

VOLUME NO. 37

OPINION NO. 134

COUNTY CLERK AND RECORDER - Duties, joint tenancies; COUNTY CLERK AND RECORDER - Fees; FEES - County Clerk, joint tenancy terminations; REVISED CODES OF MONTANA, 1947 - Sections 16-2905, 16-2905(1), (2), 25-231(5), 91-4321.1(1), (2), (3), (4), (5), (6), 91-4469, 91A-3-1205, 91-4470, 91-4470(2), 91-4471, (1)(a), (2), 91-4472, 91-4473.

- HELD: 1. Clerk and recorders are not required to issue "transfers of title."
2. Upon filing of the application and certificates (form INH-3), the clerk should index the transfer in the grantor and grantee index, noting the time and place of filing. The proper filing fee for form INH-3 is three dollars (\$3.00).

17 April 1978

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Gentlemen:

You have requested my opinion on the following questions:

Are county clerk and recorders required to issue a transfer of title to a surviving joint tenant? If not, what procedures should clerk and recorders follow?

Section 91-4321.1, R.C.M. 1947 (repealed by Laws of Montana (1977), ch. 409, sec. 5) provided an expedited procedure for proving title to joint tenancy property owned by husband and wife after the death of one of the spouses. The surviving spouse filed proof of death, a list and valuation of joint tenancy property, and proof of creation of the joint tenancy with the Department of Revenue. Section 91-4321.1(2), (3), (4), and (5). The Department of Revenue then determined the inheritance tax due. If no tax were due, or if due, after its payment, the county clerk and recorder issued a "transfer of title" for any real property involved to the surviving spouse. Section 91-4321.1(6). The completed transfer of title form prescribed by the Department of Revenue was filed and recorded in the book of deeds and indexed in the grantor and grantees indexes, thereby preserving a record chain of title.

The statute provided that title to the joint tenancy property vested in the surviving spouse "provided the requirements of this section have been complied with." Section 91-4321.1(1). Because this subsection appeared to place conditions on vesting, it potentially ran afoul the federal estate tax marital deduction. 37 Mont.L.Rev. 131, 132 (1976). The 1977 Legislature responded by repealing sections 91-4321.1, 91-4469, and 91A-3-1205, (similar provisions dealing with joint tenancy property held by unmarried persons and estates requiring administration). Laws of Montana (1977), ch. 409, sec. 5. Enacted in their stead were sections 91-4470 to 4473 which provide a procedure applicable to all joint tenancy property without regard to the relationship of the joint tenants or administration requirements.

Section 91-4470 requires the surviving joint tenant to file with the Department of Revenue a copy of the death certificate, a verified application for determination of inheritance tax, and evidence of the instruments creating the joint tenancy if required by the department. Section 91-4470(2). The Department of Revenue determines the inheritance tax due, if any, and issues a certificate showing this information. Section 91-4470. The certificate and an acknowledgement by the county treasurer that the tax was paid are incorporated in the body of the application form prescribed by the Department of Revenue (Form INH-3).

If an interest in real property is involved, the surviving joint tenant must file a certified copy of the application with the clerk and recorder of the county or counties where the property is located. Section 91-4471(1)(a). This section also requires the filing of the revenue certificate of tax due and the county treasurer's receipt showing payment, section 91-4471(1). Because both are incorporated in the application form, however, in reality only one form is filed. The filing of this document "constitutes release of any lien for inheritance taxes." Section 91-4471.

The question as to issuance of a "transfer of title" arises because the Department of Revenue determined that clerk and recorders should continue to issue these documents. A review of the legislative history of these sections indicates this was not the Legislature's intention.

The current law was enacted by House Bill 492. As originally introduced, it required the clerk and recorder to "terminate the joint tenancy or otherwise transfer the ownership." H.B. 492, sec. 2(2). The Senate Committee on Judiciary, to whom the bill was referred after passage by the House, recommended several amendments. These included striking the above language and inserting instead: "The interest of the decedent in property held in joint tenancy terminates upon his death." Standing Committee Report, Senate Committee on Judiciary, 1977 Senate Journal 922. The bill as ultimately passed incorporated this amendment. Section 91-4471(2).

The amendment is consistent with common law concepts of joint tenancy property:

[A] characteristic of joint tenancy property is that it is not testamentary but "is a present estate in which both joint tenants are seized in the case of real estate, and [are in] possession

in the case of personal property, per my et tout," that is, such joint tenant is seized by the half as well as the whole. The right of survivorship in a joint tenancy therefore does not pass anything from the deceased to the surviving joint tenant. Inasmuch as both co-tenants in a joint tenancy are possessors and owners per tout, i.e., of the whole, the title of the first joint tenant who dies merely terminates and the survivor continues to possess and own the whole of the estate as before. The interest of the other co-tenant terminated by death transfers nothing, but his interest is merely divested by "its own inherent nature and limitation." Strout v. Burgess, 144 Me. 263, 68 A.2d 241, 12 ALR.2d 939.

Kleemann v. Sheridan, 256 P.2d 553, 555 (Ariz. 1953).

Requiring clerk and recorders to issue documents purporting to transfer actual title is inconsistent with the Legislature's recognition of the common law attributes of joint tenancy property. It is also inconsistent with repeal of section 91-4321.1 and the senate amendments to House Bill 492 previously noted. Therefore it is my opinion that clerk and recorders are not required to issue "transfers of title."

Your second question concerns the clerk and recorders' role in terminating joint tenancies. Section 91-4472(1) requires applicants to file a certified copy of the application with the clerk and recorder. It is silent about the clerks' duties following filing. The statute does not specify how or where the documents are to be filed or indexed nor does it specify whether the clerk is to collect normal filing fees.

Section 16-2905 enumerates the indexes each county clerk must keep. Transfers of real estate are indexed in the grantor and grantee indexes. Section 16-2905(1), (2). Terminations of joint tenancies have historically been indexed in the grantor and grantee indexes because they involve a transfer in the sense that a deceased joint tenant is divested of his interest at death. Unlike transfers by deed, the event of death, rather than a written instrument, operates to effect the "transfer" of a deceased joint tenant's interest. Under prior law, the fact of death was acknowledged by an instrument which was recorded, either a court order to that effect, section 91-4321 (repealed by

Laws of Montana (1974), ch. 365, sec. 2), the decree of distribution or more recently, the "transfer of title." Section 91-4471(1) does not require that the application and certificates be recorded. However, these instruments when filed establish a transfer of real estate and the grantor and grantee indexes remain the appropriate indexes. The date of "transfer" is the date of death. That part of the index which refers to the place of recording is inapplicable. Recording is unnecessary because the clerk retains the certified copy of the various documents. The clerk, however, should note in this column the date and place of filing.

Section 25-231 enumerates fees the county clerk and recorders must charge. Subsection 5 states that the fee "[f]or filing and indexing each...instrument required by law to be filed and indexed..." is one dollar. The proper filing fee for form INH-3 is therefore \$3.00 because although the three instruments required by law to be filed are incorporated into a single integrated document, section 91-4471(1) treats them as separate documents for filing purposes.

THEREFORE, IT IS MY OPINION:

1. Clerk and recorders are not required to issue "transfers of title."
2. Upon filing of the application and certificates (form INH-3), the clerk should index the transfer in the grantor and grantee index, noting the time and place of filing. The proper filing fee for form INH-3 is three dollars (\$3.00).

Very truly yours,

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