HAVE STATUTES ERODED COMMON LAW COTENANCY?

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Robert B. Harwell
Brunini, Grantham, Grower & Hewes PLLC
1400 Trustmark Building
248 E. Capitol Street
Jackson, Mississippi 39201
bharwell@brunini.com

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TRANSFER OF REAL PROPERTY UPON DEATH

While methods for transferring personal property on death are several and well established, in most states an owner of real property can only specify beneficiaries to receive real property interest by will. Due to the expenses, delays, and challenge procedures involved in probate, transfers of ownership in real property upon death can be much more tedious and imprecise than non-probate transfers of personal property through mechanisms such as those available for bank accounts and insurance policies.

The convenience and precision of non-probate transfers of personal property has caused at least eight states to enact real property transfer-on-death laws. Those states include:

Arizona	-	Ariz. Rev. Stat. § 33-405
Arkansas	-	Ark. Code § 18-12-608
Colorado	-	Colo. Rev. Stat § 15-15-401
Kansas	-	Kan. Stat. § 59-3501 et seq.
Missouri	-	Mo. Stat. § 461.001 et seq.
Nevada	-	Nev. Rev. Stat. § 111.109
New Mexico	-	N.M. Stat. § 45-6-401
Ohio	-	Ohio Rev. Code §§ 5302.22, 5302.23

At least two other states have considered real property transfer-on-death laws. The Law Revision Committee in California is studying the benefits of such transfers, and a bill providing for transfers of real property on death was proposed in Utah's 2007 General Session.[1]

The Joint Editorial Board for Uniform Trust and Estate Acts has also become involved in the movement for enabling real property transfers-on-death by forming a committee to review the current laws and potentially propose a uniform real property transfer on death law.[2]

Mechanisms for non-probate transfers of land generally involve the execution of transfer-on-death deeds or registrations. Through such a document, the owner identifies the beneficiaries that the land will transfer to upon his or her death. While in most states the instruments must be recorded prior to death, until the owner dies, the successors identified on the transfer-on-death deed receives no interest in the land and the owner is free to terminate the deed or designate other beneficiaries.

Overview of Real Property Transfer-On-Death Statutes

The Arizona real property transfer-on-death statute provides that a deed conveying real property "that expressly states that the deed is effective on the death of the owner transfers the

[1] S.B. 276 (Utah State Legislature 2007)

[2] These materials borrow heavily from a recent Joint Editorial Board for Uniform Trust and Estate Acts memorandum concerning transfers of real property on death.

interest to the designated grantee beneficiary effective on the death of the owner…"[3]

The Arizona statute provides a sample transfer-on-death deed[4] and sample instrument to revoke the deed,[5] and requires the transfer-on-death instruments to be executed and recorded prior to the owner's death.[6] It also provides that property held in joint tenancy will not be affected by a transfer-on-death deed unless the grantor of the deed is the last surviving owner of the property.[7] Beneficiaries of transfer-on-death deeds take title subject to all prior conveyances, liens or other encumbrances.[8]

Of the states covered in these materials, Arkansas has the newest statute providing for real property transfers-on-death.[9] Similar to Arizona, the Arkansas statute requires transfer-on-death deeds and revocations to be recorded prior to the owner's death[10] and provides sample instruments.[11] It also provides that in the event of a bankruptcy or divorce such a deed will be treated as a revocable trust.[12]

The Colorado,[13] Kansas,[14] New Mexico,[15] and Nevada[16] transfer on death statutes are very similar in substance to the Arizona and Arkansas laws described above.

In 1989, Missouri was the first state to pass legislation providing for transfers of real property on death.[17] Unlike the other states, Missouri's law is imbedded in a statute permitting several types of transfers of personal property on death. It contains one section specifically concerning transfer-on-death deeds,[18] but the rules related to such real property transfers are the same as those provided for personal property transfers-on-death. Missouri's law generally has the same effect as those discussed above, but it does not contain specific provisions concerning property held in joint tenancy or provide any sample forms.

Ohio's transfer-on-death statute is somewhat different than those described above, in that it does not require the transfer-on-death deed to be recorded prior to the owner's death.

Another difference in the Ohio statute is that it does not permit property held in joint

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[3] Ariz. Rev. Stat. § 33-405.
[4] Ariz. Rev. Stat. § 33-405(K).
[5] Ariz. Rev. Stat. § 33-405(L).
[6] Ariz. Rev. Stat. § 33-405(E).
[7] Ariz. Rev. Stat. § 33-405(D).
[8] Ariz. Rev. Stat. § 33-405(A).
[9] Ark. Code § 18-12-608.
[10] Ark. Code §§ 18-12-608(c), (d).
[11] Ark. Code §§ 18-12-608(h), (i).
[12] Ark. Code §§ 18-12-608(g).
[13] Colo. Rev. Stat § 15-15-401.
[14] Kan. Stat. § 59-3501 et seq.
[15] N.M. Stat. § 45-6-401
[16] Nev. Rev. Stat. § 111.109
[17] Mo. Stat. § 461.001 et seq.
[18] Mo. Stat. § 461.025.

tenancy to be transferred pursuant to a transfer-on-death deed, even if executed by the last living joint tenant, and it does not permit beneficiaries of such transfers to hold property as joint tenants.[19] Also, it contains a requirement that beneficiaries must be identified by name.[20] These differences limit the ability of Ohio real property owners to provide class gifts through transfers-on-death.

As real property transfer-on-death statutes become increasingly popular, the Joint Editorial Board for Uniform Trusts and Estate Acts hopes to publish a uniform act in an effort to achieve uniformity in such laws.

[19] Ohio Rev. Code §§ 5302.22, 5302.23.

[20] If no named beneficiaries survive the owner, the property becomes a part of the owner's probate estate. Ohio Rev. Code § 5302.23(B)(1).

JUDICIAL PARTITION THROUGH SALE

At early common law, a cotenancy was insulated from the threat of partition due to a general distaste for judicial partition, and when such partitions were ordered, they were partitions in kind.[21] The development of the partition sale was an American innovation, established through partition statutes.[22] Every state has developed a statute providing for partition in kind or by sale.[23] Over time, partition has developed from a disfavored mechanism to divide property in kind to a statutory right to divide property in kind and an oft-used mechanism to force the sale of commonly owned property.

Under the statutory partition laws of most states, the burden of establishing the necessity for partition by sale, rather than partition in kind, falls on the party moving for such sale.[24] Most states follow the general rule that because a partition sale converts an interest in real estate into money, often without the consent of owners, such sales should only be ordered when necessity is clearly established. However, in at least one state, the moving party will be granted a partition by sale unless the opposing party can show that a partition in kind would be equitable and practical.[25] While in most jurisdictions the burden of proof remains on the party moving for a judicial sale, some commentators argue that the burden has become so easy to meet that partition sales seem to be the rule as opposed to the exception in the event a partition on kind remedy is ineffective.[26]

Under partition statutes, the party bringing the action must first show that it holds an interest in the land and thus has the right to partition.[27] Once proof of interest is shown, a party desiring a judicial sale must show that an equal division of land cannot be made or that a sale will better promote the interest of the cotenants.[28] Parties can show the infeasibility of partition in kind through evidence including uneven topography, insufficient access to divided parcels, the existence of a dwelling on the property, and the existence of too many interests in commonly held property, one of the most common reasons cited for sale.[29]

Modern Partition Sale Practices

While the reasoning behind partition was developed to provide a remedy for cotenants who were unable to efficiently utilize their commonly held property, as partition sales have

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[21] P. Craig-Taylor, *Through A Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 Wash. U. L.Q. 737, 751 (2000); citing Herbert Thorndike Tiffany, *The Modern Law of Real Property* § 307, at 315 (1940).
[22] Craig-Taylor, at 753.
[23] *Ark Land Co. v. Harper*, 599, S.E. 2d 754 (W.V. 2004) (citing partition statutes in all 50 states.)
[24] 59A Am. Jur. 2d § 134.
[25] *Id.*; *citing Spies v. Prybil*, 160 N.W.2d 505 (Iowa 1968).
[26] Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 Nw. U. L. Rev. 505, 513-514 (2001).
[27] Ala. Code § 35-6-40.
[28] Ala. Code § 35-6-57.
[29] Craig-Taylor, at 755-756

become more prevalent, modern commentators argue that partition has become a mechanism for the nonconsensual taking of property by the most wealthy cotenant.[30]

The general concern is that family land - often commonly held by multiple interest holders spanning several generations - can be susceptible to partition sale if a greedy developer acquires even a small interest in the land. This concern is set forth in the following quote from John Pollack, an attorney for Central Alabama Fair Housing Center:

> "Every heir has equal rights to the property and any heir can decide to sell the land through a partition sale without the permission from other heirs…The risk of a partition sale is probably the biggest disadvantage to owners of heir property…One or more heirs or co-owners can sue heirs, forcing the sale of the land to the highest bidder. If the heir living on the land is unable to out bid other heirs or in many cases a developer or real estate speculator, the land is sold, often at a fraction of its true value. The heir living on the property not only loses the land but also their home located on the land. Any proceeds from the forced sale are distributed among the heirs according to their fractional interests but only after court fees, costs of conducting the sale and attorney fees are deducted."[31]

Commentator Phyllis Craig-Taylor has proposed modifications to partition statutes to combat the practice of developers effectively taking commonly held family property. She proposes the requirement of a supermajority vote of cotenants before courts would have the discretion to order a sale.[32] She also proposes a redemption period, similar to that found in foreclosure statutes,[33] and finally she suggests that statutes include a mechanism to ensure that cotenants keep a license in the property, forcing a developer to share the profits of the property.[34]

Modern constructions of partition statutes have made it very easy for holders of a small interest to effectively execute a nonconsensual taking of commonly held land. While a clear remedy has yet to be fully established, a substantial movement has developed to limit this practice of "taking" commonly held property through judicial partition sale.

Contracts Concerning Partition

While every state has a statute giving cotenants the right to partition, cotenants may waive their rights to partition through written agreement.[35] Such agreement acts as an estoppel

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[30] *Id.*, at 761; Mitchell, at 514.

[31] *Extension Joining Other Agencies to Help with Heir Property Issues*, Ala. Cooperative Extension Service, (August 23, 2007), http://www.aces.edu/department/extcomm/npa/newsline/archives/003251.php.

[32] Craig-Taylor, at 781. (She does not discuss how cotenants that fail to appear would be accounted for in such voting).

[33] *Id.*, at 783-784 (Her redemption proposal appears to be similar to the buy back options incorporated in some current partition statutes.)

[34] Craig-Taylor, at 785.

[35] 59A Am. Jur. 2d. § 50.

to the right to partition, and depending on the terms of the agreement, the cotenant and cotenants successors in title may be bound by the waiver of partition.[36]

Although contracts concerning the waiver of partition generally are enforceable, most jurisdictions refuse to enforce agreements never to partition and require that cotenants limit such agreements to a reasonable period of time.[37] While contract provision restricting partition have not been construed in all jurisdictions, there is a well settled general rule that cotenants may limit or restrict their right to partition by will, deed or contract for a reasonable length of time.[38] Courts have been inconsistent in treatment of agreements to partition for an indefinite period of time; some holding the contract void and some limiting the contract to a reasonable length.[39] Therefore, an agreement to waive partition rights should contain a definite, and not unreasonably long, period of time.

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[36] *Id*.
[37] Schulteis v. Schulteis, 675 P. 2d 634 (Wash. App. 1984); *Condrey v. Condrey*, 92 So. 2d 423 (Fla. 1957).
[38] Wiener v. Pierce, 203 So. 2d 598, 603 (Miss. 1967).
[39] 59A Am. Jur. 2d. § 53; *Schultheis v. Schultheis*, 675 P.2d 634 (Wash App. 1984).

TORT LIABILITY FOR COMMON INTEREST OWNERS

Common interest communities are relatively new forms of cotenancy where each owner, along with owning a unit, owns a proportionate share of the common portion of the property. Generally, title to the common areas of such properties is held by an incorporated property owners association, membership in which is mandatory for each owner and governed by recorded declarations.[40] The allocation of tort liability in such common interest communities is a quickly developing and still uncertain body of law. When tort damages exceed the insurance coverage of the owners association or the association does not maintain insurance coverage, the allocation of the remaining damages among the owners is unsettled.[41]

Case Law

Concern related to the allocation of tort liability for actions arising out of common elements first came to light when courts in California and Texas took different stances on allocating damage amounts to unit owners. California courts held unit owners jointly and severally liable, while Texas courts applied the damages pro rata among the owners.[42]

In *Davert*, the California court applied common law joint and several liability through the property owners association to individual owners for a tort arising in common areas. The court refused to recognize the property owners association as an entity separate from the owners and held that tenants in common who delegate control and management to an association remain jointly and severally liable.[43] The court reasoned that joint and several liability was necessary because California law failed to require such property owners associations to carry insurance to protect third parties.[44]

In *Dutcher*, the Texas Supreme Court allowed liability to pass through a property owners association to the individual unit owners but limited the owners' liability to the pro rata share of each.[45] The court recognized the limited authority that the individual condominium owners held over the management of the association, and held that a pro rata allocation of damages was appropriate to balance the interests of a third parties and individual owners.[46]

Uniform Common Interest Ownership Act

The Uniform Common Interest Ownership Act ("UCIOA"), last amended in 1994,

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[40] Jerry C.M. Orten, *Allocation of Damages for Tort Liability in Common Interest Communities*, 31 Real Prop. Prob. & Tr. J. 647 (Winter 1997).
[41] *Id.*
[42] *Davert v. Larson*, 209 Cal. Rptr. (Cal. App. 1985); *Dutcher v. Owens*, 647 S.W.2d 948 (Tex. 1983).
[43] Orten; *discussing Davert*, at 448.
[44] Since *Davert*, California has passed Cal. Civil Code § 1365.9, which exempts individual owners from liability for torts in common areas if the association holds general liability insurance, but should such liability exceed the coverage amounts of the insurance, presumably the joint and several rule of *Davert* would apply.
[45] *Dutcher*, at 951.
[46] Orten; *discussing Dutcher*, at 950.

provides a comprehensive set of laws for common interest properties. Regarding tort liability for individual owners, UCIOA adopts the pro rata approach.[47]

UCIOA § 3-111(a) provides that "[a] unit owner is not liable, solely by reason of being a unit owner, for an injury or damage arising out of the condition or use of the common elements." Further, § 3-111(b) provides that "an action arising out of the condition or use of the common elements, may be maintained only against the association and not against any unit owner."

While individual owners are not directly liable for tort damages or parties to suits arising common areas, § 3-117 provides that any liens against the owners association that are not covered by insurance or otherwise paid by the association shall be imposed on the unit owners on a pro rata basis.

Comment 4 to § 3-111 indicates that the current UCIOA was written specifically to follow the Texas courts and avoid the California joint and several liability rule: "the form in which common elements are owned – whether in a condominium, planned community or cooperative – should not impose joint and several personal liability on condominium owners[48]...Rather, the result under both this section and § 3-117 – which imposes liability on unit owners for unsatisfied judgments against the association in proportion to their common expense liabilities – is consistent with the decision in *Dutcher v. Owens*, 647 S.W. 2d 948 (Texas 1983)."[49]

State Statutes[50]

- Georgia law requires that property owners associations carry a minimum level of general liability insurance coverage, and limits the extent of a creditor's lien to the property of the association.[51]
- Washington law limits the liability of individual owners for damages related to common areas to their pro rata share of interest and does not require the owners association to carry insurance.[52]
- Mississippi law provides that unit owners are not liable for any damages that arise from common areas and does not mandate liability insurance.[53]
- Alaska law requires owners to pay judgments in proportion to their liability, but does not prevent judgments from exceeding the value of the unit, thus only limiting liability by the amount of the judgment.[54]

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[47] UCIOA §§ 3-111, 3-117.
[48] Comment 4 to UCIOA § 3-111 expressly rejects *Ruoff v. Harbor Creek*, 13 Cal. Rptr. 2d 755 (Cal. Ap. 1992), which followed the holding of *Davert*.
[49] *See* Orten for further discussion of the treatment of tort damages under UCIOA.
[50] This section is derived from Jerry C.M. Orten's discussion of state common interest statutes in *Allocation of Damages for Tort Liability in Common Interest Communities*, 31 Real Prop. Prob. & Tr. J. 647 (Winter 1997).
[51] Ga. Code §§ 44-3-106, 107.
[52] Wash. Rev. Code § 64.32.240.
[53] Miss. Code Ann. § 89-9-29.
[54] Orten; discussing Alaska Stat. 34.07.260.

OTHER DEROGATIONS OF COMMON LAW COTENANCY

Actions for Waste Between Cotenants

- At early common law, one cotenant traditionally was not liable to another cotenant for waste, but as courts began to recognize actions between cotenants for waste, some states have enacted statutes that expressly authorize one cotenant to recover for waste committed by another.
- For example, Wis. Stat. § 844.06(2) provides "if one joint tenant or tenant in common commits waste of the estate held in joint tenancy or in common, the tenant committing waste shall be subject to an action at the suit of the tenant's cotenant or cotenants."
- The removal of minerals from commonly held property does not constitute waste in most jurisdictions. Strict application of common law or statutory waste laws to the removal of minerals could result in the loss of the entire value of the mineral estate. In a majority of producing states, a cotenant may explore for and remove minerals from the estate without the consent of cotenants but must provide an accounting and proportionate share of production to cotenants.

Statutory Presumption of Tenancy by the Entireties

- At common law, any conveyance of real property to two or more people is presumed to create a tenancy in common unless the instrument provides otherwise, but several states,[55] by statute or through case law, have changed this common law rule so that a tenancy by the entireties is presumed in any conveyance to husband and wife.
- For example, Florida law presumes a tenancy by the entireties in any instrument that conveys property to both husband and wife unless a contrary intention appears in the instrument, and the estate by entirety remains until the dissolution of the marriage, at which point a divorced couple becomes tenants in common.[56]

Severance of Joint Tenancy

- At early common law, a conveyance by a cotenant to himself or herself had no legal consequence. Therefore, a party desiring to sever a joint tenancy was forced to use a strawman. Many states have eliminated the strawman requirement and allow a joint tenant to terminate the joint tenancy through a self conveyance.[57]
- California enacted a statute, Cal. Civ. Code § 683.2, expressly providing that a joint tenancy may be severed by the execution of deed from a joint tenant to the joint tenant or

[55] Including Florida, Michigan, Missouri, North Carolina, and Vermont.
[56] Fla. Stat. §§ 689.15, 689.115.
[57] *Hendrickson v. Minneapolis Fed. Sav. & Loan Ass'n*, 161 N.W.2d 688, 691 (Minn. 1968), *Minonk State Bank v. Grassman*, 447 N.E.2d 822, 825 (Ill. 1983) (holding that conveyance of a joint tenant's property back to herself effectively severed the joint tenancy*); In re Estate of Knickerbocker*, 912 P.2d 969, 976 (Utah 1996) (holding that a joint tenant may effectively sever a joint tenancy by executing and recording a unilateral self-conveyance); *Taylor v. Canterbury*, 92 P.3d 961, 963 (Colo. 2004) (holding that a joint tenant may sever a joint tenancy by conveying the property to himself or herself as a tenant in common, without the need for an intermediary strawman).

even by "a written declaration that, as to the interest of the joint tenant, the joint tenancy is severed." However, the California law requires such a self conveyance to be recorded before the death of the severing cotenant or executed and acknowledged at least three days before the death of the severing joint tenant and recorded no later than seven days after death.[58] This statute was enacted in response to *Riddle v. Harmon*, 162 Cal. Rptr. 530 (Cal. App. 1980), where the court allowed a wife to terminate a joint tenancy with her husband without his knowledge by executing a deed to herself as a tenant in common, then hiding the deed to be found upon her death.

[58] Cal. Civ. Code. § 683.2(c).