



Francesca O'Neill

Property Law Briefing

PROPERTY UPDATE - SEVERANCE OF JOINT TENANCIES

The law normally exists to give certainty about the effect of a person's intentions. Nowhere is that more important than in the realm of wills and properties, where wills are construed in accordance with the intention of the deceased. Sometimes that intention is the subject of dispute, in which case a Judge will have to divine what that intention truly was (subject to statute).

However, I was recently asked to advise on a question in which it seems that the express wishes of the deceased will not come to fruition, because of a short delay in sending a vital document. In this case, Mrs X wished to sever a joint tenancy that existed between herself and her estranged husband concerning a property which she wished to leave entirely to her son. She asked her solicitors to sever the joint tenancy. They prepared the documents, which she duly signed. However, she unexpectedly died the day before the letter was put in the post. In those circumstances, is there still a valid Notice to Sever?

Section 36(2) of the Law of Property Act 1925 provides that:

“where a legal estate (not being settled land) is vested in joint tenants beneficially, and any tenant desires to sever the joint tenancy in equity, he shall give to the other joint tenants a notice in writing of such desire”.

So, where one joint tenant wishes to sever the tenancy they must “give” to the other joint tenants written notice of that intention. It is a unilateral act, and not one that requires the other parties to agree. However, Megarry & Wade on The Law of Real Property explains that, there are significant limitations on this power to sever as *“it applies only to notices in writing given inter vivos. There is still no power to sever by will.”* “Inter vivos” means “between living people”. A notice cannot be given by someone who has died. This was confirmed in a Judgment handed down on the 17th October 2017 in *Shah v Forsters LLP* [2017] EWHC 2433 (Ch) which considered whether a desire to sever a joint tenancy post-death could be effective, and found that it was not, and that any post-death variation pertaining to it would be effectively, “a long shot”.

The applicable case law reinforces the view that the intention of the party serving notice has no impact on whether or not a notice has been “given”. In *Kinch v Bullard* [1999] 1 WLR 423, a wife intercepted and destroyed a notice served on her husband on her behalf after it had been delivered, because she believed that his death was imminent: the notice was held to be effective.

However, the giving of written notice is only one way of severing a joint tenancy, According to *Williams v Hensman* [1861] 1 J & Hem 546, it is possible to sever a joint tenancy by an act of any one of the persons interested acting upon

his own share, mutual agreement, or a course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.

Unfortunately for Mrs. X's son, in the circumstances of the case there did not seem to be anything that would trigger any the three methods above and so the express wish of his mother to leave him a property would be frustrated. The law intervened in an unusual, and archaic way.