July 6th, 2009

Court of Appeal Agrees that Severing a Joint Tenancy Requires More than Intention

By Nickie Vlavianos

Cases Considered:

Felske Estate v. Donszelmann, 2009 ABCA 209

In a previous post, I concluded that the Court of Queen's Bench correctly dismissed an application brought by a neighbor of Mrs. Felske for a declaration that he was entitled to half of her farm upon her death. The Court of Appeal has agreed and has dismissed the neighbor's appeal.

Mr. and Mrs. Felske were married for over 50 years and owned a farm together as joint tenants. If the joint tenancy persisted upon her death in 2007, Mr. Felske would automatically be entitled to her share of the estate. Instead, Mr. Donszelmann argued that he was entitled to Mrs. Felske's half. Mr. Donszelmann said Mrs. Felske wanted to leave him her share of the farm, in recognition of the help he had provided her over the past years. Mr. Felske had moved to an assisted-living centre in 1997.

One month before her death in April 2007, Mrs. Felske had a will prepared which left her half interest in the farm to Mr. Donszelmann. At the same time, she signed a transfer of her interest to Mr. Donszelmann, but nothing was done to try to register this transfer before her death. Moreover, written notice of her intention to sever the joint tenancy was never given to the Public Trustee (as trustee of Mr. Felske) as required by section 65(1) of Alberta's *Land Titles Act*, R.S.A. 2000 c.L-4. Section 65(1) says that the Registrar of Land Titles shall not register a transfer that has the effect of severing a joint tenancy unless there is proof that the other joint tenant has been given notice.

With respect to the will, the Court of Appeal applied the well-established principle that any attempt to sever a joint tenancy through a will is ineffective: see also *Sorensen v. Sorensen*, [1997] A.J. No. 742 (C.A.). As for the transfer of land executed by Mrs. Felske, the Court of Appeal held that preparing and signing such a transfer will not suffice to sever where the transferor holds onto the transfer and does nothing more with it. According to the Court, unless the transfer is delivered or otherwise acted upon by the transferor, no severance will result. Here, if this were intended to be a gift during Mrs. Felske's lifetime, there was insufficient delivery of this gift to Mr. Donszelmann. Consequently, the joint tenancy was never severed. The Court of Appeal emphasized that mere expression of an intention to sever a joint tenancy is not sufficient: *Sorensen v. Sorensen*. Mr. Felske thus took Mrs. Felske's share of the farm upon her death and Mr. Donszelmann's appeal was dismissed.

An interesting question that was not decided by the Court of Appeal relates to the chamber judge's conclusion that it is possible in Alberta to sever a joint tenancy without registering a transfer of land. The parties took no issue with this finding, but the Court of Appeal said it did not have to decide the point on this appeal. The language of Alberta's *Land Titles Act* does not provide an obvious answer. As noted, section 65(1) says that the Registrar shall not register a transfer of land that has the effect of severing a joint tenancy unless the required notice has been given. But the section does not say that a transfer of land cannot have the effect of severing unless it is duly registered. The Legislature could have said so expressly; the implication seems to be that registration is not critical, at least not as between immediate parties to the transfer and before anyone has relied on the non-registration to their detriment.