

Memorandum 79-38

Subject: Study D-300 - Enforcement of Judgments (Effect on Lien on Joint Tenancy Property When Joint Tenant Dies)

A rule that should be reviewed in connection with the enforcement of judgments recommendation is the rule that a surviving joint tenant takes an estate free from a judgment lien on the interest of a deceased joint tenant debtor. We have prepared a separate memorandum on this problem because the existing rule applies to liens generally, not just judgment liens.

The Current Law

Conveyance by joint tenant. A joint tenant may, with or without the knowledge or consent of the other joint tenant or tenants, convey his share to a stranger. Such a conveyance terminates the joint tenancy as to the interest conveyed. If there were two joint tenants, the stranger and other joint tenant hold as tenants in common. See 1 Ogden's Revised California Real Property Law § 7.19, at 283-85 (Cal. Cont. Ed. Bar 1974) (hereinafter cited as "Ogden").

Judgment liens. In Ziegler v. Bonnell, 52 Cal. App.2d 217 (1942) (cited with approval in Tenhet v. Boswell, 18 Cal.3d 150, 159 (1976)), the court held that a judgment lien upon the interest of a joint tenant terminates on the death of the joint tenant. In so holding, the court stated:

The right of survivorship is the chief characteristic that distinguishes a joint tenancy from other interests in property. The surviving joint tenant does not secure that right from the deceased joint tenant, but from the devise or conveyance by which the joint tenancy was first created. (Citation.) While both joint tenants are alive each has a specialized form of a life estate, with what amounts to a contingent remainder in the fee, the contingency being dependent upon which joint tenant survives. The judgment lien of respondent could attach only to the interest of his debtor, William B. Nash. That interest terminated upon Nash's death. After his death there was no interest to levy upon. Although the title of the execution purchaser dates back to the date of his lien, that doctrine only applies when the rights of innocent third parties have not intervened. Here the rights of the surviving joint tenant intervened between the date of the lien and the date of the sale. On the latter date the deceased joint tenant had no interest in the property, and his judgment creditor has no greater rights. . . . This rule is sound in theory and fair in its operation. When a

creditor has a judgment lien against the interest of one joint tenant he can immediately execute and sell the interest of his judgment debtor, and thus sever the joint tenancy, or he can keep his lien alive and wait until the joint tenancy is terminated by the death of one of the joint tenants. If the judgment debtor survives, the judgment lien immediately attaches to the entire property. If the judgment debtor is the first to die, the lien is lost. If the creditor sits back to await this contingency, as respondent did in this case, he assumes the risk of losing his lien. [52 Cal. App.2d at 219-22.]

An execution sale during the judgment debtor's lifetime severs the joint tenancy, leaving title in the execution purchaser and the other joint tenant as tenants in common. *Pepin v. Stricklin*, 114 Cal. App. 32, 299 P. 557 (1931); *Hilborn v. Soale*, 44 Cal. App. 115, 185 P. 982 (1919). (It is uncertain under existing law whether the joint tenancy is revived if the judgment debtor redeems from the execution sale.) There apparently is no California decision on the effect of a levy of execution on the jointly-held property but no sale before the judgment debtor's death, and the holdings in other states are divided. Ogden § 7.23, at 287.

The existing rule--that the surviving joint tenant takes the property free from the rights of the creditors of the deceased joint tenant--does not necessarily operate to provide clear title where a judgment lien is created before the death of a joint tenant. See Ogden § 7.23, at 287 ("Title insurers may hesitate to insure in reliance upon this rule in the absence of a decision by the California Supreme Court. A partial release of judgment lien executed by the judgment creditor or an action to quiet title against the judgment creditor may be required to clear the lien from the records."). It should be noted, however, that the California Supreme Court, after publication of this statement, did cite with approval the case which established the rule that the death of the joint tenant judgment debtor terminates the lien.

Mortgage or deed of trust by one joint tenant. A similar analysis was followed in *People v. Nogarr*, 164 Cal. App.2d 591 (1958), which held that upon the death of a joint tenant who had executed a mortgage on the property, the surviving joint tenant took the property free of the mortgage. The court reasoned that "as the mortgage lien attached only to such interest as [the deceased joint tenant] had in the real property[,] when his interest ceased to exist the lien of the mortgage

expired with it." 164 Cal. App.2d at 594 (cited with approval in Tenhet v. Boswell, 18 Cal.3d 150, 159 (1976)). In Hamel v. Gootkin, 202 Cal. App.2d 27 (1962), the court applied the Nogarr holding to a trust deed (cited with approval in Tenhet v. Boswell, 18 Cal.3d 150, 159 (1976)).

With respect to a mortgage or deed of trust by one joint tenant, the law is outlined in Ogden § 7.22, at 286-87 as follows:

4. [§7.22] Mortgage or Deed of Trust by One Joint Tenant

A joint tenant has the right to execute a mortgage or a deed of trust on his interest. The mortgage or deed of trust creates only a lien or charge and does not in itself effect severance of the joint tenancy. If the mortgage or deed of trust is foreclosed during the life of the joint tenant mortgagor, transfer by foreclosure sale clearly results in severance of the joint tenancy just as effectively as a voluntary conveyance of his interest. Assume, however, that A and B are joint tenants, A executes a mortgage on his interest, and A dies before the mortgage is paid or foreclosed. Does B hold title as surviving joint tenant free of the mortgage lien? In some states (see, e.g., *Wilken v Young* (Ind 1895) 41 NE 68), the mortgage is regarded as having suspended the joint tenancy to the extent the lien is not lost if the mortgagor predeceases the other joint tenant. Anno, 129 ALR 813, 817 (1940). California, however, follows the common law view that "the creation by a joint tenant of a mere charge [or lien] upon the land is a nullity as against the right of survivorship of the other joint tenant." *Hammond v McArthur* (1947) 30 C2d 512, 515, 183 P2d 1, 3 (dictum). Recent cases have affirmed this conclusion. A mortgage executed by all or fewer than all of the joint tenants does not destroy the joint tenancy. *Fresno v Kahn* (1962) 207 CA2d 213, 24 CR 394; *People Ex Rel Dep't of Pub. Works v Nogarr* (1958) 164 CA2d 591, 330 P2d 858. It has also been held that a deed of trust executed by one joint tenant does not destroy the joint tenancy. *Hamel v Gootkin* (1962) 202 CA2d 27, 20 CR 372.

As a rule of title practice, a mortgage or deed of trust by one joint tenant should not be insured without an appropriate qualification on the effect of the death of the joint tenant mortgagor or trustor before payment of the debt or performance of the obligation secured by the mortgage or deed of trust. Such a mortgage or deed of trust should not automatically be ignored on proof of death of the mortgagor or trustor; an appropriate release (see chap 17) should be obtained for recording purposes.

Husband and wife holding property as joint tenants. Where a husband and wife hold property as joint tenants, there is an additional complication. This is because property held in joint tenancy may actually be community property. Or the property may be held in true joint tenancy, with the interest of each being the separate property of each spouse. Ogden § 7.12, at 275-76. The California Supreme Court, for example, sustained a trial court judgment that a creditor was entitled

to impress a judgment lien for a debt of the husband on the entire property held in joint tenancy, the trial court having found that the property was community property upon a showing that the property had been acquired with the husband's earnings during marriage. *Hulse v. Lawson*, 212 Cal. 614 (1931).

Analysis

It is clear that the general rule in California is that the surviving joint tenant takes the property free from the rights of the creditors of the deceased joint tenant. However, this rule has received criticism from the commentators. In an article in the California State Bar Journal, it is stated:

Although the general rule is that one takes property from a decedent subject to the claims against the property, this rule does not apply in the joint tenancy context, and the surviving joint tenant apparently takes the property free from the rights of the decedent's creditors. In the authors' opinion, there is no sound policy reason for treating community property differently from joint tenancy property vis a vis the rights of creditors, and legislation in this area is needed to equate the rights of creditors in both types of property.

Kahn & Frimmer, Management, Probate and Estate Planning Under California's New Community Property Laws, 49 Cal. State Bar J. 516, 570 (1974). In an article in the Minnesota Law Review (Hines, Personal Property Joint Tenancies: More Law, Fact and Fancy, 54 Minn. L. Rev. 509 (1970)), the author comments: "[I]t is difficult to perceive the social policy underlying a rule that denies the enforcement of a lien simply because the decedent whose property the lien attached happened to be a joint tenant." 54 Minn. L. Rev. 509, 545.

While the criticisms of the rule center around the opinion that there is no beneficial social policy underlying it, the rationale for the rule itself primarily rests on the tenet that when one joint tenant dies, his interest in the land ceases. The surviving joint tenant theoretically does not receive an increased interest; therefore, there is nothing to which the lien can attach. The resulting extinguishment of all liens and charges against the deceased joint tenant's interest has been noted as one of the advantages of joint tenancy. *Ogden* § 7.5, at 265. It is the staff's view that this rationale is a holdover from

the English property system which was designed to concentrate land holding in the hands of a few by favoring joint tenancy. We do not consider this rationale a sufficient policy justification for depriving a judgment creditor or mortgagee of his security, absent some social policy justifying the existing rule.

If a joint tenant can raise funds by selling his joint tenancy interest, why should he not be permitted to raise funds by encumbering his interest? Yet the existing rule forces the joint tenant to sell since no knowledgeable lender will loan money on security of a joint tenancy interest unless all the joint tenants join in the transaction. In this respect, the existing rule may operate as a trap to an unwary lender—one who lacks knowledge of the joint tenancy, one who fails to check the records because the loan is relatively insubstantial or because the transaction is a friendly one, or one who is merely an uninformed private lender.

With respect to the judgment creditor, the staff sees little justification for the existing rule. The rule may permit a judgment debtor to shield his property from his creditors by putting it in joint tenancy because, under some circumstances, the judgment creditor may not be able to levy on and sell the property during the joint tenant's lifetime. For example, if the jointly-held property is the home of the joint tenant, the creditor's right to sell the property is greatly restricted by the dwelling exemption. Yet, when the joint tenant dies and no longer needs the home, the home passes to the other joint tenant (who may or may not occupy the home) free of the judgment lien. Also a judgment lien may attach even though a deed conveying the property to the judgment debtor is unrecorded, so the judgment creditor may not even be aware of the ownership of the judgment debtor's interest in the property during the judgment debtor's lifetime. 2 Freeman on Judgments § 939, at 1976 (5th ed. 1925) ("The mere fact that the judgment debtor's interest in land is not shown by the record should not alone defeat the operation of the lien except as against bona fide purchasers or encumbrancers, since the interest may nevertheless be one subject to execution, though not recorded."). Finally, we believe that the existing rule gives the surviving joint tenant a windfall at the expense of the lienholder. For these reasons, the staff believes that the joint tenancy property should be taken subject to the lien but the lien should only

be secured by the interest that the judgment debtor or borrower had in the property.

The Ziegler court also commented that the extinguishment of the lien upon the debtor's death was fair since, if the debtor survived the other joint tenant, the lien would attach to the entire property; the possibility of the loss of the lien if the judgment debtor dies is balanced by the possibility of the lien attaching to the entire property. As for the possibility of the judgment creditor being able to levy on the entire property if the debtor survives the other joint tenants, this situation is no different than one where a judgment creditor waits for the debtor to receive an inheritance or to increase his assets.

Conclusion

The staff recommends that the Commission propose a change in the existing law so that a judgment lien or other lien on the interest of a joint tenant in real property will survive the death of the joint tenant but continue only on the proportionate share formerly held by the deceased joint tenant. If the Commission adopts this recommendation, the staff will prepare a tentative recommendation for Commission consideration, revision, and approval for distribution to interested persons and organizations for review and comment. The comments we receive could be considered when the Commission considers the community property study, and at that time a determination can be made whether a special rule should be established where real property is held jointly by a husband and wife.

Respectfully submitted,

John H. DeMouilly
Executive Secretary