

General Obligations Law § 3-309 and Post Death Marital Real Property

The estate of a spouse, whose decedent entered into a settlement agreement which distributed real property held as tenants-by-the-entirety, can find enforcement rebuffed if the decedent died prior to the judgment of divorce or transfer of the property. Notwithstanding contract doctrine to the contrary and the further absence any of catechistic statutory formulae, the Court of Appeals and the Second Department have made this area formula sensitive and unforgiving. The First and Third Departments have parted with the Court of Appeals and breathed sensibility into this quicksand, which means a future date on the Albany docket.

Estate of Violi

The separation agreement in, *In re Estate of Violi*,¹ the seminal decision, required that the marital residence, held as tenants-by-the-entirety, be sold within four years with an equal division of the proceeds, subject to her exclusive occupancy. The wife commenced an action for divorce but died before termination of the marriage or any sale. Her estate sought to recover her share of the proceeds.

The Court of Appeals held that the agreement had not transformed the tenancy-by-the-entirety into a tenancy-in-common, accordingly, the surviving husband retained the proceeds because, under tenancy-by-the-entirety, spouses own the property as if they were one person. Upon the death of a spouse the entire estate passes to the surviving spouse because the survivor remains seized of the whole,² not because of right of survivorship. *Violi* noted that spouses may terminate a tenancy-by-the-entirety in one of four ways, including under General Obligations Law (GOL) § 3-309, none of which was present. *Violi* further held that, at most, the agreement constituted an executory sales contract which does not establish a partition or division of property. An agreement to seek a buyer and convey the entirety's interest at a fixed future time does not satisfy § 3-309 and does not transform the tenancy into a tenancy-in-common. GOL § 3-309 provides:

Husband and wife may convey or transfer real or personal property directly, the one to the other, without the intervention of a third person; and may make partition or division of any real property held by them as tenants in common, joint tenants or tenants by the entireties. If so expressed in the instrument of partition or division, such instrument bars the wife's right to dower in such property, and also, if so expressed, the husband's tenancy by curtesy.

Notwithstanding the provision that the waiver and relinquishment of “any and all rights [each party] may [] have or []acquire . . . to share in the property of the estate of the other”, *Violi* found no specific language of clear intent to alter the form of ownership because, under a tenancy-by-the-entirety, the decedent's estate cannot claim an interest in the property. The Court emphasized public policy's favoring certainty in title to real property to protect bona fide purchasers and to avoid conflicts of ownership: title alterations require clear expressions of intent. The Court suggested constructive trust as an avenue of preventing unjust enrichment.

Judge Bernard Meyer's dissent convincingly distinguished each decision cited by the majority, concluding: (1) the agreement terminated the tenancy-by-the-entirety, subject to the wife's occupancy rights; (2) the majority had rewritten § 3-309; and (3) public policy would remain unharmed.

Pasmore v. King

In *Pasmore v. King*,³ the parties executed an agreement “*as and for Equitable Distribution*” during their divorce action. The wife would buy out and the husband would convey his interests in the marital residence pursuant to a contract of sale. Prior to the closing and entry of a divorce judgment, the husband died. The executrix of his estate commenced an action for breach of contract to recover payment. The Appellate Division upheld the dismissal of the action because since the contract sprung from a divorce it was to effectuate equitable distribution, not breach of contract. The husband's death abated the action and extinguished any equitable distribution rights.⁴

The executrix urged that the language, together with the contract of sale, satisfied § 3-309 as an inter-spousal property conveyance: the decedent performed his contractual obligations and was entitled to the benefit of his bargain, which, by its terms, inured to his estate. The Appellate Division, citing *Violi*, disagreed because the closing had not occurred at his death – the premises had thus not been conveyed prior to the termination of the marriage. Therefore, the agreement did not qualify as an instrument of “partition or division of any real property” under § 3-309.

Justice David Ritter's cogent dissent reviewed settled law – that the decedent had acquired vested property rights during his lifetime which inured to his estate. Since marital agreements are governed under contract doctrine,⁵ its unequivocal language was a clear expression of intent: (1) to terminate their tenancy-by-the-entirety via a § 3-309 conveyance; and (2) for the agreement to exist as a separately enforceable contract, unaffected by subsequent divorce, and binding on the estates.

Justice Ritter emphasized that the estate did not seek to fix the decedent's equitable distribution because equitable distribution had been achieved by the parties' agreement – those property rights vested when the settlement was consummated.⁶ Justice Ritter cited *Peterson v. Goldberg*,⁷ which held that equitable distribution does not abate upon death where an ex parte foreign divorce judgment has been granted prior to the death.

Maguire's Estate

In *In re Maguire's Estate*⁸ the parties contracted to sell real property which they held by-the-entirety. The wife died before its conveyance. Although an equitable conversion generally results from the making of a contract for the sale of realty, it was inapplicable because the purpose of equitable conversion and the nature of a tenancy-by-the-entirety differ:

Equitable conversion is not a fixed rule of law but a mere fiction of equity designed to effectuate the obvious intention of the parties and to promote justice. It rests ‘on the presumed intention of the owner of the property and on the maxim that equity regards as done what ought

to be done.”⁹ The conversion, if any, takes place only when it is the duty of the contracting party to act. . . .

In an estate-by-the-entirety . . . [e]ach owns, not an undivided part, but the whole estate. ‘The survivor [] does not take a new acquisition, but holds under the original grant or devise, the estate being merely freed from participation by the other. There is no succession in or transfer of title.’ When [the wife] died before the time fixed for the delivery of the deed, her interest in the property died with her. The duty imposed upon her by the contract to execute and deliver the deed [] died with her ... Therefore, there is neither reason nor necessity for resorting to the doctrine of equitable conversion. To invoke it would not only ignore the intention of the parties at the time they acquired the property, but destroy the legal rights of the survivor inherent in a tenancy-by-the-entirety.

The estate was denied any share of the proceeds.

Brower v. Brower

In *Brower v. Brower*,¹⁰ the parties’ agreement equally distributed the marital residence, subject to the wife’s eight month occupancy. She did not vacate the property on the prescribed date, nor was the property ever sold. Two years later, while still married, the husband died.

The Third Department rejected the defendant’s contention that, under *Violi*, she acquired sole ownership. The estate asserted that defendant’s failure to vacate the residence prior to the husband’s death constituted a breach of contract that survived his death. Under EPTL § 11-3.1¹¹, the decedent was entitled to specific performance at that time, which survived his death without impacting his estate’s right to seek enforcement.¹²

Estate of Shatraw

In *In re Estate of Shatraw*,¹³ the husband, in return for the wife’s waiver of any interest in his business, agreed to, inter alia, transfer his interest in certain real property to her. The wife died before entry of the divorce judgment or the filing of the transfer instrument. Surrogate’s Court directed the husband to convey the property to the estate. The Appellate Division, citing EPTL § 11-3.1 and *Brower*, its own precedent, upheld the transfer as a contractual proprietary right created immediately upon the execution of the agreement which passed to the wife's estate upon her death, unconditioned upon her survival.

Beudert-Richard v. Richard

In *Beudert-Richard v. Richard*,¹⁴ Adam and his first wife, Pamela, purchased a cooperative apartment during their marriage. They took title to the shares as joint tenants with rights of survivorship rather than as tenants-by-the-entirety, since prior to the amendment of EPTL 6-2.1 and 6-2.2 (January 1, 1996) co-op shares were treated as personalty rather than realty, and a married

couple's ownership interest in such shares could be as joint tenants or as tenants-in-common, but not as tenants-by-the-entirety. Their separation agreement, nevertheless, erroneously described their ownership "as tenants-by-the-entirety." The agreement called for its sale with an equal distribution of the proceeds.

Upon his death, his will bequeathed to Michele, his second wife, his one-half ownership interest in the apartment. In 2007, Michele and Pamela signed an agreement which acknowledged Michele's one-half interest, and agreed to share the proceeds.

Michele commenced an action to enforce the separation agreement and the 2007 agreement with Pamela. Pamela moved to deny Michele any proceeds of the sale and to rescind the 2007 agreement based upon mutual mistake, because Adam and Pamela had owned the co-op as joint tenants with the right of survivorship, and Adam's death left her the sole owner.

The motion court denied Michele any share in the proceeds thereby rescinding the 2007 agreement, and dismissing her complaint. Relying on *Violi*, the court reasoned that, at Adam's death, the agreement was an executory contract to divide the proceeds upon the sale, which did not alter the form of ownership, and since Adam's contract right to the sale of the co-op was not enforceable at the time of his death, his estate could not claim it (citing *Brower*). The Appellate Division reversed.

The Appellate Division distinguished *Brower* from *Violi* in that the husband in *Brower* had a specifically enforceable contract right at his death because the wife had failed to vacate the marital residence during his lifetime, accordingly, the right passed to his estate. However, GOL § 3-309 requires no more than a clear intent to alter the form of ownership.

In *Beudert-Richard*, unlike either *Violi* or *Brower*, the divorce judgment incorporated the parties' agreement which expressed their "mutual belief that they held the co-op shares by-the-entirety and the concomitant [] expectation that upon the divorce their tenancy would automatically convert into a tenancy-in-common" but a mistake of law is insufficient to vacate an agreement.¹⁵ While a tenancy-by-the-entirety automatically converts into a tenancy-in-common upon entry of a divorce judgment, the same does not hold true for joint tenancy. However, under § 3-309 and *Violi*, a married couple may freely "convey or transfer real [] property directly, one to the other, without the intervention of a third person" and may convert the form of ownership by expressing their intent in writing.

While Adam and Pamela's "separation agreement did not specifically state an intent to convert their ownership of the co-op from joint tenancy to a tenancy-by-the-entirety ... their failure to do so appear[red] to be based on their (incorrect) understanding that their ownership already took that form." Their agreement confirmed that they "intended, and assumed, that upon entry of [] divorce judgment they would automatically become tenants-in-common without [] right of survivorship." The absence of a direct assertion of intent to alter their joint tenancy arose from the fact that neither party viewed their tenancy as a joint tenancy. Pamela confirmed this mutual intent

in the 2007 agreement with Michele. Furthermore, Pamela claimed sole survivorship rights only after the co-op's managing agent demanded that Michele's name be redacted from the sales contract.

The majority charged the dissent with “an overly and unnecessarily strict formalistic application of § 3-309 which ignored the clear understanding of the [] separation agreement as to the form of ownership following the divorce judgment, and instead relied on the lack of formal language expressly stating an intent to change the form of ownership of the apartment.” “Respect” for the law requires that “clear facts and intentions are recognized, and not ignored due to technical legalistic requirements ... the law [does not] impose exacting requirements as to formulaic recitals to render a document legally effective.”

Contract Doctrine

Violi and *Pasmore* are unyieldingly harsh and violative of contract doctrine which requires contrary results without doing violence to real property principles because the written dispositions guard the Statute of Frauds. The written intent in each aforementioned case was clear and unambiguous.

Contract doctrine zealously protects the expectation of contracting parties:

- Albeit said regarding ambiguous provisions, the Court of Appeals echoed: contracts are not to be interpreted by giving a strict and rigid meaning to general words or expressions without regard to the surrounding circumstances or the apparent purpose which the parties sought to accomplish. The court should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance, and a sensible meaning of words should be sought.¹⁶
- While a literal reading of a provision may support a claim but would simultaneously defeat the purpose of the agreement, even the actual words provided therein may be transplanted, supplied, or entirely rejected to clarify the meaning of the contract as a means of giving effect to the parties' intent which is the paramount concern of contract construction.¹⁷
- It is the court's duty sitting in equity to attempt to get at the substance of things and to ascertain, uphold, and enforce the rights and duties which spring from the real relations of the parties; it will never suffer the mere appearance and external form to cancel the true purpose, object, and consequences of a transaction.¹⁸
- Contract interpretation requires a practical interpretation of the expressions of the parties to the end that there be a realization of (their) reasonable expectations¹⁹ in accordance with their intent and the purpose of the stipulation by examining the record as a whole.²⁰
- Courts can reject an absurd construction in favor of one which would better accord with the reasonable expectations of the parties.²¹

- The Court of Appeals warned against strict grammatical applications.²²
We refuse to follow a signpost when it appears that it points in the wrong direction. Intention may be formulated in words that are not strictly accurate, and in terms that are not grammatical.

Conclusion

Violi and *Pasmore* run afoul of fundamental contractual principles – the intent, understanding, and expectations were clear. The First and Third Departments and the dissenters in *Violi* and *Passmore* are correct. This area is a minefield for disaster. Counsel must be mindful of GOL § 3-309 and make it crystal clear that parties intended: (1) their agreements to survive either parties' death, enforceable by their estates; and (2) to immediately convert the form of ownership from a tenancy-by-the-entirety to a tenancy-in-common.

¹ 65 N.Y.2d 392 (1985).

2. *Kahn v. Kahn*, 43 N.Y.2d 203 (1977).

³ 186 A.D.2d 241 (2nd Dept.,1992), leave to appeal dismissed, 81 N.Y.2d 1007 (1993).

⁴ *Passmore* cited *Sperber v. Schwartz*, 139 A.D.2d 640 (2nd Dept.,1988), *appeal dismissed*, 73 N.Y.2d 871 (1989).

⁵ *Meccico v. Meccico*, 76 N.Y.2d 822 (1990).

⁶ *See In re Pavese*, 195 Misc. 2d 1 (Sur.Ct., Nassau Co. 2002).

⁷ 180 A.D.2d 260 (2nd Dept.,1992), *lv. to appeal dismissed*, 81 N.Y.2d 835 (1993).

⁸ 251 A.D. 337 (2nd Dept.,1937), *aff'd*, 277 N.Y. 527 (1938).

⁹ *See Rockland-Rockport Lime Co. v. Leary*, 203 N.Y. 469 (1911).

¹⁰ 226 A.D.2d 92 (3rd Dept.1997); *see In re Pavese*, *id.*, (the Surrogate followed the reasons in *Brower* and by the dissenter in *Passmore*, *id.*

¹¹ EPTL 11-3.1: Any action, other than [] for injury to person or property, may be maintained by and against a personal representative in all cases and in such manner as such action might have been maintained by or against his decedent.

¹² The Third Department declined to follow *Passmore*.

| ¹³ 66 A.D.3d 1293 (3rd Dept., 2009).

14. 894 N.Y.S.2d 22 (1st Dept., 2010).

15. *Symphony Space, Inc. v. Pergola Properties, Inc.* 88 N.Y.2d 466 (1996).

¹⁶ *William C. Atwater & Co. v. Panama R. Co.*, 246 N.Y. 519 (1927).

¹⁷ *Essex Insurance. Co. v. Pingley*, 41 A.D.3d 774 (2nd Dept.2007).

¹⁸ *Schwartz v. Schwartz*, 153 A.D.2d 935 (2nd Dept.1989).

¹⁹ *Brown Bros. Elec. Contractors, Inc. v. Beam Const. Corp.*, 41 N.Y.2d 397 (1977).

²⁰ *See Maury v. Maury* 7 A.D.3d 585 (2nd Dept.,2004).

²¹ *Reape v. New York News, Inc.*, 122 A.D.2d 29 (2d Dep't 1986).

22. *Wirth & Hamid Fair Booking v. Wirth*, 265 N.Y. 214 (1934).