To Fee or Not to Fee

Two deed drafting traps created by recent changes in S.C. law

By Paul W. Dillingham and Claire T. Manning

The S.C. Supreme Court emphatically states that drafting deeds is the practice of law. *Doe v. McMaster,* 355 S.C. 306, 585 S.E.2d 773 (2003); *State v. Buyers Service Co., Inc.*, 292 S.C. 426, 357 S.E.2d 15 (1987). There are many excellent reasons for those decisions! Drafting deeds can be a tricky proposition, not for the faint of heart. Lawyers from other states draft deeds that are recorded in South Carolina, creating a wide variety of title defects. Non-lawyers in South Carolina also draft deeds that somehow manage to be recorded, often making it difficult to determine whether clear title passed. Drafting a deed by a South Carolina licensed attorney no longer involves merely opening his or her law firm's standard general or limited warranty deed form on the computer and paying attention to the minutia of the parties' names, the legal description, the derivation, the tax map number and the grantee's address. That task is difficult enough standing on its own. But two legal issues created by fairly recent changes in the law must now be considered, and deed forms may need to be reviewed and revised in light of these developments. These developments emphasize once again that South Carolina lawyers should draft South Carolina deeds.

The first development involves the interplay between a 1994 statutory change and a 2004 S.C. Court of Appeals case, *Hunt v. S.C. Forestry Comm'n,* 358 S.C. 564, 595 S.E.2d 846 (Ct. App. 2004). The issue here is the proper method of adding enforceable limiting or "subject to" language in a deed for a seller client. The second development involves a Supreme Court case, *Smith v. Cutler,* 366 S.C. 546, 623 S.E.2d 644 (2005). This case confused real estate practitioners and complicated drafting survivorship deeds.

A deed is a written document where the owner (the "grantor") conveys the title to real estate to a purchaser (the "grantee"). South Carolina has a statutory form of deeds set out in S.C. Code section 27-7-10. This statute requires two or more credible witnesses and indicates a deed will be valid to convey fee simple title if it is expressed in the following form:

"The State of South Carolina

Know all men by these presents that I, A B, of ..., in the State aforesaid, in consideration of the sum of ... dollars, to me in hand paid by C D of ... County, State of ..., the receipt of which is hereby acknowledged, have granted, bargained, sold and released and by these presents do grant, bargain, sell and release unto the said C D all that (here describe the premises), together with all and singular the rights, members, hereditaments and appurtenances to said premises belonging or in any wise incident or appertaining; to have and to hold all and singular the premises before mentioned unto C D, his heirs and assigns, forever. And I do hereby bind myself, my heirs, executors, and administrators, to warrant and forever defend all and singular said premises until said C D, his heirs and assigns, against myself and my heirs and against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

Witness my hand and seal this ... day of ... in the year of our

Lord ... and in the ... year of the independence of the United States of America. " ... [L.S.]"

S.C. CODE ANN. § 27-7-10 (1991).

The statutory form is not indispensable according to very old case law. Any form is sufficient if the intention to convey can be ascertained and there is a seal, two witnesses and a description of the property. *Navassa Guano Co. v. Richardson,* 26 S.C. 401, 2 S.E. 307 (1887); *Lorick & Lowrance v. McCreery,* 20 S.C. 424 (1884). Additionally, the grantor must be competent, the deed must recite adequate consideration, the signatures must be probated or acknowledged and the deed must be delivered to the grantee. With this general background on South Carolina deeds, let's look at the new developments.

Drafting deeds with enforceable limiting or "subject to" language

Sellers almost uniformly need some type of limiting language in deeds. Without limiting language, the seller may be in the position of warranting that the title is perfect, and titles are rarely, if ever, perfect. Any lawyer representing a seller in a commercial context should take great care to negotiate specific "subject to" language in a contract of sale, depending on the state of the title and the use of the property. It is common for contracts involving commercial transactions to contain pages and pages of "permitted exceptions," often as Schedule B or Exhibit B. Those permitted exceptions should be included as limiting language in the deeds that consummate the contracts. Even in residential transactions, sellers should protect themselves with simple limiting language like "this conveyance is made subject to easements and restrictions affecting the subject property." Standard residential contracts generally contain language to this effect. Additionally, some developers create new subdivisions or add restrictions to single properties they sell by placing restrictive covenants in each deed, rather than in a separate document. A lawyer who drafts a deed for any residential or commercial transaction should always review the contract of sale to determine whether the parties have agreed to limiting language, and that language should be added to the deed.

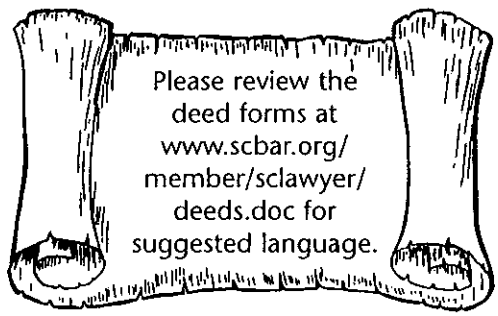
Drafting the limiting or "subject to" language has always been tricky because of "a long and unbroken line [of cases that hold that,] where the granting clause in a deed purports to convey title in fee simple absolute that estate may not be cut down by subsequent words in the same instrument." *See Stylecraft, Inc. v. Thomas,* 250 S.C. 495, 498, 159 S.E.2d 46, 47 (1968) and the cases cited therein. In *Stylecraft,* a deed contained words of inheritance in the granting clause and was followed by limiting language to the effect that the property must be used for school purposes to avoid a reverter to the grantor. The Supreme Court held the limiting language to be unenforceable.

Until January 1, 1994, when S.C. Code section 27-5-130 became effective, words of inheritance ("his, her or their heirs or successors and assigns") were necessary to convey fee simple title. By common law, deeds without words of inheritance could, at most, convey life estates. The habendum clause ("to have and to hold unto the Grantee, her heirs and assigns forever") was historically the place in the deed where words of inheritance were placed. Traditionally, careful practitioners did not place words of inheritance in the granting clause in order to avoid the *Stylecraft* rule. The granting clause without words of inheritance left open the ability to add enforceable limiting language later in the deed. The limiting or "subject to" language followed the legal description, and then the habendum clause contained the words of inheritance, conveying the fee simple title at that point.

Effective January 1, 1994, section 27-5-130 eliminated the requirement for words of inheritance to convey fee simple title. (As an aside, because of this statutory change, an argument can be made that the habendum clause is no longer required in a deed in South Carolina, since its purpose was historically to house the words of inheritance, but the habendum clause has not been eliminated from the statutory form of deeds.) More significantly, this statutory change eliminated the practitioners' device, set out above, to add enforceable limiting language.

The *Hunt* case, cited above, restated the common law rule that, where the granting clause conveys fee simple title, the estate cannot be cut down by subsequent words in the same instrument. Because this case followed the 1994 statutory change, practitioners focused, some for the first time, on the necessity to revise their device to add enforceable limiting language. Ideally, practitioners would have focused on this issue in 1994 when the necessity for words of inheritance were eliminated, but many did not become aware of the issue until the *Hunt* case was published.

Now that words of inheritance are no longer needed to convey a fee simple title, perhaps the best way to add enforceable limiting language is to limit the granting clause itself. A suggestion for revising the granting clause would be: "A does hereby grant, bargain, sell and release, subject to the easements, restrictions, reservations and conditions ('Exceptions') set forth below unto the said B, the following described real estate ..." Some practitioners go so far as to put similar language in the three operative clauses of a deed, the granting clause, the habendum clause and the warranty clause, or to indicate that the conveyance is subject to the defined exceptions in those clauses.



All practitioners should be aware that the limiting language they carefully draft for their seller clients will not be effective, under our current law, if the limiting language follows a standard granting clause, regardless of whether the granting clause contains words of inheritance. This common and inef-

fectual practice of limiting language drafting can be found in countless South Carolina recorded deeds, but should nonetheless be discontinued in order to adhere to this case law described above.

Drafting survivorship deeds

Under the common law in South Carolina, tenancy in common is the favored form of ownership. A deed "to A and B" will result in a tenancy in common between A and B. At the death of A or B, his or her interest in the property will pass pursuant to the will or intestacy laws. Joint tenancy was not favored in South Carolina, and there is no tenancy by the entirety form of ownership.

While joint tenancy was not favored under our common law, a rather convoluted 1953 S.C. Supreme Court case, *Davis v. Davis,* 223 S.C. 182, 75 S.E.2d 46 (1953), interpreted a deed that intended to create a tenancy by the entirety as creating a shared interest in property between husband and wife referred to as a tenancy in common with an indestructible right of survivorship. After this case, many practitioners, attempting to create a survivorship form of ownership, used the following language: "for and during their joint lives and upon the death of either of them, then to the survivor of them, his or her heirs and assigns forever in fee simple." Other practitioners have routinely used language commonly regarded as creating a joint tenancy with right of survivorship: "as joint tenants with rights of survivorship and not as tenants in common."

Conveying title from a person (like a husband) to himself and another person (like his wife) establishing survivorship was not possible in South Carolina prior to 1996 because the old common law requirement of "unities of title" could not be met. *Jenkins v. See, e.g., Jenkins,* 8 S.C.L. (1 Mill) 48 (S.C. Const. App. 1817). To create a survivorship form of ownership, the property owner conveyed the property to a "straw party," who would then convey to the husband and wife, complying with the unities of title requirement and establishing survivorship.

A 1996 statutory amendment to S.C. Code section 62-2-804 rectified this problem by providing that a deed can create a right of survivorship where one party conveys to himself and another person, or two or more persons convey to themselves or to themselves and others. The straw party is no longer needed. This statute was given retroactive effect by its own terms and by case law. *See Estate of Sherman v. Estate of Sherman,* 359 S.C. 407, 597 S.E.2d 850 (Ct. App. 2004). *Estate of Sherman* construed a 1985 deed from one spouse to both spouses creating a joint tenancy to be effective, despite the absence of a straw party deed, because of the retroactive effect of this statute.

In 2000, our legislature added section 27-7-40, which provides that a joint tenancy may be created "[i]n addition to any other methods for the creation of a joint tenancy in real estate which may exist by law" by the familiar words "as joint tenants with rights of survivorship, and not as tenants in common." The statute makes clear that a joint tenancy may be created in more than two persons. It provides that an interest held by one joint tenant may not be encumbered by another joint tenant acting alone. All joint tenants must join in a mortgage to make it effective.

The statute addresses severing joint tenancies and provides that, unless expressly provided for otherwise in the statute, any joint tenancy that is severed creates a tenancy in common without rights of survivorship. For example, a divorce severs a joint tenancy held by husband and wife, vesting title in both of them as tenants in common, unless the order of a family court determines otherwise. The statute states that, if there are only two joint tenants, then a deed from one to the other severs the joint tenancy and vests fee simple title in the grantee. If there are more than two joint tenants, then a deed from one of the joint tenants to the others conveys the interest equally to the others, who continue to own the real estate as joint tenants with rights of survivorship. A conveyance of the interest of one joint tenant by a court of competent jurisdiction severs the joint tenancy and vests title in the parties as tenants in common, unless the order provides otherwise. A conveyance by all the joint tenants to themselves as tenants in common severs the joint tenancy.

According to this statute, the surviving joint tenant or tenants, following the death of a joint tenant, may file a certified copy of the death certificate with the Register of Deeds in the county where the real estate is located. The ROD must index the death certificate under the name of the deceased joint tenant in the grantor index. The statute indicates that recording the death certificate is conclusive evidence that the joint tenant is deceased and that the interest of the deceased joint tenant vests as an operation of law in the surviving tenant or tenants.

Interestingly, the appellant in *Estate of Sherman,* cited above, argued that section 62-8-804 conflicts with section 27-7-40. The Court of Appeals held, however, that the two statutes are not in conflict, neither as to the provision of section 62-2-804 that one person can create a joint tenancy by a conveyance to himself and another without the use of a straw person nor as to the retroactive effect of section 62-2-804.

Following the enactment of section 27-7-40, most practitioners used the language set out in the statute to create a joint tenancy with right of survivorship, "as joint tenants with rights of survivorship, and not as tenants in common."

Then along came *Smith v. Cutler,* cited above. *Smith* is a 2005 S.C. Supreme Court case that left practitioners scratching their heads in confusion. 366 S.C. 546, 623 S.E.2d 644 (2005). Most practitioners were using the statutory language to create survivorship deeds, but this case holds that there continue to be two survivorship forms of ownership in South Carolina, tenancy in common with an indestructible right of survivorship and joint tenancy. The Court recognized that the two estates have many similar characteristics, but stated that, unlike a tenancy in common with rights of survivorship, a joint tenancy with a right of survivorship is capable of being defeated by

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the unilateral act of one tenant. The Court also stated that property held in joint tenancy is subject to partition, but property held by tenancy in common with a right of survivorship is not subject to partition. The language the Court recognized as establishing a tenancy in common with an indestructible right of survivorship is the language set out above, "for and during their joint lives and upon the death of either of them, then to the survivor of them, his or her heirs and assigns forever in fee simple." *Id.* At 548, 623 S.E.2d at 645

Real estate lawyers in the resort areas of South Carolina are requested on a regular basis to create survivorship deeds because property owners who come to South Carolina to buy resort properties have been taught by lawyers in their home states that a survivorship form of ownership avoids probate and may avoid creditors to some extent. Real estate lawyers in other parts of South Carolina typically draft tenancy in common deeds and advise clients to have proper estate planning documents. Lawyers have differed, over the years, on the issue of whether the appropriate language to create a joint tenancy is the statutory language, "as joint tenants with rights of survivorship and not as tenants in common," or the *Smith* case language, above. Until the *Smith* case was decided in 2005, most practitioners did not think different estates were created by the different language.

Now, lawyers, particularly those along the coast, are struggling with whether to advise clients to create joint tenancies or tenancies in common with an indestructible right of survivorship when clients request survivorship forms of ownership. Both forms create survivorship. If the parties hold title until one of them dies, then title is clearly vested in the survivor or survivors. The differences between the two forms of ownership come into play with lifetime conveyances and litigation such as an attempted conveyance by one joint tenant to a third party, a partition or a divorce. The choice of language may be significant in these situations. Clients who seek to create survivorship deeds should be advised about the differences between the two forms of ownership and should be given the opportunity to select the form they prefer. And, lawyers who draft these deeds should make the language crystal clear as to the intent of the parties.

One final thought on the survivorship issue in South Carolina: do we now have or will we soon have a form of ownership that is protected from creditors? The form of ownership in *Smith v. Cutler,* a tenancy in common with an indestructible right of survivorship, was held by the Supreme Court not to be subject to partition. Would this estate, like tenancy by the entirety, also not be subject to the power of a creditor to reach the interest of one of the tenants in common? Perhaps the next case on this topic will decide this issue.

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