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## In re Cox' Estate, 380 P.2d 584 (Mont. 1963)

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Reber: In re Cox' Estate  
**RECENT DECISIONS**

**HUSBAND WHO MURDERS WIFE AND COMMITS SUICIDE PREVENTED FROM ASSERTING SURVIVORSHIP RIGHT IN JOINT TENANCY AND HOLDS HALF-INTEREST AS CONSTRUCTIVE TRUSTEE FOR WIFE'S HEIRS; HIS HEIRS INHERIT HIS HALF.** — Husband and wife owned real property jointly with each having heirs by a previous marriage. The wife was shot and killed by the husband, who immediately committed suicide. Although she predeceased her husband, the wife's heirs claimed her half-interest in the joint property for her estate. The husband's heirs filed a petition to determine to whom distribution of her half-interest should be made. They claimed that at the instant the wife was killed the husband became sole owner of the joint property, and when he committed suicide they inherited all of the property. The district court, sitting in probate without a jury, found that the husband had unlawfully and feloniously killed his wife. The husband was held an involuntary trustee of the wife's half-interest in the joint property for the benefit of her estate.<sup>1</sup> The husband's heirs appealed to the Montana Supreme Court, *held*, affirmed. Justice and equity demand that a man cannot benefit by his own wrong. This principle precludes a felonious killer from acquiring, by survivorship, his victim's share of property owned jointly. This rule applies also to the murderer's estate, and his heirs may only inherit his half-interest. *In re Cox' Estate*, 380 P.2d 584 (Mont. 1963) (Mr. Justice Doyle dissented. Mr. Justice Adair dissented without opinion).

As a general rule property may not be acquired by a person who feloniously murders its owner. Founded on the equitable doctrine that a man cannot benefit by his own wrong, this rule is applied where title to property and the benefits of ownership pass from the victim to the murderer, who is then deprived of these interests because of his unlawful acquisition.<sup>2</sup> However, where one joint tenant murders the other, title to the property held jointly and the benefits of ownership do not pass from the victim to the murderer because of well-established property rules peculiar to joint ownership.

A joint tenancy is created by a conveyance of property which vests

<sup>1</sup>In the instant case the criminal determination was made in a civil proceeding. In the absence of a statute requiring a conviction of criminal homicide in order to prevent a murderer from taking property from his victim, the fact that a criminal act has occurred may be established in a civil proceeding. A civil action to determine property rights between private individuals requires a preponderance of the evidence to establish criminal guilt, whereas a criminal action requires proof beyond a reasonable doubt. The result of either action is not binding on the other. See generally 4 SCOTT, TRUSTS § 492.4 (2d ed. 1956).

<sup>2</sup>For example, a legatee or devisee who murders his testator is prevented from taking property under the will of his victim. See Annot., 36 A.L.R. 2d 960 (1954). For application of the rule in other situations, see: Annot., 39 A.L.R.2d 477 (1955) (heir murders his ancestor); Annot., 26 A.L.R.2d 987 (1952) (beneficiary murders his insured). Thirty-four states have enacted statutes containing this rule. Although not uniform in the types of property to which they apply, they generally require a conviction. The statutes are collected in 4 SCOTT, TRUSTS § 492 (2d ed. 1956); Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715 (1936).

title to the whole of the property in each of the tenants.<sup>3</sup> During their joint lives each tenant holds a half-interest entitling him to share the profit and enjoyment of the property with his cotenant. Each tenant also has a survivorship right which entitles him to succeed to the exclusive use of the entire property by surviving the other tenant. Upon the death of one tenant, the interest of the deceased continues in the survivor by force of the survivorship right. By the common law theory this survivor merely succeeds to an interest to which he was already entitled.<sup>4</sup> These property law principles, expressly provided for by statute,<sup>5</sup> permit no exception to the operation of survivorship upon the death of one tenant.

Where one joint tenant murders the other, the courts are presented with a dilemma: should a strict application of property rights yield to the public policy consideration that a man cannot benefit by his own wrong. The murderer has defeated his victim's survivorship right, and his claim of survivorship is founded on his unlawful act. Such a result is "abhorrent to even the most rudimentary sense of justice."<sup>6</sup> Justice Cardozo suggested that the public policy consideration outweighs property rights in these instances because: "[T]he social interest served in refusing the criminal to profit by his crime is greater than that served by the preservation and enforcement of legal rights of ownership."<sup>7</sup>

These considerations have motivated a majority of jurisdictions to find that a murderer does in fact acquire additional interests upon the death of his victim. However, there is a split of authority on the extent of these additional interests.<sup>8</sup> One view divests the murderer of all interests in the joint property. Another view permits him to retain only a life-interest in half of the property. The recent trend of authority divides the property between the murderer and the estate of his victim.

In the instant case the Montana court applied public policy considerations in refusing to enforce a murderer's statutory survivorship right. The determination that the husband had intentionally<sup>9</sup> killed his wife,

<sup>3</sup>Joint tenancy and tenancy by the entirety will be considered together for purposes of this article. In both, title to the whole of the property and the right of survivorship vest in each tenant at the time of the original conveyance. Similarities and distinctions are pointed out in 26 AM. JUR. *Husband & Wife* § 66 (1940).

<sup>4</sup>TIFFANY, REAL PROPERTY § 282 (3d ed. 1940).

<sup>5</sup>REVISED CODES OF MONTANA, 1947, § 67-310 provides: "In all conveyances of real property made in joint tenancy or to tenants in estates by entirety, where the right of survivorship is contained in the grant of such conveyance, the right of survivorship is hereby expressly declared to exist by virtue of such grant." See *Hennigh v. Hennigh*, 131 Mont. 372, 309 P.2d 1022 (1957). REVISED CODES OF MONTANA are hereinafter cited R.C.M.

<sup>6</sup>*Neiman v. Hurff*, 11 N.J. 55, 93 A.2d 345, 347 (1952). Similar language was used in the instant case at page 587: "Suffice it to say that we decline to follow the reasoning supporting any interpretation fraught with consequences so pernicious and so abhorrent to the sense of justice, equity, and morality entertained by what we are pleased to believe is the overwhelming majority of thoughtful and moral people."

<sup>7</sup>CARDOZO, NATURE OF THE JUDICIAL PROCESS 43 (1921).

<sup>8</sup>Discussed note 18 *infra et seq.* If the courts can find additional benefits passing to the murderer, instead of an automatic right of survivorship, it becomes much easier to deprive the murderer of all or a portion of these benefits.

<sup>9</sup>An intentional criminal homicide is prerequisite to the application of the doctrine that a person cannot benefit by his own wrong. The killer's motive is irrelevant: "It is immaterial whether he killed for the purpose of getting the property or for some

"was a controlling factor [which could not] be disregarded in a just determination of the case."<sup>10</sup> For this reason, the petitioner's argument that the survivorship statute<sup>11</sup> should be strictly enforced, was rejected. The court ruled that the survivorship statute was controlled by the equitable maxim that a person cannot benefit by his own wrong.<sup>12</sup> The opinion states:<sup>13</sup>

If we accept the petitioner's view, then we must believe that the Legislature contemplated a situation where a joint owner would feloniously kill the other joint owner, thereby taking all, and approved such a result. We cannot believe that such an abhorrent result was contemplated by the Legislature.

The court therefore construed the survivorship statute to prevent the murderer from acquiring the half-interest of his victim.

Justice Doyle dissented, feeling that any exception to the statutory survivorship right must come from the legislature.<sup>14</sup> A minority of jurisdictions are in accord with this view, holding that the murderer is entitled to all of the joint property even though he kills his cotenant.<sup>15</sup> These courts rely on the common law rule that a survivor acquires no new interest on the death of the cotenant. Any limitation would cause a forfeiture.<sup>16</sup> Public policy with respect to disposition of property has already been declared in survivorship statutes, and any change by the court would encroach upon legislative functions. The Ohio court reflected this view and noted that, ". . . a public policy however sound cannot take away from the individual his vested rights."<sup>17</sup>

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other motive. He has in fact acquired property as a result of his criminal act, and the inequity and impolicy of letting him retain it exist, even though he killed in a moment of anger and at once thereafter committed suicide." 3 BOGERT, TRUSTS & TRUSTEES § 478 (2d ed. 1960). The killer will not be barred from taking property if he was insane at the time of the homicide. *In re Eckhardt's Estate*, 54 N.Y.S.2d 484 (1945); *Anderson v. Grasberg*, 247 Minn. 538, 78 N.W.2d 450 (1956).

<sup>10</sup>Instant case at 586.

<sup>11</sup>See note 5 *supra*.

<sup>12</sup>R.C.M. 1947, § 49-109 provides, "No one can take advantage of his own wrong."

<sup>13</sup>Instant case at 587.

<sup>14</sup>Mr. Justice Doyle said at page 589: "The court by this decision usurps the realm reserved for the Legislature . . . The law itself made no exception and it was not the province of this court to read into the law something which it did not and does not contain."

<sup>15</sup>*Beddingfield v. Estill*, 118 Tenn. 39, 100 S.W. 108 (1907); *Wenker v. Landon*, 161 Ore. 265, 88 P.2d 971 (1939); *In re Foster's Estate*, 182 Kan. 315, 320 P.2d 855 (1958).

<sup>16</sup>Constitutions or statutes in most jurisdictions provide that no conviction of crime shall cause forfeiture of property. See, *e.g.*, MONT. CONST. art. III, § 9, and R.C.M. 1947, § 94-4725. The weight of authority has rejected this argument and holds that there is no forfeiture because the property never vested in the murderer. See *Bradley v. Fox*, 7 Ill. 2d 106, 129 N.E.2d 699 (1955) overruling *Welsh v. James*, 408 Ill. 18, 95 N.E.2d 872 (1951). This weight of authority reasons that the doctrine that a man cannot benefit by his own wrong does not deprive the murderer of property, but merely prevents him from acquiring benefits as a result of his unlawful act. This distinction might not be necessary because forfeiture is not meant to shield unjust enrichment but to protect the citizen against oppressions of the sovereign. *Houser v. Haven*, 32 Tenn. App. 670, 225 S.W.2d 559 (1949). For a discussion see Comment, 17 Md. L. Rev. 45 (1957).

<sup>17</sup>*Shuman v. Schick*, 95 Ohio App. 413, 120 N.E.2d 330, 332 (1953). In this case the fact of the killing was undisputed. However, by committing suicide, the murderer prevented the application of a statute requiring a conviction before he could be

The New York courts have gone to the other extreme, and divest a murderer who has committed suicide of all interests in the joint property.<sup>18</sup> Property law is ignored by regarding the murderer as if he had no joint property interests prior to the murder. Under this view all of the joint property passes to the estate of the victim.

In the instant case, adoption of either of the foregoing positions would have precluded a division of the joint property. Either the husband's heirs or the wife's heirs would have inherited all of the property.

The majority of jurisdictions have sought to give effect to public policy considerations and at the same time preserve the nature of joint ownership, as a property law concept. The recent trend of authority has accomplished this by dividing the joint property between the estates of both murderer and victim. This solution has been adopted by Missouri,<sup>19</sup> Florida,<sup>20</sup> Kentucky,<sup>21</sup> Indiana,<sup>22</sup> Michigan,<sup>23</sup> Illinois,<sup>24</sup> and California.<sup>25</sup>

Examining the nature of joint ownership in terms of the doctrine that a man cannot benefit by his own wrong, the Illinois court said:<sup>26</sup>

That policy would be thwarted by a blind adherence to the legal fiction that a joint tenant holds the entire property at the date of the original conveyance, and acquires no additional interest by virtue of the felonious death of his cotenant, since that rationale sanctions in effect the enhancement of property rights through murder. For legal fictions cannot obscure the fact that before the murder defendant, as a joint tenant, had to share the profits of the property, and his right to complete ownership, unfettered by the interests of a joint tenant, was contingent upon surviving his wife; whereas, after, and because of, his felonious act that contingency was removed, and he became the sole owner of the property, no longer sharing the profits with anyone nor fearing the loss of his interest.

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barred from acquiring benefits. *Accord*, *Smith v. Greenburg*, 121 Colo. 417, 218 P.2d 514 (1950). In these cases it is evident that legislatures have clearly declared public policy with respect to disposition of property under felonious circumstances. The murderer should not be permitted to prevent the application of such a statute by committing suicide. In support of the latter view see *Cowan v. Pleasant*, 263 S.W.2d 494 (Ky. 1954); *Nat'l. City Bank v. Bledsoe*, 237 Ind. 130, 144 N.E.2d 710 (1957).

<sup>18</sup>*Van Alstyne v. Tuffy*, 103 Misc. 455, 169 N.Y.S. 173 (Sup. Ct. 1918); *Brierbrauer v. Moran*, 244 App. Div. 87, 279 N.Y.S. 176 (4th Dep't. 1935); *Accord*, *Vesey v. Vesey*, 237 Minn. 295, 54 N.W.2d 385 (1952)

<sup>19</sup>*Barnett v. Couey*, 244 Mo. App. 913, 27 S.W.2d 757 (1930); *Grose v. Holland* 357 Mo. 874, 211 S.W.2d 464 (1948).

<sup>20</sup>*Ashwood v. Patterson*, 49 So. 2d 848 (Fla. 1951); *Hogan v. Martin*, 52 So. 2d 806 (Fla. 1951).

<sup>21</sup>*Cowan v. Pleasant*, note 17 *supra*.

<sup>22</sup>*Nat'l. City Bank v. Bledsoe*, note 17 *supra*.

<sup>23</sup>*Goldsmith v. Pearce*, 345 Mich. 176, 75 N.W.2d 810 (1956).

<sup>24</sup>*Bradley v. Fox*, 7 Ill. 2d 106, 129 N.E.2d 699 (1955).

<sup>25</sup>*Abbey v. Lord*, 168 Cal. App. 2d 499, 336 P.2d 226 (1959). In this case a husband who murdered his wife was held to be entitled only to the amount of property which he had contributed to the joint tenancy. This was not an equal division since the husband had only contributed one-third.

<sup>26</sup>*Bradley v. Fox*, note 24 *supra* at 705.

The Illinois court concluded that the murderer "destroyed" his right of survivorship, lawfully retaining only his half-interest in the joint property.

The effect of dividing the joint property is to eliminate the element of survivorship. To accomplish this by means of a legal rationalization which will harmonize with traditional property law concepts, these courts treat the unlawful act as a severance by operation of law. At common law, the creation and continuance of a joint tenancy required four co-existing unities: time, title, interest, and possession.<sup>27</sup> Any destruction of these unities operated as a severance of the joint tenancy, converting it into a tenancy in common and extinguishing the right of survivorship. Voluntary severance is caused by one tenant selling his half-interest, by a partition, or by a divorce. The felonious killing of one joint owner by the other also destroys these unities.<sup>28</sup> Therefore, the unlawful act of murder operates to imply a severance.<sup>29</sup>

Severance divides joint property into beneficial interests, which are inheritable by the heirs of the respective tenants. This result is demonstrated in *Bradley v. Fox*, where the Illinois court held the husband-murderer to be a tenant in common with the heir-at-law of the murdered wife.<sup>30</sup>

The status of title to joint property presents a more difficult problem because the survivor was vested with title before the cotenant's death. In equity, a murderer may be prevented from acquiring beneficial interests but not legal title. In the first case in which the issue was presented, the Missouri court stated:<sup>31</sup>

Conceding, but not deciding, that full legal title may pass by the fact of survivorship, yet, because of the unconscionable mode of its acquisition, a court of equity, as here, should and will treat [the murderer] as a constructive trustee. In any event . . . there is a severance . . . [and the] property may well be treated as held by tenants in common.

The Missouri court utilized the constructive trust theory as an expedient remedy to solve the problem of title. The trend of authority has followed this reasoning, regarding the murderer as a constructive trustee of title to half of the joint property for the benefit of the victim's estate. The Indiana court has stated that a division of joint property is "most compatible with common law and equitable principles."<sup>32</sup>

<sup>27</sup>TIFFANY, REAL PROPERTY § 283 (3d ed. 1940).

<sup>28</sup>The marital relation is the essential ingredient of a tenancy by the entirety, and the cases which involve this type of property reason that severance results from the unlawful destruction of the marriage. See, e.g., *Goldsmith v. Pearce*, note 23 *supra*.

<sup>29</sup>In *Barnett v. Couey*, note 19 *supra*, the Missouri court said: "To qualify as a survivor, one must not only be a survivor in fact, but must also be a survivor in contemplation of law . . . the [death] must be in the ordinary course of events and subject only to the vicissitudes of life." Likewise, in *Bradley v. Fox*, note 24 *supra* at 705, the Illinois court said: "One of the implied conditions of the [joint tenancy] is that neither party will acquire the interest of the other by murder."

<sup>30</sup>See note 24 *supra*.

<sup>31</sup>*Barnett v. Couey*, note 19 *supra* at 760.

<sup>32</sup>*Nat'l. City Bank v. Bledsoe*, note 17 *supra* at 715.

In the instant case, the result is consistent with this trend of authority because the Montana court divided the joint property into beneficial interests. However, the Montana court did not arrive at its reasoning by causing the murder to operate as a severance by operation of law. Instead the court eliminated the element of survivorship by finding a reservation in the survivorship statute that a man cannot benefit by his own wrong.

The reasoning of the Montana court is not in line with the recent trend of authority in one aspect because it effectuated the division of the joint property by construing the survivorship statute, rather than by utilizing common law property principles. However, either rationale recognizes public policy and necessarily violates traditional concepts of joint ownership. Whether the doctrine that a man cannot benefit by his own wrong is applied to joint ownership by one theory or another is less important because the results are the same.

In the instant case the pleading brought only the wife's half-interest in the joint property into issue. The Montana court therefore left open the issue of whether a murderer can be prevented from acquiring a larger interest than his own half-interest.

Where the murderer has not committed suicide and the victim's estate has claimed an interest larger than half, some courts impose a constructive trust upon all of the joint property. The murderer is then permitted to retain only a beneficial life-interest in half of the joint property.<sup>33</sup> Under this theory,<sup>34</sup> the "contingent" right of survivorship cannot be defeated by one tenant murdering another. In *Neiman v. Hurff*,<sup>35</sup> it was "conclusively presumed" that the victim survived the murderer, who had prevented the natural determination of survivorship.

<sup>33</sup>*Colton v. Wade*, 32 Del. Ch. 122, 80 A.2d 923 (1951); *Neiman v. Hurff*, 11 N.J. 55, 93 A.2d 345 (1952); *In re Perry's Estate*, 256 N.C. 65, 123 S.E.2d 99 (1961); *In re Hawkin's Estate*, 213 N.Y.S.2d 188 (1961).

<sup>34</sup>This view has been adopted by RESTATEMENT, RESTITUTION § 188 (1937), and advocated by Professor Scott, 4 SCOTT, TRUSTS § 493.2 (2d ed. 1956). It has been enacted by several states, see, e.g., S. D. CODE § 56.0505 (1939). See also Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, note 2 *supra*.

<sup>35</sup>"Equity therefore conclusively presumes for the purpose of working out justice, that the decedent would have survived the wrongdoer. In no other way can complete justice be done and the criminal prevented from profiting through his crime." *Neiman v. Hurff*, note 33 *supra* at 348. In this case the New Jersey court rejected the reasoning of an earlier decision where it had used mortality tables to ascertain which tenant would have survived to the whole. In that case the court determined that the murderer would have survived anyway, and therefore he took the joint property subject to the commuted value of the life-interest of the other tenant. *Sherman v. Weber*, 113 N.J. Eq., 451, 167 Atl. 517 (1933). This latter view is advocated by Professor Bogert, but no decisions have been controlled by these subjective considerations. 3 BOGERT, TRUSTS & TRUSTEES § 478 (2d ed. 1960). *But see*, *Bryant v. Bryant*, 193 N.C. 372, 137 S.E. 188 (1927).

<sup>36</sup>As applied in a murder-suicide situation see *In re King*, 261 Wis. 266, 52 N.W.2d 885 (1952). In that case the court held that the victim's survivorship right continued in her estate, becoming operative when the murderer committed suicide. Nothing remained to pass into the murder's estate. This view's manifest unfairness to the murderer's heirs has prevented its acceptance. One court has observed: "No useful purpose would be served to reconcile our conclusion [division of joint property] with . . . the finely spun legalistic theories . . . holding that the heirs of either the wrongdoer, or those of the one murdered, take all of the property." *Cowan v. Pleasant*, 263 S.W.2d 494, 496 (Ky. 1954).

Since the murderer was entitled to half of the joint property before the killing, he could retain the benefits of this interest. However, the doctrine that a man cannot benefit by his own wrong prevents the murderer from acquiring not only the victim's half-interest, but also the victim's survivorship right. This view differs from the instant case because there is no division of the joint property into inheritable interests; the victim's estate inherits all of the property.<sup>36</sup>

It is submitted that the Montana court adopted a solution which compromises conflicting considerations raised by the murder and suicide of joint owners.<sup>37</sup> On the one hand, the murderer is not permitted to benefit his estate by acquiring the victim's half-interest. On the other, the victim's estate is not deprived of property by the enforcement of the murderer's survivorship right. In addition, the decision does not punish the murderer's innocent heirs by denying their right to inherit all of the joint property, but pragmatically states that justice and fairness are best served by allowing the victim's heirs to take half of the joint property.<sup>38</sup>

JOSEPH E. REBER

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DETERMINATION OF INSANITY—OLD PROBLEM REQUIRES A NEW APPROACH.—In 1962 the defendant shot his wife and another woman, killing his wife. Upon an information for first degree murder, he pleaded the defense of insanity. The plea was based upon two grounds: (1) a history of serious mental illness which dated from 1944; and (2) that the alleged crime was the result of mental illness inasmuch as the defendant was suffering from the delusion that his wife and the other woman were carrying on illicit relations. The jury, under instructions from the court, pronounced the accused legally sane at the time of the act and convicted him. On appeal by the defendant to the Montana Supreme Court, *held*, affirmed. The instructions of the trial court containing the right-wrong and irresistible impulse tests presented the jury with the correct standard for determining insanity. *State v. Noble*, 384 P.2d 504 (Mont. 1963). (A dissent by Mr. Justice Doyle condemned these tests as being outdated.)

Although a perfect test for insanity may never be developed, both society and the courts have struggled to establish an adequate standard to separate "criminals" from persons who are mentally irresponsible for

<sup>36</sup>Where a murderer does not commit suicide, the Montana court may be asked to impose a constructive trust on all of the joint property, and permit the murderer to retain only a life-interest in his half. The reasoning of the instant case would not support this solution. It recognizes that a murderer cannot benefit by his felonious act and thereby acquire the deceased's share of the property held jointly. This benefit entails only the "half-interest" of the victim, and does not extend to the victim's survivorship right.

<sup>38</sup>In the absence of clear proof of which tenant died first it is unrealistic to enforce the survivorship right. The facts of the instant case indicate that there was a nominal time gap between the murder and the suicide. A lapse of several minutes should not result in exclusive heirship. Under such circumstances the same result could have been reached in the instant case by presuming that the deaths were simultaneous. As provided in R.C.M. 1947, § 91-425, the joint property would descend to the heirs of the respective tenants.