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An Unseverable Joint Tenancy: Intentions of the Donor or a Question of Law?

By: Nigel Bankes

Case Commented On: *Pohl v Midtal*, 2017 ABQB 711 (CanLII)

In this decision Justice Rita Khullar concludes that when a parent makes an *inter vivos* gift of interest as a joint tenant in real property to an adult child, that gift may include an irrevocable right of survivorship. While there is a presumption that the donor has retained the power to sever during the donor's lifetime, this presumption may be rebutted based on the expressed intentions of the donor. In this case the presumption was rebutted. In reaching these conclusions Justice Khullar relies heavily on the decision of the Supreme Court of Canada in *Pecore v Pecore*, 2007 SCC 17 (CanLII), a case dealing with a joint bank account.

In this post I argue that *Pecore* does not support these conclusions.

The post proceeds as follows: (1) a review of the facts, (2) a statement and re-statement of the legal issues, (3) a review of the decision in *Pecore*, (4) a review of persuasive authority from other provincial jurisdictions and then (5) a (re)examination to examination of the main issues (a) did the donors intend to create an unseverable joint tenancy? and, (b) assuming that the donors intended to create an unseverable joint tenancy, could they do so as a matter of law?

The Facts

Vivian Midtal had five children from a previous marriage including a daughter Melva (husband, Dennis) who was the only child interested in continuing to farm. Vivian married Gordon Midtal in 1974. After the marriage Gordon transferred his six quarter sections to himself and Vivian as joint tenants. Gordon and Vivian subsequently sold four of these quarter sections (including three quarters to Melva and Dennis). In June 2004 Gordon and Vivian added Melva as a joint tenant on the home quarter and Vivian's son Bryce as a joint tenant on the last quarter (quarter # 6). Vivian's will (made at the same time) left her entire estate to Gordon or if he predeceased her to her three other children. The will made no mention of Melva or Bryce. Gordon became Vivian's attorney in 2007 and in 2010 transferred their interests in quarter # 6 to Bryce as the sole owner. Gordon also made a will leaving his estate to Vivian's other three children indicating that he had already made provision for Melva and Bryce. Gordon continued to reside on and farm the home quarter.

Relations between Gordon and Melva and Dennis deteriorated and in 2012 Gordon on his own behalf and as Vivian's attorney commenced an action claiming that that the 2004 transfer created a resulting trust in favour of Gordon and Vivian. In *Midtal v Pahl*, 2014 ABQB 646 (CanLII)

Justice Moreau concluded that Melva had been able to rebut the presumption of a resulting trust and that the transfer was a gift. In February 2015 Gordon on his own behalf and as Vivian's attorney served Melva with notice of intention to sever the joint tenancy. Melva declined to consent and instead filed a caveat. The judgment does not disclose the nature of the interest claimed by the caveat. In March 2015 Gordon on his own behalf and as Vivian's attorney registered the transfer and the resulting title listed Gordon and Vivian as joint tenants with respect to a two thirds interest and Melva as to a one third undivided interest. In May 2015 Gordon on his own behalf and as Vivian's attorney registered a transfer of Vivian's interest to him, and in September 2015 Gordon on his own behalf and as Vivian's attorney served Melva with notice to take proceedings on the caveat. Melva commenced this action. Vivian died in December 2016 and Gordon died in May 2017. The matter came on before Justice Khullar on the agreed statement of facts prepared for the earlier action.

The Issue(s) Before the Court

The parties asked the Court to determine the following question:

> Whether the defendants were entitled, at law, to exercise their rights to sever the joint tenancy pursuant to s 65 of the *Land Titles Act*, with respect to the lands legally described in the Statement of Claim filed in this action.

Section 65 of the *Land Titles Act*, RSA 2000, c L- 4 provides that:

> The Registrar shall not register a transfer that has the effect of severing a joint tenancy unless
> (a) the transfer is executed by all the joint tenants,
> (b) all the joint tenants, other than those executing the transfer, give their written consent to the transfer, or
> (c) the Registrar is provided with evidence satisfactory to the Registrar that all the joint tenants who have not executed the transfer or given their written consent to the transfer have by
> (i) personal service, or
> (ii) substitutional service pursuant to a court order,
>
> been given written notice of the intention to register the transfer.

The question posed required answers to a series of subsidiary questions.

First, was there evidence that the donors intended that the joint tenancy created by the gift was to be an unseverable joint tenancy?

Second (and alternatively), was there an enforceable agreement or similar undertaking (or common understanding) between Melva, Gordon and Vivian that the joint tenancy created by the gift was to be an unseverable joint tenancy? Such an agreement or similar undertaking might arise in a number of ways. There might be an enforceable contract between the parties (which would likely need to comply with the *Statute of Frauds*, or alternative acts of part performance: *Haan v Haan*, 2015 ABCA 395 (CanLII)) or there might be a proprietary or other estoppel that

would prevent the donors from asserting a right of survivorship (see *Cowper-Smith v Morgan*, 2017 SCC 61 (CanLII)).

Third (and if either of the above was answered in the affirmative), is there a legal interest known to the law as an unseverable joint tenancy or is such an interest a "mere fancy"? See *Keppel v Bailey* (1834) 39 ER 10142.

On these facts there was no suggestion of either a contract or the elements of an estoppel (no reliance to detriment) and thus any claim by Melva seems to turn on the claim that the joint tenancy that was gifted was intended to be unseverable and that it was part of the complete gift. Indeed this characterization seems to have been suggested by Justice Moreau in the earlier action where she seems to have held (as quoted at para 33 in the current judgment) that "Gordon and Vivian's transfer of a joint interest in the Home Quarter to Melva constituted an irrevocable *inter vivos* gift and the right of survivorship vested when the gift was made".

The Relevance of *Pecore*

Justice Khullar's judgment relies heavily on *Pecore*.

The facts in *Pecore* were that the father added his adult daughter (P) to a joint bank account. The father remained in sole charge of that account until his death. Upon his death P assumed control of the account. The father gifted the residue of his estate to P and her then husband (M). P and M later divorced and in the ensuing matrimonial property proceedings M took the position that: (1) P held the proceeds of the joint bank account in a resulting trust for the estate, (2) therefore the right of survivorship could not operate on the monies in the account, and therefore (3) these monies fell into residue thus entitling M to a 50% interest.

The Supreme Court concluded that there was no presumption of advancement in favour of an adult child and that the default presumption was therefore that of a resulting trust. However, that presumption could be rebutted if there was evidence of an intention to make a gift; in this case the evidence supported that intention and the presumption of a resulting trust was rebutted.

These are the main propositions for which *Pecore* is known, but the decision also had to grapple with the nature of the account that the father had created since the facts tended to show that while legal title to the joint account was vested in both the father and P, the beneficial interest until the father's death was held by the father. This raised the problem of whether the father really intended to make the gift, and, if so, whether it was in fact a testamentary gift. The Court dismissed both objections, effectively concluding that "the intention at the time of the transfer [was] that the transferee would acquire the balance of the account on the transferor's death through the gift of the right of survivorship" (at para 66, emphasis added). In sum, the gift was a present gift and not a testamentary disposition but the amount of the gift was contingent.

It might be noted that *Pecore* has nothing whatsoever to say about the right of severance of a joint account (or an irrevocable right of survivorship) although as we shall see, subsequent cases draw an analogy between the right of a joint account holder to dissipate all the monies in the joint account and the right of a joint tenant to sever the joint tenancy.

In her assessment of *Pecore*, Justice Khullar emphasized (at para 41) that the Supreme Court of Canada must be taken to have "adapted the concept of joint tenancy" largely because on the Court's conceptualization of the joint account the unities necessary to create a joint tenancy (at least in relation to land) were not present (at para 41):

> ... the joint tenants in [*Pecore*] .... did not have the same rights with respect to the property; they had the same legal ownership, but the daughter's beneficial interest did not crystalize until her father's death. The Supreme Court of Canada recognized that:
>
> - joint tenants can have different beneficial interests in the property; and
> - it is necessary to determine the intention of the transferor at the time the joint tenancy is created to determine if an *inter vivos* gift is made with different beneficial interests.

It is not clear that there is as much new law here as Justice Khullar seems to suggest. It has long been understood in both real property and personal property law that it might be necessary to examine a co-ownership scenario both in terms of law and equity. Co-owners may be joint tenants in law but tenants in common in equity. For example, A and B may be registered as joint tenants, but B may have paid 75% of the purchase price; and thus in the eyes of equity A and B are tenants in common as to 25%/75% undivided interests. Or C and D may have equal legal and beneficial interests in the property until C executes a declaration of her interest in favour of S. C and D may still have a joint tenancy at law but in the eyes of equity C has effected a severance and there is a tenancy in common as between D and S. If C predeceases D, D takes the legal title by virtue of survivorship but not the beneficial interest. The beneficial interest continues to be held as a tenancy in common as between D and S. S may be vulnerable to a purchaser from D on the faith of the register but S can protect herself through a caveat: see generally *Sorensen (Estate) v Sorensen*, 1977 CanLII 1648 (AB CA), 90 DLR (3d) 26.

Be that as it may, Justice Khullar took the view that it was "a logical implication that flows from *Pecore*" that an *inter vivos* gift of a joint interest in property might include an irrevocable right of survivorship. In her view this was supported by existing authority to the effect that parties can agree by contract not to sever: *Haan v Haan* (although that case as reported on appeal seems to assume that an agreement not to sever is permissible as a matter of law).

Persuasive Authority: Decisions of the Courts of Appeal of Saskatchewan, Manitoba and British Columbia

In her judgment Justice Khullar also surveyed several appellate decisions from other provinces. She acknowledged that while her conclusion was supported by the decision of the Saskatchewan Court of Appeal in *Thorsteinson Estate v Olson*, 2016 SKCA 134 (CanLII), there are contrary decisions from the Manitoba Court of Appeal (*Simcoff v Simcoff*, 2009 MBCA 80 (CanLII)) and the British Columbia Court of Appeal (*Bergen v Bergen*, 2013 BCCA 492 (CanLII)); and *McKendry v McKendry*, 2017 BCCA 48 (CanLII)).

Simcoff

Simcoff does not directly address the question of whether there can be an agreement not to sever or whether that might be a term of the gift. The actual issue in *Simcoff* was whether or not the donor was entitled to bring an application for partition or sale. While such an application if granted would effect a severance, that was not the principal issue before the Court of Appeal. Thus, in deciding that the lower court should not have denied the donor's application for an order for partition or sale the Court does not suggest that unseverability might be an incident of a gift of real property. Indeed, *Simcoff* suggests to the contrary and in doing so (at para 64) offers an important insight as to how one might view the right of survivorship in the context of a joint account as opposed to real property: "[t]he right of survivorship is only to what is left. Accordingly, if one joint owner drains a bank account (in the case of personal property) or severs a joint tenancy (in the case of real property), there is nothing in the right of survivorship itself that somehow prevents this" (at para 64). If one reads the analogy between joint accounts and co-ownership as *Simcoff* suggests, there is nothing whatsoever in *Pecore* to support the idea that the donor has lost the power to sever. *Pecore* acknowledges that the beneficial owner of a joint account is entitled to draw down the account; the right of survivorship applies only to what is left in the account.

McKendry

McKendry is in many ways the reverse of the current decision in terms of changing donor intent. In *McKendry* the mother initially put the son on title to her home in Vancouver merely for administrative reasons. Initially therefore, the son held his interest, *including his right of survivorship*, on trust for the mother and ultimately the estate. Subsequently, the mother decided to make the son a gift of the beneficial interest. The principal question for the trial court and the Court of Appeal was whether or not the mother had done enough to rebut the continuing presumption of the resulting trust. The Court of Appeal held that she had and in doing so explained the mother's actions in terms of "a renunciation of her beneficial interest in the right to survivorship" (at para 42). This did not mean that she had committed herself not to sever; *it merely meant that the son no longer held his interest under the right of survivorship on a resulting trust*.

Bergen

In *Bergen v Bergen* the mother and father put the son on title and the son at least partially built a house on the lands. There was a falling out. The parents severed the joint tenancy and then applied for an order for the sale of the lands with all the proceeds to be paid to them. The premise of that argument was evidently a resulting trust. The son counterclaimed arguing that the parents held their interests in trust for him. The premise of that argument must have been that the parents intended to make him a gift of the entire property. Both the trial court and the Court of Appeal found in favour of the parents. For present purposes, the most interesting part of the Court of Appeal's decision is the recognition at paras 39-41 of some of the challenges of applying *Pecore v Pecore* in the context of land and its endorsement of the approach taken in *Simcoff*.

Thorsteinson

In *Thorsteinson*, Mrs. Thorsteinson (Marjorie) transferred nine parcels of land into the names of herself and Olson. She subsequently commenced an action requesting that the transfers be set aside on the basis, among other things, of resulting trust, undue influence and breach of fiduciary duty. In the alternative, she sought severance of the joint tenancy. Marjorie died before the action was heard. The trial judge concluded that Marjorie had intended to make a gift to Olson and that since there had been no severance prior to death Olson took by way of the right of survivorship. The trial judge concluded that Marjorie's executor was not in a position to exercise a right of severance on behalf of the estate simply on the basis that it was too late; survivorship had already operated. This reasoning is entirely conventional. Certainly, as a matter of common law, merely commencing an application for partition or sale is not dispositive enough to effect a severance (*Sorensen*) and one might expect the same of an application to sever.

The Court of Appeal while reaching the same result took a very different view of the law of severance in Saskatchewan. Two sections of Saskatchewan's *Land Titles Act*, SS 2000, c. L-5.1 are central to the discussion:

> 152(1) On the death of a registered owner or interest holder, all rights and obligations of the registered owner or interest holder vest in the personal representative of the deceased registered owner or interest holder.
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> (2) The person in whom land of a deceased owner has been vested owns the land on the trusts and subject to any equitable claims on which the deceased owner held the land.
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> ...
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> 156 No title or interest held in joint tenancy may be alienated by an instrument purporting to grant the title or interest unless the alienation is authorized:
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> (a) by all the joint tenants, in writing; or
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> (b) by court order, on the application of one of the joint tenants.

The Court concluded that the trial judge was correct to hold that s 156 established that a joint tenancy with respect to land can only be terminated in Saskatchewan by written agreement of the joint tenants or by court order. However, reading ss 152 and 156 together the Court concluded that the estate was entitled to continue the application for severance after Marjorie's death. However, the Court still reached the same conclusion as the trial judge on the basis that Marjorie was not entitled to sever. The Court's reasons for this extraordinary conclusion were short and perfunctory (at para 67):

> Marjorie's application for severance of the joint tenancy should have been dealt with by the trial judge on its merits. However, the trial judge's conclusion that Marjorie had gifted William joint ownership of the land is, in my view, determinative of the severance application, as her gift included the right of survivorship. This was explained by Rothstein J. in *Pecore*:

> [50] Some judges have found that a gift of survivorship cannot be a complete and perfect *inter vivos* gift because of the ability of the transferor to drain a joint account prior to his or her death: see e.g. Hodgins J.A.'s dissent in *Re Reid*. … The nature of a joint account is that the balance will fluctuate over time. *The gift in these circumstances is the transferee's survivorship interest in the account balance — whatever it may be — at the time of the transferor's death, not to any particular amount*.
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> Having gifted the right of survivorship, Marjorie could not take it back. (emphasis in original)

It is not clear why Justice Ryan-Froslie thought that the italicized text from *Pecore* supported the conclusion that Marjorie, having made a gift of a joint tenancy, was no longer in a position to sever. In fact based on the analogy drawn above by the Manitoba Court of Appeal, *Pecore* seems to support the opposite conclusion when applied in the context of real property: namely that all that Olson received was the right to take the whole by right of survivorship *provided that* Marjorie had not severed the joint tenancy during her life and provided of course that he did not predecease her. In sum, *Thorsteinson* is hardly a convincing authority for any proposition related to the unseverability of a joint tenancy.

We are now in a position to examine how Justice Khullar examined the main questions formulated above: (a) did the donors intend to create an unseverable joint tenancy, and, (b) assuming that the donors intended to do so, could they do so as a matter of law?

Did the Donors Intend to Create an Unseverable Joint Tenancy?

Justice Khullar acknowledges (at para 52) that there must at least be a presumption that a joint tenancy comes with the normal incidents of a joint tenancy including the rules on both survivorship and severance. There is thus a right (or opportunity) of survivorship in favour of the surviving joint tenant provided that there has been no severance of the joint tenancy by either party prior to that time. However, that presumption, according to Justice Khullar, may be rebutted (at para 52) "by evidence that the intention of the transferor was to give an irrevocable right of survivorship which would prevent the transferor from applying to sever the joint tenancy in the future."

But what sort of evidence will suffice to show this intention? And what evidence was available here? Certainly there is nothing like a written or oral statement to the effect that the donors were giving up their right of severance. The evidence was certainly consistent with a gift; but the evidence was lacking when it came to the question of severance. What the evidence tended to show was that the parents provided for Melva and Bruce through joint tenancies and for the other three children through testamentary dispositions. The evidence also suggested that Melva would not have the present use of the quarter section and thus the gift (at para 63) "was really only intended to take effect on Vivian and Gordon's deaths." This was not enough (per *Pecore*) to make this a testamentary gift, but for Justice Khullar the postponed enjoyment of possession did mean that "the only content to the gift is the right to take the interest in the entire property on the transferor's death" (at para 60). The difficulty with this argument is that it is simply that, an

argument – it is hardly evidence of the intentions of the donor. And in reality it is little more than a way of describing the uncertainties (and unfairness) associated with the very idea of survivorship. And Justice Khullar seems to acknowledge this since she immediately goes on to say (at para 60): "As in any joint tenancy, there is no guarantee as to the status of the property at the time of the transferor's death (the bank account could be drained, the real property spoiled)."

So where was the evidence of intention that the donors were irrevocably giving up their power to sever? In the end (and while admitting that this was not the issue before Justice Moreau) Justice Khullar relies heavily on Justice Moreau's earlier conclusion: "In all of the circumstances, I conclude that Melva has rebutted the presumption of a resulting trust. Gordon and Vivian's transfer of a joint interest in the Home Quarter to Melva constituted an irrevocable *inter vivos* gift and the right of survivorship vested when the gift was made ...". According to Justice Khullar, this statement when read "with the other findings made about the estate planning context to the decision to make Melva a joint tenant, provides enough evidence to rebut the *prima facie* position that nothing prevents the transferor from dealing with the joint interest while alive" (at para 63).

But surely this cannot suffice as an adequate evidentiary and legal basis for Justice Khullar's conclusion that the presumption of a continuing power of severance has been rebutted. It cannot be an adequate *evidentiary* basis since it adds nothing to our earlier assessment of the previous paragraphs of the judgment. Those previous paragraphs provide evidence of a gift but not evidence adequate to rebut the presumption that the donor retains the right to sever. But it is also legally inadequate in that it misreads what Justice Moreau actually said. What Justice Moreau said was that: (1) the gift was irrevocable, and (2) that the right of survivorship vested immediately. There is nothing here that indicates that the donors have revoked or neutered their power of severance. The present vesting of the right or power of survivorship was merely necessary to confirm that that this was not a testamentary disposition of land; the gift did not vest the right to be the survivor, it vested the incident of survivorship.

Assuming that the Donors Intended to Create an Unseverable Joint Tenancy, Could they do so as a Matter of Law?

There is a long line of authority and illustrative examples for the proposition that when it comes to property, that which counts as property and the contours of that property are prescribed by law and not determined according to the intentions of the parties. The principal reason for this is that property claims are claims *in rem*; claims that endure and bind the entire world rather than simply the parties to the particular transaction. The illustrative examples include the rule against perpetuities, the law of easements, the characterization of royalties, the law of restrictive covenants and the doctrine of estates. In each case "the law" (with some slack cut by equity) prescribes the relevant constitutive rules by which we must play if we want to create a property interest. The law of contract may have some very basic constitutive rules (offer, acceptance, consideration) but most of contract law turns on the intentions of the parties. Rules of law (as opposed to the intentions of the parties) play a much more important role in the law of property. While it may not be strictly true to say that the categories of property are closed (*numerus clausus*) it is clear that the courts generally jealously scrutinize the creation of new forms of property (new "fancies") while recognizing that the legislature may do so (as in the case of

intellectual property or more prosaically as in the case (in Alberta) of rights of first refusal: see *Law of Property Act*, RSA 2000, c L-7 s 63(1)(a)) (*LPA*).

The law of co-ownership is part of the law of property. The law of co-ownership has evolved over time. Historically we know that there were formerly four forms of co-ownership known to the common law: tenancy in common, joint tenancy, coparcenary and tenancy by entireties. The tenancy by entireties has been abolished by statute in Alberta: see *LPA*, s 5. It is not without interest in the present context to note that the tenancy by entireties was a form of unseverable joint tenancy. Furthermore, the *LPA* contains a strong presumption (s 8) in favour of a tenancy in common and it is widely assumed that this is because of a concern as to the potential unfairness associated with the operation of survivorship.

The constitutive rules and attributes of a joint tenancy are well known and well-rehearsed within this decision and the provincial appellate decisions. Thus we understand that a joint tenancy must exhibit the four unities: the unities of possession, interest, title and time. The unity of possession is a common characteristic of the joint tenancy and the tenancy in common. Those unities of the joint tenancy are rules of law. If A, B and C do not have equal interests in the legal title, the co-ownership that they have created (no matter what they call it) must be a tenancy in common and not a joint tenancy. A joint tenancy has the incident of the right of survivorship by virtue of which the deceased's interest in a joint tenancy accrues to the surviving joint tenants(s). As a result of survivorship the deceased's interest never becomes part of the deceased's estate. A joint tenant may prevent the operation of survivorship by severing the joint tenancy during his or her life – typically by an act that destroys one or more of the unities. The modes of severance are prescribed by law. In other words a declaration or notice by one joint tenant to the effect that "I now hold by virtue of a tenancy in common" will not sever (unless the rules of that legal system so prescribe as in the UK). A jurisdiction may also choose to limit the power of severance. For example, as long ago as 1925 the UK abolished the right to sever the legal title in a joint tenancy (while retaining the right of severance in equity). See *Law of Property Act*, 1925, s 36(2) which provides that: "No severance of a joint tenancy of a legal estate, so as to create a tenancy in common in land, shall be permissible… but this subsection does not affect …the right to sever a joint tenancy in an equitable interest ...".

The question in this case therefore must be, absent legislation, can a donor waive the power of severance generally associated with a joint tenancy? Justice Khullar concludes that it is possible. Her reasons seem to be as follows. First (at paras 50-51), *Pecore* has started down the road of amending the attributes of a joint tenancy and thus a decision to deny a donor the power to sever, if not the next logical step, is at least the next step along that same road. Second, much of the case law in this area (at para 54) "presumes the conclusion in how it frames the question" insofar as it starts with the proposition that a joint tenant has a right of severance. Third (at para 56), an unseverable joint tenancy is not inconsistent with a Torrens title system. Fourth (and in a different part of her judgement (at para 42)), Justice Khullar concludes that since there is authority for the proposition that a joint tenant may agree by contract that s/he cannot sever, the same should be true of the donor of a gift.

Is this reasoning adequate – especially recognizing that this was a novel point of law at issue in this case?

There are several reasons for questioning the adequacy of the reasons offered in support. First, and for reasons already given above, I do not think that *Pecore* made significant changes in the law of joint tenancy especially as it relates to land. Furthermore, *Pecore* if anything affirms the donor's right of severance (and the equivalent in the context of a joint account of the right to dissipate the account) during his or her life. Second, the framing of the issue in the existing cases is not tautologous or question-begging if the right of severance is a legal incident of a joint tenancy. Framing the issue in terms of a tautology suggests that Justice Khullar may not have appreciated the full import of the issue before her – namely, can the parties (or specifically the donor) change the rules associated with a joint tenancy or are they rules of law? Fourth, by focusing on the position of the donor(s) Justice Khullar fails to fully appraise the consequences of changing the severance rules associated with a joint tenancy. In particular, she fails to address whether the interest created by the donor(s) is mutually unseverable: i.e. has the donee lost the power of severance? If this is the case a donee in a palliative condition would not be able to sever even though such a conclusion would make the irrevocable nature of the gift yet more illusory than Justice Khular contemplates. Alternatively if it is only the donor that is precluded from severing, what has happened to the mutuality normally associated with co-ownership in general and joint tenancy in particular, and does that matter?

Conclusion

In sum, Justice Khullar has decided that a party making a gift of an interest in a joint tenancy in Alberta may change the normal attributes of the institution of joint tenancy so as to irrevocably deny to the donor, the donor's ordinary power of severance. Furthermore, Justice Khullar has also suggested a very low threshold for rebutting the presumption of a continuing power of severance. In fact, on the evidence available here, it almost seems as if the presumption applied by Justice Khullar is actually the reverse of what she suggests such that a donor is presumed to want to make the donation "effective" and thus further presumed to irrevocably renounce the power of severance.

I would like to acknowledge that but for my colleague Jonnette Watson Hamilton I would never have read this case! Jonnette was thinking of writing a post on the case and came to chat about it. By the end of the discussion it was agreed that I was to take the lead; and then the 'flu intervened and it became a solo effort. I know that I have drawn on that earlier discussion as well as useful comments that Jonnette provided on an earlier draft but I am not sure that she agrees with all of the text. In sum, credit goes to Jonnette for initiating the discussion but the responsibility for the opinions expressed here is mine alone.

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