS, she will always have a roof over her head. Unfortunately, the deities of love (in the form of the Appellate Division, Fourth Department) disagreed and awarded complete title to Boy's executor. *Northern Trust, NA, as administrator of the Estate of Richard Sarkis v. Delley,* 2011 NY Slip Op 09710 [90 AD3d 1644] (4th Dept., December 30, 2011).

The court concluded "that an action pursuant to Civil Rights Law §80-b raises issues regarding the title and ownership interest in real property that survive the death of a party." The court distinguished this situation from that of a pending partition action or pending divorce action. "[A] section 80-b action for the return of real property is not extinguished upon the death of the party who commenced the action, even where, as here, the subject property is held as joint tenants with right of survivorship."

Has the Fourth Department panel just extended the meaning of the word "rescission?" Typically, "rescission" restores the parties to their pre-deed positions. In this case, Boy didn't make a deed to Girl. All he did was amend his contract to add her as a purchaser, presumably with the assent of both Girl and the seller. So the panel is not actually "rescinding" the deed, but "reforming" the deed, *post facto*, to negate Girl's interest pursuant to the deed.

Unlike the "girl" in *Trotta,* Boy had the good sense to get a promise to marry from his intended before arranging that she receive a half-interest in the real estate. By doing so, Boy was not only able to negate the unambiguous grant in the deed, but to preserve his right to do so beyond his death.

It is particularly noteworthy that had Boy merely sought a partition of the property, that cause of action would have died with him, leaving Girl in title to the whole. In the right circumstances, could the rationale behind *Sarkis* be used to support a post-mortem §80-b action by the personal representative of the decedent?

Moral of the Stories

Many unmarried couples acquire real estate as joint tenants to avoid succession problems following the death of one of the "partners." They should understand all the ramifications of this approach ahead of time to insure that their intentions are realized.

Note: Lance R. Pomerantz is a sole practitioner who provides expert testimony, consultation and research in land title disputes. He is also the publisher of the widely-read land title newsletter Constructive Notice.SM Please visit www.LandTitleLaw.com.