

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

San Fernando

Claim No. CV2017-01825

BETWEEN

TENILLE HEPBURN

1st Claimant

ADAM LATIFF HEPBURN

2nd Claimant

AND

ELEANOR LOURENCO SO'BRIEN

Defendant

Before the Honourable Mr. Justice Seepersad

Date of Delivery: January 15, 2019

Appearances:

1. Lana Debbie Benoit for the 1st and 2nd the Claimant.
2. Lemuel Murphy for the Defendant.

DECISION

INTRODUCTION

1. In this matter the Court is called upon to determine whether the joint tenancy which existed between Don So'Brien (now deceased) and the defendant, was severed either by a lease which Don So'Brien effected on the November 16, 2013 or by virtue of the course of conduct engaged by Don O'Brien and the defendant and by virtue of the positions which they declared during their divorce proceedings.
2. The defendant was married to Don So'Brien who was the father of the 1st claimant. The So' Briens owned various properties jointly which included their matrimonial home at # 52 Lady Chancellor Road, a property in Mayaro and one in Tableland. Prior to his death on December 13, 2016, the relationship between the parties became acrimonious, and the defendant filed for a divorce. The deceased filed a cross-petition. Both parties sought a division of the properties. The wife sought an order that she be allowed to occupy the matrimonial home for such period as the court saw fit, and alternatively, or on expiry of that period of occupation, that an order be made directing the sale of the home and a division of the proceeds in such proportions as the court deemed fit. The deceased in his cross-petition sought a settlement order in relation to the matrimonial home, the Mayaro property and the third property at Tableland.
3. On November 16, 2013, the deceased granted a leasehold interest to tenants for four years for an apartment in the matrimonial house. He also leased the other apartment to another tenant on January 20, 2016 for a period of two years.
4. Upon the death of the deceased, the defendant claimed that all the lands belonged to her by virtue of the existence of the joint tenancies. The claimants, who are the daughter of the deceased and her husband, claim that there was severance of the joint tenancies, and that the estate of the deceased is entitled under his will made on August 30, 2016.

5. It is not in dispute that parts of the matrimonial home were rented. However, the defendant had contradictory positions on the issue as to how that generated income was used. In the divorce proceedings, she outlined that the deceased failed to adequately maintain her but, in these proceedings, she advanced that the income generated from the rentals was for their mutual benefit.

PLEADINGS

6. The claimants' pleaded case is that said joint tenancies were severed by the course of dealing whereby they mutually treated their interest of said properties as constituting tenancies in common. In relation to the matrimonial home, they pleaded that the existence of lease between the deceased and Michael Mills (tenant) severed the joint tenancy.
7. The Particulars of Severance as set out by the Claimants are as follows: -
 - i. The deceased and the defendant lived separate lives in the property at LP 52 since some time in 2015.
 - ii. The deceased considered that between December 2014 and January 2015 he was being poisoned by the defendant and he so reported to the Belmont Police Station.
 - iii. The deceased and the defendant occupied separate portions of the said property at LP 52.
 - iv. The defendant filed a divorce petition against the deceased on the 1st September 2016 in which she sought an order directing the sale of the said property and a division of the proceeds of sale.
 - v. The defendant sought in the said petition a settlement or transfer of property order in respect of all matrimonial assets.

vi. The deceased filed an answer and cross-petition on 29th November 2016 in which he sought a settlement order in respect of LP 52.

vii. The deceased in his cross-petition also sought a settlement order in respect of other matrimonial properties.

viii. The deceased executed a will in which he contemplates severance of the said properties and a passing of his share to his daughter, the 1st Claimant.

ix. During the lifetime of the deceased, the defendant treated the Mayaro beachfront property as her own by renting it out and keeping the rent therefrom as her own. The property accommodated eight persons at a time and had the ability to generate a monthly rental of approximately \$8,000.00.

8. Consequently, the claimant sought the following reliefs:

- a. A declaration that the properties LP 52 Lady Chancellor Road Port-of-Spain, No.1 Mahanna Drive Manzanilla and 1432 Roberts Village Tableland are held as tenancies in common between the claimant and the defendant.
- b. A declaration that the claimants as executors are entitled to possession of such part of the house and lands at LP 52 Lady Chancellor Road Port-of-Spain, as falls within the estate of the deceased pending the Grant of Probate of the estate and thereafter, until the lawful distribution of the said estate.
- c. An account of rent monies appropriated from tenants occupying the premises.
- d. An injunction to restrain defendant and her agents from evicting the estate of the deceased from any part of the house and lands at LP 52 Lady Chancellor Road Port-of-Spain.

- e. A declaration that the 2nd claimant in his personal capacity is a lessor in possession of the apartment situated at the house and lands at LP 52 Lady Chancellor Road Port-of-Spain.
 - f. An injunction to restrain the defendant or her servants from evicting the claimants from the said premises.
 - g. An injunction to restrain the defendant or her servants or agents from molesting the claimants, or interfering with them or their possessions in any way.
 - h. An order that the Defendant return motor Vehicles PBW 321 Volkswagen Touareg, TCC 8321, SSang Yang Musso and PBL 69 a silver Chrysler to the possession of the claimants as executors of the estate of the deceased.
9. The defendant's case is that the respective joint tenancies have not been severed. She averred that the rent received was used to supplement the household income and financially provide for their daughter Ysabel So'Brien. The defendant admitted that there were no written agreements between 2007 and 2016 between her the deceased and the tenants and said that the monies collected were deposited in their joint accounts for the benefit of the household.
10. In further support of her position that the joint tenancy was not severed, the defendant stated that subsequent to the filing of their respective petition and cross-petition, they sought to use the Mayaro property as collateral for the purpose of paying the school fees and living expenses for their daughter Ysabel. However, the deceased died before the loan was approved.

11. The ultimate issue that fell to be determined in this case is whether there was severance of the joint tenancies. The determination of the aforesaid general issue is dependent on the resolution of the following sub issues:

- a. Whether the lease in question had the legal effect of severing the joint tenancy of the matrimonial home.
- b. Whether the effect of the reliefs prayed in the petition and cross-petition as well as the course of dealing between them had the effect of severing the joint tenancies.

THE LAW

12. A joint tenancy requires the existence of the four unities, namely, the unities of possession, interest, time and title. Where any of the unities is displaced, there can be no joint tenancy.

13. In **Megarry and Wade 8th ed** the learned authors said as follows:

“Although the point is not free from doubt, both principle and judicial opinion suggest that a lease for years granted by one or more (but not all) of the joint tenants will effect a severance of the joint tenancy not just for the duration of the lease but thereafter. A lease for years confers a right to possession of some particular share of the land for a fixed period, and this right arises by a separate title.

By contrast, where a joint tenant creates an encumbrance such as an easement or profit no estate or interest passes to the grantee. Such a grant destroys none of the four unities.”

14. In **Gould v Kemp (1834) ER 959** it was held that a letter from A to B in which A engaged to secure to B’s family in any way B may desire by his will, a moiety of a fund in which A

and B are interested as joint tenants was a severance of the joint tenancy of the fund. Lord Chancellor Brougham said at page 962:

“The dictum of Lord Thurlow in *Frewen v Relfe* goes fully to this length, and it accords with Lord Hardwicke’s doctrine in *Partricke v Powlett* where though he laid it down that a declaration that the joint tenancy should be severed was not enough to work the severance, he, nevertheless, held that an agreement to that effect worked a severance. Now, agreement always means something in future, and nothing is done till the thing be executed; yet the bare agreement, while the matter rests in fieri, works a severance. So a lease by one joint tenant, to commence at his death and living his companion, works a severance of the joint tenancy; and so it was ruled in *Clark v Clark*.”

15. In **Cowper v Fletcher (1865) 122 ER 1267** one of three co-executors to whom land was devised in trust, agreed with the others to pay a rent for it and entered into possession and paid rent. It was held that the two might distrain for rent in arrears. Blackburn J said at page 1270 :

“In *James v Porman* the Judges were not quite agreed, but there is the authority of Lord Coke in *Co. Litt. 186* that “one joint tenant may let his part for years or at will to his companion and I cannot understand those words in any other than the ordinary sense of a lease with the incident of distress attached to it. I am inclined to think that the effect of making a separate demise to one is a severance of the joint tenancy.”

16. It follows from the above reasoning, that one joint tenant might let his part to a stranger, and then the joint tenancy would be severed; for if distraint is possible, it means that one co-owner is pointing to one part of the land as belonging to him as landlord, and that the other is a tenant, and then co-ownership does not exist. Megarry and Wade, 8th ed page 497; *Bull v Bull*, 1955 1 QB 234 at 237.

17. In **Re Armstrong 1920 1 IR 239**, a testator left two properties to his sisters by will jointly. There was a proviso that if one sister got married she should cease to have any interest in one of the properties. One sister, Elizabeth, did get married to Armstrong and in an agreement reciting the will, she took a ten year lease of certain of the properties. The question arose upon the death of the other sister whether that rental amounted to a severance. Ross J held that the granting of a lease severed the joint tenancy because it necessarily affected the main characteristic of a joint tenancy, namely the jus accrescendi. He said:

“If one of two joint tenants assigns his share to a third person, this destroys the unity of title and creates a severance, and creates a tenancy in common between the assignee and the other joint tenant: Littleton's Tenures, s 292. But where one of two joint tenants in fee creates a lease for years, it appears that such lease is binding on the other joint tenant after the death of the lessor; but does it effect a severance? In the case of a term of years held in joint tenancy a lease by one joint tenant for a term less than the residue does sever the joint tenancy. So it has been laid down in Co. Litt (s 289, s 319); but why this should be so is far from clear. It would seem reasonable when an act is done by either joint tenant inconsistent with the chief characteristic of a joint tenancy, namely, survivorship, that such an act should effect a severance. Now a lease must effect the survivorship to some extent, because it is binding after the death of the lessor.”

18. In **Frieze v Unger 1960 VR 230** Scoll J said:

“If joint tenants hold in fee, the grant by one of a life estate or of a lease for life or lives, effects, according to what is now considered the "better opinion", a severance of the entire fee simple, so that the remainder or reversion will descend to the heir of the grantor; see Co. Litt., 191b; and the text-writers above cited; and

see also per Dixon, J (as he then was), in Wright v Gibbons [1949] HCA 3; (1949) 78 CLR 313, at p. 330.

But a demise for a term of years by one of two joint tenants in fee does not, according to the preferable view, work a severance of the whole fee; at most it effects a "severance for the time", or "suspends" the joint tenancy pro tem. This is the view of Dixon, J, loc. cit.; and see Co. Litt. 185a, 318a, and Megarry and Wade, loc. cit., note 23, commenting on Coke's doctrine. It is not altogether apparent what is meant by a temporary severance or suspension; but at all events, it is clear that the doctrine involves the proposition that the reversion expectant on the term will pass to the survivor of the joint tenants, so that any "severance" or "suspension" is such only as is necessary to procure for the lessee the enjoyment during the term of the grantor's moiety both after as well as before the grantor's death; cf. Co. Litt., 186a; and Rolle's Abr., 1668, vol. 2, p. 89, in a note on Smallman v Agborow (1617) Cro Jac 417; 79 ER 356. Even in such a case, however, Megarry and Wade, loc. cit., consider that the severance is of the whole estate of the joint tenants; but they do not distinguish between the case of joint tenants in fee, and the case of joint tenants for lives, as to which see infra. On the other hand, Cheshire, op. cit., says "no severance is effected". And in Preston on Abstracts (2nd ed.), 1824, vol. II, pp. 56-63, it is said that a partial alienation, as for life, only suspends the jointure, but that a lease for years does not either sever or suspend it. At all events, notwithstanding these differing opinions, this much should now be taken to be clear, that in the case of a lease for a term of years by one joint tenant in fee, the term survives the death of the grantor, but the reversion passes to the survivor; and see Com. Dig. IV, 112, tit. Estates, (K5). It would seem that if and so far as in such a case there is a suspension of the jointure during the term, the result is that the lessee for years and the lessor's co-tenant hold as would tenants in common;

The authorities are unanimous that one joint tenant is entitled to grant a lease, and that his companion will be bound to respect such rights of tenancy as it creates. Furthermore, if those rights are such as in their nature to be capable of surviving the death of the grantor, they will continue during the currency of the lease, whether the surviving co-owner claims his moiety as that of a deceased tenant in common.”

19. The position adopted by the Australian court in **Frieze v Unger** (supra) suggests that the lease by a joint tenant has the effect of suspending the right of possession of the other joint tenant but does not sever the joint tenancy between the parties.
20. The defendant was not a party to the lease and the position she adopted in the divorce proceedings did not suggest that she benefited from the sums generated from the leasing of the apartments. The property was clearly sub-divided into apartments and the deceased Don So'Brien, took control over the leased apartments. This was the position adopted by the defendant in the divorce proceedings and in those proceedings, she also said that he controlled the money generated from the leases. The defendant had no control over the apartments and her right to possession of same was materially affected when the leases were executed by the deceased. Accordingly, the unity of possession was destroyed. The position adopted by the deceased was inconsistent with the maxim *totum tenet et nihil tenet*- each holds everything yet holds nothing.
21. The factual matrix established that there was a partial alienation of the interest in the apartments and the deceased acted in a manner which established his intention to exercise dominion and control over the apartments and this unilateral act of alienation by the deceased served to sever the joint tenancy which he had with the defendant as the deceased operated upon what he sought to be his own share in the property.

22. This court is therefore inclined to adopt the position articulated by Blackburn J in **Cowper v Fletcher (Supra)** and that of Ross J in **Re Armstrong 1920 1 I.R. at 239** where the learned Judge said:

*"It is in substance a lease for a term of ten years, subject to certain charges and conditions. The agreement is either a partial alienation or a letting. A partial alienation does effect a severance; but, assuming it to be in substance a letting for ten years, does this amount to a severance? If one of two joint tenants assigns his share to a third person, this destroys the unity of title and creates a severance, and creates a tenancy in common between the assignee and the other joint tenant: Littleton's Tenures, s.292. But where one of two joint tenants *486 in fee creates a lease for years, it appears that such lease is binding on the other joint tenant after the death of the lessor; but does it effect a severance?"*

In the case of a term of years held in joint tenancy a lease by one joint tenant for a term less than the residue does sever the joint tenancy. So it has been laid down in Coke Litt. (s.289, s.319); but why this should be so is far from clear. It would seem reasonable when an act is done by either joint tenant inconsistent with the chief characteristic of a joint tenancy, namely, survivorship, that such an act should effect a severance. Now a lease must effect the survivorship to some extent, because it is binding after the death of the lessor. We are not, however, left to depend on the ancient authorities, because

The matter was considered by Lord Blackburn in the case of Cowper v. Fletcher 36; and he expressed the opinion that

The effect of making a separate demise does sever a joint tenancy.

I am of opinion that the agreement referred to did effect a severance, and direct the question to be answered accordingly."

23. Accordingly, the assignment by the deceased of his share and interest in the apartments also destroyed the unity of title and amounted to an act of severance thereby creating a tenancy in common between himself and the defendant.
24. The next issue which the Court addressed was whether there was severance by virtue of the course of dealings which were engaged by the parties.
25. In **Re Draper's Conveyance [1969] 1 Ch 486, ChD**, a husband and wife were joint tenants of their matrimonial property. The parties' relationship took a turn for the worse and as a result the wife filed divorce proceedings. The wife issued a summons under **s17 Married Women's Property Act 1882** requesting that the house be sold and the proceeds split between them. In support of the summons the wife swore an affidavit providing that that the proceeds be distributed equally, or in the alternative the husband would pay her one half of the value of the matrimonial home. An order for possession and sale was granted by the court. However, the husband died before the divorce proceedings were finalized. The husband's children sought the court to rule that the joint tenancy had been effectively severed in the circumstances.
26. The court formed the view that the joint tenancy had been effectively severed. The issue of a summons and the sworn affidavit indicated a clear and immediate intention to sever the joint tenancy.
27. The wife's unilateral declaration of her intention was communicated to her husband through the summons and affidavit.
28. In **Burgess v Rawnsley [1975] 3 All. E. R. 142**, H and R bought a house as joint tenants. They never married or lived together. R agreed to sell her share in the house to H for 750

pounds but subsequently refused to sell. H died in 1971. The Court held that the beneficial joint tenancy had been severed by R's oral agreement to sell her share to H.

Lord Denning albeit obiter supported the position postulated by Plwman J in Re Draper when he states at page 147:- "It is sufficient if there is a course of dealing in which one party makes it clear to clear to the other that he desires that their shares should no longer be held jointly but be held in common. I emphasize that it must be made clear to the other party. That is implicit in the sentence in which Page -Woods VC says –

It will not suffice to rely on an intention with respect to the particular share, declared only behind the backs of the other person interested.'

29. In **Hunter v Babbage (1994) 69 P & CR 548, [1994]**, a husband and wife were joint tenants of their matrimonial home. In the course of divorce proceedings, the wife sought ancillary relief including a property adjustment order. Proposals for the division of the proceeds of sale of the home were embodied in a draft consent order but final agreement had not been reached at the time of the husband's death. It fell to be determined whether the joint tenancy had been severed before his death.

The wife claimed that the tenancy had not been severed so that, on the basis of her right of survivorship as a joint tenant, she was entitled to the entire proceeds of sale of the property. The Court held that joint tenancy had been severed at common law so that the parties held the property in equal shares.

The wife's affidavit in support of her notice of application for ancillary relief constituted sufficient notice of intention to sever the joint tenancy under the Law of Property Act 1925, s 36 although, as she had expressed a wish to sever in the future, it was not a notice of severance under s 36. The correspondence between the parties and the affidavit indicated that they had agreed that the tenancy would eventually be severed. A mutual

agreement at common law to sever a joint tenancy could include an agreement to deal with the property in a way which involved severance.

The severance operated independently of the agreement itself. As the agreement had not been implemented and had no legal effect, the property was held by the wife and the husband's estate in equal shares and not on the terms of the proposed agreement. Accordingly, the wife's claim would fail. The joint tenancy was severed.

30. The defendant and the deceased by their course of dealings made it clear that they intended to realise their respective share and interest in the properties and that each should hold their respective interest effectively as tenants in common. In this Court's view, the reliefs sought by the parties in the divorce petition and cross-petition clearly signalled that they desired to sever their joint tenancies in the properties. They clearly did not intend for the joint tenancies to continue as the reliefs they sought were not consistent with the right of survivorship.

31. The evidence suggests that the parties lived in separate parts of the house, the deceased exercised control over the apartments which he leased, and the defendant rented out the Mayaro property and kept the money. Their conduct established that they knew of the other's position and they both treated their respective interest in the properties as no longer being held jointly. Even the will executed by the deceased demonstrated that he intended to deal with the properties in a manner which was inconsistent with the right of survivorship. Having lived separate lives in separate parts of the matrimonial house, the defendant's credibility before this court was compromised as she sought to say that her relationship with the deceased was functional up until his death, when, in the divorce proceedings, she complained that he locked her out of the home, threatened to shoot her and she had to cause to obtain a protection order.

32. Consequently, and pursuant to the reasons as hereinbefore outlined, this Court makes the following orders:

1. The Court hereby declares that the joint tenancies with respect to the matrimonial home *at LP #25 Lady Chancellor Road, St. Anns*, the property at *#1 Mahanna Drive, Mayaro Road Mayaro* and the property at *1432 Roberts Village, Tableland* were severed during the lifetime of the deceased Don So'Brien and that tenancies in common now exists between the estate of the deceased and the defendant in relation to the said properties.
2. The Motor Vehicles PBW321, TCC8321 and PBL69 are to be handed over forthwith to the Claimants as the Executors of the deceased Estate;
3. The Defendant is to pay to the Claimant cost assessed in the sum of \$14,000.00.
4. There shall be a stay of execution on the payment of costs of 28 days.

FRANK SEEPERSAD

JUDGE