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Effect of Qualifying Words in Deed to Husband, Wife and Third Party - Kolker v. Gorn

EFFECT OF QUALIFYING WORDS IN DEED TO HUSBAND, WIFE AND THIRD PARTY

Kolker v. Gorn[1]

Plaintiff obtained a judgment by default against defendant Samuel G. Gorn in September 1944 and in August 1948 obtained a writ of fieri facias on the judgment which was levied upon the defendant's property. The defendant filed a motion to quash asserting that his only interest in the property was a half-interest with his wife as tenants by the entireties; and his wife, Margaret A. Gorn filed her claim to the property seized on the same ground. A deed to the property showed that it had been conveyed to "John M. Gorn, Samuel G. Gorn and Margaret A. Gorn, his wife, as joint tenants, and not as tenants in common their assigns, the survivors or survivor of them, and the survivors' or survivor's heirs and assigns, in fee simple". John M. Gorn is the father of Samuel G. Gorn. Over the objection of the plaintiff, testimony was offered at the hearing to show that Samuel G. Gorn purchased the property with money supplied by his father, that the three parties contributed towards the cost of the building, that the property was to be owned one-half by the father and one-half by the son and the son's wife, and that payments on the mortgage and household expenses were shared by the father and son. Margaret A. Gorn testified, also over objection, that she had contributed to the cost of the building and that she understood that her father-in-law owned one-half and that she and her husband owned the other half. The Superior Court of Baltimore City granted the defendant's motion to quash and sustained the claim of the defendant's wife. From this order plaintiff appealed. The Court of Appeals affirmed this judgment.

The case was argued upon two questions:

"(1) Whether upon the face of the deed the interest of appellee is a half-interest as tenants by the entireties with his wife, or a one-third interest as joint tenant, and

(2) Whether the testimony is admissible to show the true intention of the parties."[2]

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[1] 67 A. 2d 258 (Md., 1949).

[2] *Ibid*, 260.

Concerning the first issue involved the Court stated that at common law a husband and wife could hold property in no other way than by tenants by entireties,[3] and that this type of ownership has been recognized in Maryland for a long period.[4] The difficulty in this particular situation was whether the words "as joint tenants, and not as tenants in common" in the deed to the defendant rebutted the presumption inferred by the words "his wife" following the name of Margaret A. Gorn. The Court pointed out that a conveyance to a husband and wife without any qualifying or restrictive words creates a presumption of tenancy by the entireties in Maryland and elsewhere,[5] but stated that there is a conflict in situations where the words used in the conveyance to husband and wife are "as joint tenants, and not as tenants in common", and that in some jurisdictions these words are sufficient to rebut the presumption of tenancy by entireties.[6] The Court followed this latter reasoning citing *Fladung v. Rose*,[7] and admitted that this view probably represented the minority.[8] "Nevertheless", the Court said, "it was followed and approved after full consideration in *Wolf v. Johnson*.[9] We accept it as settled law in this jurisdiction."[10]

Thus, the Court held that the use of the words "joint tenants" rebutted the presumption of the common law that a conveyance to a husband and wife, even where qualifying words are used, creates tenancy by the entireties.

Next the Court considered the problem that was squarely presented in the instant case, the inclusion of a stranger with the husband and wife as grantees. The opinion stated: "Where the conveyance is to husband and wife and a stranger, *without qualifying words*, it is the common-law rule that husband and wife take one-half as

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[3] 4 KENT, COMMENTARIES (14th Ed.) 363; 2 BLACKSTONE, COMMENTARIES, 182.

[4] Craft v. Wilcox, 4 Gill 504 (1846); Marburg v. Cole, 49 Md. 402 (1878).

[5] Brewer v. Bowersox, 92 Md. 567, 572, 48 A. 1060 (1901); 161 A. L. R. 457, 466-7, citing Wolf v. Johnson, 157 Md. 112, 145 A. 363 (1929) and Hammond v. Dugan, 166 Md. 402, 170 A. 757 (1934).

[6] 161 A. L. R. 457, 469-470 citing Hannan v. Towers, 3 Harr. & J. 147 (1810) and Fladung v. Rose, 58 Md. 13 (1882).

[7] 58 Md. 13 (1882).

[8] 161 A. L. R. 457, 471 "A conveyance of property to husband and wife expressly as 'joint tenants' has been held in a number of cases to make them tenants by entireties. The argument advanced for this theory usually is that the entirety estate is but a form of joint tenancy with peculiar incidents." (This represents the majority view.)

[9] 157 Md. 112, 145 A. 363 (1929). See also Annapolis Banking & Trust Co. v. Neilson, 164 Md. 8, 164 A. 157 (1933) and Young v. Cockman, 182 Md. 246, 251, 34 A. 2d 428, 149 A. L. R. 1006 (1943).

[10] *Supra*, n. 1, 260-261. (Emphasis suppled.)

tenants by the entireties and the third party takes the other half as tenant in common."[11] The problem here revolved around the use of qualifying words. The appellee argued that the use of qualifying words in a case where a stranger is included can be given effect between the husband and wife as a unit and the third party stranger, thus giving the husband and wife as a unit a tenancy by entireties in one-half with the other half held by the third party as a joint tenant. However, the Court did not follow this reasoning, stating:

> " 'This tenancy (by the entireties) may be created even when the husband and wife are not the only grantees in the conveyance . . ., as when it is to a man and his wife and another person, in which case the husband and wife would, prima facie, take a one-half interest only, which they would hold by entireties, while the third person would take the other half; . . . This rule, however, that the husband and wife take together but one share, like the rule that they take as tenants by entireties, is, it appears merely a rule of construction, and must give way to evidence of a contrary intention'."[12]

Evidence of a contrary intent would be the inclusion of these qualifying words importing joint tenancy.

The Court could find only one case in point.[13] This case turned upon the construction placed upon the instrument by the parties, and could not be strongly relied upon here except that the court in that case had looked to the intent of the parties. Thus in the absence of a contrary intent by the parties the Court held:

> "Since we have held that the use of the words 'joint tenants' rebuts the presumption arising from the word 'wife', or the fact that the grantees are husband and wife, we find no basis in the language itself for severing the tenancy into two different types. The qualifying words seem clearly applicable to all three parties, and their respective 'survivors or survivor'."[14]

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[11] *Supra*, n. 1, 261. (Emphasis supplied.) See also Haid v. Haid, 167 Md. 493, 175 A. 338 (1934); Bartholomew v. Marshall, 257 App. Div. 1060, 13 N. Y. S. 2d 568 (1939); and also Tizer v. Tizer, 162 Md. 489, 492, 160 A. 163, 161 A. 510 (1932) and Baker v. Baker, 123 Md. 32, 90 A. 776 (1914).

[12] *Supra*, n. 1, 261, citing TIFFANY, REAL PROPERTY (3rd Ed.), Sec. 431, p. 221.

[13] Mosser v. Dolsay, 132 N. J. Eq. 121, 27 A. 2d 155 (1942).

[14] *Supra*, n. 1, 261.

The Court thus answered the first issue involved to the effect that upon the face of the deed the interest of the appellee is a one-third interest as a joint tenant.

The case hinged, therefore, upon whether the appellee's testimony was admissible to show the true intention of the parties. The Court stated that as far as a bona fide purchaser would be concerned no such intention could be shown,[15] but ruled that a judgment creditor is not in the same position as a bona fide purchaser and that the former's claim is subject to prior, undisclosed equities. " 'He (a judgment creditor) is neither in fact nor in law a bona fide purchaser, and must stand or fall by the *real*, and not the apparent rights of the defendant in the judgment'."[16] The opinion then pointed out that in equity a deed may be reformed on the ground of mutual mistake as to legal effect of words in order to conform to the real intention of the parties,[17] and that while this was an action at law, such reformation was permissible when attachment and execution proceedings are concerned because equitable defenses are available where the real ownership is involved.[18] In concluding upon the question of admissibility of the evidence the Court of Appeals stated:

> "We think an execution creditor, who is a stranger to the transaction and stands in the shoes of the debtor subject to all outstanding equities, cannot invoke the parol evidence rule to prevent a party to the deed from showing a mutual mistake by the parties, in the absence of facts raising an estoppel."[19]

In conclusion this case would appear to set out the following rules concerning words of qualification where a grant to a husband and wife are involved.

(1) Where the grant is to a husband and wife and there are *no* qualifying words, the husband and wife are presumed to take as tenants by the entireties. This

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[15] Campbell v. Lowe, 9 Md. 500, 507 (1856).

[16] *Supra*, n. 1, 261. (Emphasis supplied.) Citing Ahern v. White, 39 Md. 409, 420 (1874); Lee v. Keech, 151 Md. 34, 37, 133 A. 835, 46 A. L. R. 1488 (1926); Caltrider v. Caples, 160 Md. 392, 397, 153 A. 445, 87 A. L. R. 1500 (1931); 1 GLENN, FRAUDULENT CONVEYANCES (Rev. Ed. 1940), Sec. 19.

[17] Scott v. Grow, 301 Mich. 226, 3 N. W. 2d 254 (1942), note 141 A. L. R. 826, 840. RESTATEMENT, RESTITUTION, Sec. 51(a) (Illustration 3); 5 WILLISTON, CONTRACTS (Rev. Ed.), Sec. 1585; Cooke v. Husbands, 11 Md. 492, 511 (1857).

[18] *Cf.* Frantz v. Lane, 169 Md. 703 (unreported), 182 A. 337 (1936); Haid v. Haid, 167 Md. 493, 175 A. 338 (1934); Lemp Brewing Co. v. Mantz, 120 Md. 176, 183, 87 A. 814 (1913).

[19] *Supra*, n. 1, 262.

represents the Maryland view and also the majority of American jurisdictions.

(2) Where the grant is to a husband and wife and *there are qualifying words*, the husband and wife do *not* take as tenants by the entireties, the qualifying words overruling the presumption to the contrary. This represents the Maryland view, but is in the minority in other American jurisdictions.

(3) Where the grant is to a husband and wife and a third party stranger and there are *no* qualifying words, the husband and wife take one-half as tenants by the entireties and the third party takes the other half as tenants in common. This is the Maryland view and probable weight of authority in American jurisdictions.

(4) Where the grant is to a husband and wife and a third party stranger and *there are* qualifying words, the husband and wife do *not* take as tenants by the entireties but take as individuals subject to the qualifying words in the absence of a clear contrary intent. This is the Maryland view (represented by this case) but is probably the minority view in other American jurisdictions.