Dirt Law at Ground Level

BEWARE OF THE FORMS OF TRICK QUESTIONS…
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Using forms in real estate transactions, whether retrieved from the internet or an office supply store, is not a bad thing, in and of itself, even for do-it-yourself estate planning. However, seeing the terms in print may give you the feeling that you know more about the impact of those terms than you do. Furthermore, in our mobile society, you may overlook the fact that the same form can produce different results in different states.

Those may have been the causative factors in the North Carolina case of Countrywide Home Loans v. Reed, which case provides valuable lessons in other jurisdictions. In that case, Margaret Smith, her daughter Judy Reed and Judy's husband Troy Reed bought a house as joint tenants with the right of survivorship, with Judy and Troy together constituting a tenant and Margaret the other tenant. Plainly the idea was to pass title to the home to Judy and Troy on Margaret's death without resorting to probate, as to which several options would have been available if the house were in Arkansas, including a beneficiary deed.

Forms and more forms…

In order to finance the purchase, Margaret borrowed money and signed a note and deed of trust. Actually, Judy did the signing as attorney in fact for Margaret (maybe using a form), but neither Judy nor Troy signed anything in their own name even though the three of them occupied the house.

Margaret apparently was the financial weight behind the purchase and the loan, as the loan went into default fairly quickly after Margaret died and from there into foreclosure. The question before the trial court was what impact Margaret's death had on ownership of the house. Creating a joint tenancy with the right of survivorship ordinarily means that, if one of the tenants dies, his or her interest merges with that of the surviving tenants, automatically. In theory, each tenant owns an undivided complete interest, subject to being divested upon failure to survive.

Handle with care…

However, joint tenancies are not indestructible. Should a tenant sell his or her interest, the tenancy converts to a **tenancy in common**---that is, in this case, the purchaser and the other tenants would each own half, not an undivided whole.

Troy and Judy argued that the joint tenancy was in place when Margaret died and that her interest merged with their interest. They further argued that the mortgage lender's lien was granted subject to divestment since the interest the lender took as collateral would by its terms vest in parties who did NOT execute the note and lien instrument.

A fiction made fact…

However, North Carolina is what is known as a "title" state---that is, that a deed of trust really does transfer title conditionally to the lender, just like a sale, so that the joint tenancy was converted to a tenancy in common before Margaret died, and the lender got a lien on Margaret's half (which may also have come as a surprise to the lender).

What relevance does this tricky analysis have for folks in Arkansas? Well, there are two ways of dealing with these facts, one of which, as noted, is the "title" state approach, whereby a mortgage or deed of trust does in fact sever the joint tenancy. Other states ("lien" states) say a lien is just a lien, and does NOT transfer title and, hence, does NOT sever the joint tenancy.

Just take a wild guess…

The bad news is that the Arkansas cases are just not clear as to which category Arkansas falls within. So, if a lawyer or real estate professional or lender is faced with a buyer who wants to take title the way Margaret, Judy and Troy did, they need to know that they are essentially guessing as to the impact, in the event of a mortgage on only one tenancy, so they better find another clearer way to get the result they want.

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