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Severing a Joint Tenancy Without Adequate Notice to the Other Joint Tenant

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Cases Considered:

Felske (Estate of) v. Donszelmann, 2007 ABQB 682

This is one of those estates cases where the facts cry out for a particular result. It is also one of those cases where the law provided the right result. This was a fight between the Public Trustee of Alberta, on behalf of an 80 year old mentally incompetent widower who, for 42 years, owned a farm with his wife as joint tenants, and a neighbour who, while the wife lay dying in hospital, had his lawyer prepare a will and transfer of land giving him the wife's interest in the farm. There is no question that Mr. Justice D.A. Sirrs decided correctly when he chose the Public Trustee over the neighbour on these facts.Mr. and Mrs. Felske lived together on a farm near Millet, Alberta from the date of their marriage in 1955 until 1997. They had no children. They owned the farm together as joint tenants. When one died, his or her share would transfer automatically to the other through the right of survivorship. In 1997, because of a serious mental illness, Mr. Felske was unable to continue living on the farm. He has resided in an assisted-living centre ever since and his affairs have been managed by the Public Trustee. Mr. and Mrs. Felske agreed that they would not sell the farm as long as Mrs. Felske was able to remain there. She continued to live on the farm until she was hospitalized with cancer in February 2007.

Mr. Donszelmann, a neighbour, visited Mrs. Felske in hospital. His evidence was that he had provided assistance to Mrs. Felske on her farm. This included maintaining fences and buildings, providing feed for and feeding the animals, and driving Mrs. Felske to town and for other errands. Mr. Donszelmann said Mrs. Felske referred to him as "the son she never had". According to the Public Trustee, Mr. Donszelmann's only connection to the Felske farm was that he had rented part of it for awhile. Because of difficulties in collecting rent from him, the Public Trustee had at some point advised him that they would no longer rent to him.

Mr. Donszelmann testified that while visiting her in hospital, Mrs. Felske told him that she wanted to leave half of the farm to him. Mr. Donszelmann consulted his lawyer who prepared a will and a transfer of land to be executed by Mrs. Felske. The lawyer acted only for Mr. Donszelmann and did not receive any instructions from Mrs. Felske. There was no evidence that Mrs. Felske received any legal representation on her own behalf. On March 25, 2007, Mrs. Felske executed both the will and the transfer of land. She died in hospital on April 25, 2007. The transfer of land was never registered at Land Titles, but a caveat was registered by Mr. Donszelmann after title had issued in the name of Mr. Felske as the surviving joint tenant.

The issue before the court was whether the will or the transfer of land had the effect of severing the joint tenancy held by Mr. and Mrs. Felske with respect to the farm. As for the will, the court applied the leading case of Sorensen v. Sorensen, [1977] A.J. No. 742 (C.A.) and concluded that the right of survivorship took precedence over any disposition made in Mrs. Felske's will.

Because the right of survivorship applies automatically on the death of one joint tenant, there is nothing left to devise by will.

The court then considered whether the transfer of land amounted to an effective severance of the joint tenancy. The law recognizes that a joint tenancy may be unilaterally severed through an act by one of the joint tenants acting on his or her share. Was the transfer of land such a sufficient "act"? Mr. Donszelmann had the onus of proving that it was.

In the court's view, the transfer of land from Mrs. Felske to Mr. Donszelmann contemplated a gift. Mr. Donszelmann did not pay value for Mrs. Felske's share of the farm. Although he gave evidence of some past services, past consideration is generally no consideration. Did Mrs. Felske intend the transfer to be a gift during her lifetime? On the evidence, Justice Sirrs held that she did not. The transfer and the will evidenced two competing intentions — an immediate transfer and a disposition to take effect only on Mrs. Felske's death (with an ability to revoke it until then). Mr. Donszelman's evidence that Mrs. Felske wanted to "leave" him half the farm was more consistent with the latter intent. As well, the fact that Mrs. Felske did not reserve a life estate for herself in the farm was more consistent with an intention to dispose of her share on her death.

Alternatively, said the court, if this was an inter vivos gift, did Mrs. Felske do all that she could do to complete the gift? Without adequate delivery, the law is clear that a gift is not legally binding against the donor. Although Alberta's Land Titles Act (LTA) does not require registration to sever a joint tenancy, where an alleged transfer involves a gift of land, the requirements for registration shape what the donor must do to complete the gift. Section 65 of the LTA precludes the Registrar from registering any transfer of land that has the effect of severing a joint tenancy unless: (i) the transfer is executed by all the joint tenants; (ii) all the joint tenants have given their written consent to the transfer; or (iii) all joint tenants have been properly served with written notice of the intention to register the transfer. This provision addresses the fact that unfairness can result to the other joint tenant if severance occurs without notice.

In this case, the only notice given to the Public Trustee was done so verbally, and it did not indicate an intention to register a transfer of land as required by s. 65. The Public Trustee was told that Mrs. Felske intended to transfer her interest in the farm to Mr. Donszelmann, but not to register a transfer. This did not meet s. 65 and, according to Justice Sirrs, there were no exceptional circumstances in this case to allow for severance without proper notice. It would have been a simple matter to serve the required written notice on the Public Trustee. In the result, Mr. Donszelmann failed to establish sufficient delivery for a completed gift. His application for a declaration that Mrs. Felske's actions had severed the joint tenancy was denied, and Mr. Felske was declared the sole owner of the farm.

So what kind of "exceptional circumstances" might have led Justice Sirrs to hold that the notice given to the Public Trustee, although not perfect, was sufficient to sever the joint tenancy? Well, for one, if Mr. Donszelmann had paid value, the question of whether Mrs. Felske had done all that she could to perfect the gift would not have arisen. Moreover, if Mrs. Felske had been represented and there was less ambiguity as to her intentions, this may have made a difference. Having your lawyer draft documents to be signed by someone dying in hospital without ensuring that they have adequate legal representation is usually not a good idea.