DIRT Periodic Developments for Thursday, July 31, 2014
Concurrent Ownership Edition

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Periodic Developments returns from an extended hiatus with two recent cases dealing with concurrent owndership.

Fannie Mae v. Winding, 10 N.E.3d 799 (Ohio Ct. App. 2014)

SYNOPSIS: Ohio Court of Appeals rules (correctly) that a mortgage executed by only one of two join tenants encumbered only the one-half share owned by the mortgaging joint tenant, but then concludes (incorrectly) that the death of the mortgaging joint tenant did not extinguish the mortgage.

FACTS: In 2006, Ligon Gaines purchased a home in Middletown, OH, using the proceeds of a mortgage loan from Middletown Mortgage. While Ligon was listed as the sole borrower on the note and was the only signer of the mortgage, the property was deeded to "Ligon Gaines, an unmarried person, and Julia Winding, an unmarried person for their joint lives remainder to the survivor of them." The note was subsequently assigned to Fannie Mae. Ligon and Julia were married in 2007, and Ligon died in August 2011. Julia made two loan payments after Ligon's death, but then ceased making payments. In July 2012, Fannie Mae filed a foreclosure complaint against Julia, who counterclaimed for a declaratory judgment that she owned the property free of the mortgage. Each party moved for summary judgment, with Fannie Mae arguing that (1) its mortgage was enforceable against Julia because she took the property subject to the mortgage and (2) even if the mortgage was not enforceable against Julia, the court should impose an equitable lien on the property. [The evidence indicated that at the time of the purchase, Julia and Ligon were not married but had lived together for 30 years, had shared a home and household expenses, and had raised Julia's children together, and that Julia and Ligon had lived together in the home from the time of its purchase until Ligon's death. Ligon and Julia had decided at the time of the purchase that Ligon would finance the home individually as Ligon earned substantially more money than Julia. Due to an injury, Julia had not worked for several years and received only social security income, and Julia stated that she would have refused to sign the mortgage and the note because she was unable to afford the mortgage payments on her own.]

The trial court granted summary judgment in favor of Fannie Mae. It held that while Fannie Mae did not have a valid first mortgage lien against Julia by virtue of the mortgage, Fannie Mae was entitled to the imposition of an equitable lien which it was

entitled to foreclose. Julia appealed, and the Ohio Court of Appeals affirmed the result (but not the reasoning) of the trial court.

COURT'S ANALYSIS: The reasoning of the court of appeals focused on the following subsections of Ohio's survivorship tenancy statute, Ohio Rev. Code § 5302.20, which provide in pertinent part:

> (A) … If any interest in real property is conveyed or devised to two or more persons for their joint lives and then to the survivor or survivors of them, those persons hold title as survivorship tenants, and the joint interest created is a survivorship tenancy. Any deed or will containing language that shows a clear intent to create a survivorship tenancy shall be liberally construed to do so….
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> (B) If two or more persons hold an interest in the title to real property as survivorship tenants, each survivorship tenant holds an equal share of the title during their joint lives unless otherwise provided in the instrument creating the survivorship tenancy. Upon the death of any of them, the title of the decedent vests proportionately in the surviving tenants as survivorship tenants. This is the case until only one survivorship tenant remains alive, at which time the survivor is fully vested with title to the real property as the sole title holder….
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> (C) A survivorship tenancy has the following characteristics or ramifications: …
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> > (2) A conveyance from all of the survivorship tenants to any other person or from all but one of the survivorship tenants to the remaining survivorship tenant terminates the survivorship tenancy and vests title in the grantee. A conveyance from any survivorship tenant, or from any number of survivorship tenants that is from less than all of them, to a person who is not a survivorship tenant vests the title of the grantor or grantors in the grantee, conditioned on the survivorship of the grantor or grantors of the conveyance, and does not alter the interest in the title of any of the other survivorship tenants who do not join in the conveyance….
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> > (4) A creditor of a survivorship tenant may enforce a lien against the interest of one or more survivorship tenants by an action to marshall liens against the interest of the debtor or debtors…. Upon a determination by the court that a party or cross-claimant has a valid lien against the interest of a survivorship tenant, the title to the real property ceases to be a survivorship tenancy and becomes a tenancy in common….

Julia argued that under subsection (C)(2), because Fannie Mae's mortgage interest was conditioned upon Ligon's survival, the mortgage was extinguished upon his death. The court of appeals concluded, however, that "subsection (C)(2) is inapplicable to the case … because it does not address the effect of conveying a mortgage." The court noted that subsection (c)(2) suggests that a "conveyance" by a survivorship tenant vests "title," but

that in Ohio, which is a lien theory state, a mortgage creates only a lien and not a transfer of title prior to foreclosure: "Because the plain language of the statute addresses "title" and under Ohio law mortgages do not convey title, we find that subsection (C)(2) does not apply to the situation where a survivorship tenant mortgages his or her interest in a property." For this reason, the court held, Fannie Mae's interest was not conditioned on Ligon's survival of Julia: "while full title to the property immediately vested in Julia, this did not extinguish Fannie Mae's mortgage because the mortgage is merely a security for a debt until there is a default on the note and the mortgage is foreclosed and a sale consummated. Instead, the mortgage follows the property and Julia took the property subject to the mortgage."

The court argued that its interpretation of the statute was further supported by subsection (C)(4). The court reasoned that subsection (c)(4) allows a creditor "of a survivorship tenant" to bring an action against the interest of "one or more survivorship tenants," and thus "contemplates a creditor enforcing an action against survivorship tenants who did not grant the lien." The court reasoned that its interpretation of the survivorship statute was preferable to Julia's, which it held

> would create commercial uncertainty and allow debtors to avoid claims of creditors simply by the way property is held. Allowing a debtor-survivorship tenant to receive money by offering the property as security for a debt and then extinguishing that debt upon that debtor's death without providing the lender any recourse would be unreasonable. Further, permitting this result would discourage lenders from financing home purchases for couples when one person is unable to obtain financing for the purchase of a home but the couple wishes to hold the property in survivorship tenancy.

The court thus held that Julia held full title --- a one-half share that she held free of the mortgage (which she did not sign) and a one-half share that she took by survivorship from Ligon subject to the mortgage. [The court of appeals rejected Fannie Mae's argument that the facts justified according Fannie Mae with an equitable lien, constructive trust, or purchase money resulting trust on Julia's one-half share.]

COMMENT 1: The court's "reasoning" is EXACTLY backwards. Under the traditional common law rule, in a lien theory state, a mortgage by only one joint tenant would not sever the joint tenancy and destroy the right of survivorship. As a result, when the mortgaging joint tenant dies first, the mortgage dies with him, and the nonmortgaging survivor(s) own the property free of the mortgage. See, e.g., *Harms v. Sprague*, 473 N.E.2d 930 (Ill. 1984) (a longtime staple of most 1L Property casebooks). By contrast, in a title theory state, the mortgage would sever the joint tenancy, and the mortgage would continue to be enforceable against the mortgaging tenant's one-half share even after that tenant's death. The court characterizes Ohio as a lien theory state, but then reaches a result that, at common law, could happen only in a title theory state.

Further, there is nothing in the Ohio survivorship tenancy statute that requires (or justifies) the court's conclusion. The court's interpretation of § 5302.20(C)(2)—the mortgage was not a "conveyance" that passed "title" because a mortgage creates only a lien—is particularly embarrassing. The fact that a mortgage creates only a lien does not mean that the grant of a mortgage is not a "conveyance." [This should be obvious given that the recording statutes require the recordation of a mortgage to render it effective against good faith purchasers, even prior to foreclosure.] Any transfer of a property interest, whether possessory title or only a lien, is a "conveyance." Likewise, the court's interpretation of subsection (C)(4) is similarly befuddling. Subsection (C)(4) merely allows the mortgagee of one joint tenant to pursue its remedies (and thus terminate the survivorship tenancy) while the mortgaging joint tenant remains alive, even over the objection of the nonmortgaging tenants. Properly understood, it has nothing to do with whether the mortgage survives the death of the mortgaging tenant.

The court's result effectively displaces the derivative title principle and allows the mortgaging joint tenant (like Ligon) the ability to grant a mortgage lien that is not conditioned upon that tenant's survival, even though the tenant's underlying possessory interest is by its nature conditioned upon the tenant's survival. If the Ohio legislature intended to displace the derivative title principle, you would have expected them to do so a wee bit more explicitly.

Finally, the court's attempt to provide a policy justification for its analysis is equally unsatisfying. The correct analysis would hardly "discourage lenders from financing home purchases for couples when one person is unable to obtain financing for the purchase of a home but the couple wishes to hold the property in survivorship tenancy." All that Middletown Mortgage had to do was have Julia sign the mortgage. Thus, the court's reasoning merely incentives lenders like Middletown Mortgage to be careless and/or stupid.

COMMENT 2: In many states, the deed used in this case would not create a joint tenancy (or, "survivorship tenancy," as described in Ohio), but would create a joint life estate between the cotenants, with each holding an individual contingent remainder in fee simple absolute. In those states, the mortgage by Ligon only clearly would not have survived his death. In Ohio, however, this deed language clearly falls under the language of § 5302.20 and thus creates the "survivorship tenancy" (which the parties in the case conceded).

COMMENT 3: Professor James Durham, co-author of Ohio Real Property Law and Practice, points out that prior Ohio cases have characterized Ohio as an "intermediate theory" state:

> A mortgage of real property in its usual form is mere security for a debt. The title to the property remains with the mortgagor until after legal proceedings on the mortgage. The "right of a mortgagee to recover the possession of the land upon condition being broken always existed at common law. As it has not been taken away by statute in Ohio, it still exists in this state." Based upon the foregoing, Ohio has adopted neither a pure lien theory nor title theory and has taken a position between these two theories of mortgages that can be termed an "intermediate" theory of mortgages, meaning mortgagees have more than a mere lien on the mortgaged property and have certain rights to have or control possession of the property without possessing actual title to the property. [Ohio Real Property Law and Practice § 17.01[1]]

Powell v. Estate of Powell, 3014 WL 2988174 (Ind. Ct. App. July 3, 2014)

SYNOPSIS: In a case of first impression, Indiana Court of Appeals holds that a deed to two brothers as "tenants by the entireties" created between the brothers a joint tenancy with right of survivorship, rather than a tenancy in common.

FACTS: In December 1995, Lawrence Powell conveyed a parcel of land to his two sons, Kevin and Gary, by means of a warranty deed that purported to convey the property to them as "tenants by the entireties." Yes, he really did.

Gary died in March 2013, survived by Kevin. Gary's estate sought a declaratory judgment that the parcel was held as tenants in common, with Gary's one-half share passing into the estate upon his death. Kevin argued that the deed was sufficient to make them joint tenants with the right of survivorship, and that Kevin now owned the land in fee simple absolute as the surviving joint tenant. The trial court ruled that Kevin and Gary took title via the deed as tenants in common. Kevin appealed.

COURT'S ANALYSIS: Unsurprisingly, the court noted that Kevin and Gary could not have taken title to the parcel as tenants by the entireties, as that relationship was limited to spouses. The court thus turned to address whether the deed rendered Kevin and Gary as tenants in common (with no right of survivorship) or joint tenants (with the right of survivorship). Ind.Code Ann. § 32–17–2–1(c) provides, in pertinent part:

> … [A] conveyance or devise of land or any interest in land made to two (2) or more persons creates an estate in common and not in joint tenancy unless:
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> > (1) it is expressed in the conveyance or devise that the grantees or devisees hold the land or interest in land in joint tenancy and to the survivor of them; or

> (2) the intent to create an estate in joint tenancy manifestly appears from the tenor of the instrument.

The Estate argued that under this statute, the tenancy in common construction was required because Lawrence did not explicitly state that the brothers should take as joint tenants. The Estate argued that there was no indication of intent to create a right of survivorship other than the "as tenants by the entireties" language, which it argued was an "obvious scrivener's error" because the brothers could not hold title in that fashion. The court of appeals rejected this view:

> The Estate's argument begs the question; the argument's conclusion is among its premises. That is, the Estate urges us to conclude that Lawrence intended to convey the land to his sons as tenants in common based in large part upon the presumption that such is what he intended to state in the deed when he in fact wrote something entirely different. The Estate compounds the logical fallacy in contending that we should not attempt to ferret out Lawrence's intent, but instead focus only upon the language used in the deed—while at the same time urging us to disregard what Lawrence actually stated in the deed in favor of the presumption that he intended to state something else. This argument leaves us a bit perplexed, and unconvinced.

The court held that the deed's designation of Kevin and Gary as "tenants by the entireties" manifested an intention on the part of Lawrence to create a right of survivorship between Gary and Kevin, and thus ruled that under § 32-17-2-1(c)(2), the deed created a joint tenancy between Gary and Kevin.

> [W]e presume that, in conveying his property to his sons, Lawrence intentionally chose to give it to them "as tenants by the entireties." The validity of this presumption is further buttressed, we think, by the fact that Lawrence retained legal counsel to help him draft this instrument. The most notable aspect of tenancy by the entirety is that upon the death of one tenant, the surviving tenant takes possession of the whole—so-called right of survivorship…. Therefore, we conclude that in specifying that Kevin and Gary would take the property "as tenants by the entireties", Lawrence meant to convey the right of survivorship.

COMMENT 1: The court's interpretation is reasonable and, and as the court noted, courts in several other states that have addressed this question have reached a similar result. See, e.g., *Pennsylvania Bank & Trust Co. v. Thompson*, 432 Pa. 262, 247 A.2d 771, 771 (1968); *Coleman v. Jackson*, 286 F.2d 98 (D.C.Cir.1960); *Sams v. McDonald*, 117 Ga.App. 336, 160 S.E.2d 594, 596 (1968); *Mitchell v. Frederick*, 166 Md. 42, 170 A. 733 (1934); *Morris v. McCarty*, 158 Mass. 11, 32 N.E. 938, 939 (1893); *Wood v. Wood*, 264 Ark. 304, 571 S.W.2d 84, 85 (1978).

COMMENT 2: The only surprise about this opinion is that the deed appears to have been drafted by Lawrence's attorney. Plainly, drafting a deed conveying title to the grantor's two sons as "tenants by the entirety" would not meet the appropriate standard of care. Mercifully for the lawyer (unnamed in the court opinion), the statute of limitations has run by now . . . .