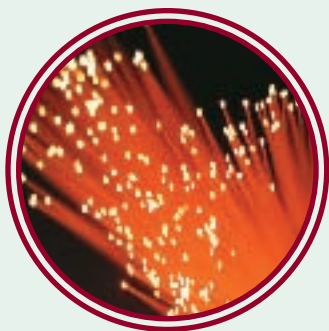


By Paul L. DeBole

Special Cases





Tenancies Gone Awry – Some Special Cases of Who Owns What

You know, a funny thing happened the other day. I had to get an easement to run some conduit containing fiber optic cable across a parcel of property in a small town in Massachusetts. I went to the Registry of Deeds and found that John and Mary Smith had acquired the property in 1973, as husband and wife, as tenants by the entirety. The only encumbrance of record was a purchase money mortgage in 1973 that had been discharged in 1988. Simple, right? No way.

A problem arose in that John and Mary Smith were divorced in 1982. John had been living in a small town in northern New Hampshire (almost Canada), in a cabin that he also owned as tenants by the entirety with Mary. But since his divorce, he had been living with his girlfriend Barbara; and he and Barbara had begotten a child. John died intestate (without a will) in 1998. So the question becomes who owns what and in what proportion?

TENANCIES GONE AWRY

I. The House in Massachusetts

In Massachusetts, a tenancy by the entirety creates a right of survivorship in each spouse. Upon the death of one, the other still owns the property. However, a tenancy by the entirety is only allowed for a husband and wife. The moment that the judge signed their divorce decree, the tenancy by the entirety was destroyed by operation of law, and a tenancy in common was created—a tenancy with no right of survivorship. John's half-interest in the property then descended either (a) under the terms of his will, or (b) as in this case, under the intestacy statute. Since he died with no spouse (he was divorced remember), his half interest passed to the children he had with Mary (his ex-wife), *and* to the child that he had begotten with his girlfriend, Barbara. Mary still had her one-half interest in the house. In addition, his three children by Mary each took a one-eighth interest in the property, *and* his illegitimate child by Barbara also got a one-eighth share.

So the house that Mary has lived in since 1973, and where she had raised her children while she and John were divorced, was no longer all hers. The fact that her children each got a one-eighth share was not a problem, but that her ex-husband's child by another woman also got a one-eighth interest on the property.

II. The Cabin in New Hampshire

New Hampshire is one of those states that do not recognize a tenancy by the entirety. However, since so many real property conveyances are handled by Massachusetts attorneys, you still see a lot of tenancies by the entirety. But the New Hampshire courts construe the language "to John and Jean Jones, husband and wife, as tenants by the entirety," as a joint tenancy with a right of survivorship.

In this case, John and Mary owned the cabin as tenants by the entirety, which in this case is really a joint tenancy. As such, the divorce decree has no effect on the tenancy. Upon John's death, Mary still owns the entire fee. So in this case, the cabin where John and Barbara have lived since they have been together is all Mary's!

Some Words of Caution

1. Make sure that you are familiar with the statutory and case law of your state. How are various types of tenancies treated? How can a statutory provision or common law principle change a tenancy as stated in a recorded document?

2. What other sources should you consult to verify ownership and title issues? The probate court? The family (divorce) court? The department of vital statistics (the state's central registry of births, deaths and marriages)?

3. What happens when no type of tenancy is specified? If a grant reads merely to "John and Jean Jones," what type of tenancy is created? In many states, if no type of tenancy is specified then, by statute it is deemed to be a tenancy in common. Furthermore, in most states, if the grant reads to "John and Jean Jones, husband and wife," then a tenancy in common is still implied.

Appendix A - Affidavit of No Divorce

AFFIDAVIT OF NO DIVORCE

Now comes the affiant, being duly sworn, thereby deposes and states as follows:

1. My name is Mary Smith and I reside at 123 Main Street, Any Town, Massachusetts.
2. I am the same Mary Smith as described in the grantee clause of a deed from Joseph and Joanne Jones, dated June 1, 197x and recorded on June 2, 197x, in Book 12345, Page 678, in the Any County Registry of Deeds.
3. Said deed conveyed title in the property known and numbered as 123 Main Street, Any Town, Massachusetts, to John Smith and Mary Smith, husband and wife as tenants by the entirety.
4. Said John Smith deceased on November 1, 198x.
5. At the time of John Smith's death in 198x, we were lawfully married.
6. To the best of my knowledge and belief, there are no divorce or annulment proceedings filed in any jurisdiction, nor has any Decree of Divorce, Judgment, Decree Nisi, or Annulment been issued by any court of competent jurisdiction.

IN WITNESS WHEREOF: the above named Mary Smith sets her hand and seal under the penalties and pains of perjury on this ____ day of January, 2000.

Mary Smith

COMMONWEALTH OF MASSACHUSETTS

Any County, ss

January ____, 2000

Then personally appeared before me, the above-named Mary Smith, and has acknowledged the foregoing to her free act and deed.

Notary Public

My Commission Expires: _____

4. If a husband and wife hold property as joint tenants, and are subsequently divorced, then the joint tenancy remains intact. In the event of the death of one (after the divorce), the rights of survivorship remains, and the surviving joint tenant takes all. However, there was a presumption that when property was granted to "John and Jean Jones, husband and wife, as joint tenants," that a tenancy by the entirety was implied at law. Check the statute and common law rules of jurisdiction to find out how this peculiar area of the law is treated.

Hints and Checklists

1. Take nothing for granted. If you are speaking with a surviving tenant by the entirety or surviving tenant in common, check the divorce records in the county in which the property is located.

2. Check the death certificate for the marital status. If the death certificate lists the decedent as divorced, check for a probate proceeding or administration.

3. Know the common law principles in your jurisdiction, or at least be aware that something like this may be a problem.

4. When in doubt, or quite frankly even if you are not in doubt, get an affidavit of no divorce as shown in the attached APPENDIX.

Problem for Consideration

In the way of a discussion problem, assume that the facts of the above case are exactly the same, except that John had executed a will in 1979, that stated that John left "all property, both real and personal, that I own on the date of my death to my wife, Mary." Who takes what then? Please e-mail your answers to me at paul.debole@rcn.net. ■

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