



[2012] JMSC Civ 33

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. D008/2000

BETWEEN	BEVERLEY DAVIS	CLAIMANT
AND	SUNSHINE DOROTHY THOMAS	1 <sup>ST</sup> DEFENDANT
AND	WINSOME "BLOSSOM" THOMPSON	2 <sup>ND</sup> DEFENDANT
AND	OWEN BROWN	3 <sup>RD</sup> DEFENDANT

B. Frankson and N. Fearon instructed by B.E. Frankson & Company for Claimant

J. Daley for Defendants

Heard: May 13, 14, 17, 21, November 29, 2010, June 10, 2011 and March 23, 2012

*Severance of Joint Tenancy- Rescission of Transfer –Fraud*

**Lawrence-Beswick J**

[1] The registered Certificate of Title of 12 Valley Drive, St. Andrew states that Leonard Brown and Beverley Davis own the property as tenants-in-common. Either owner would therefore be at liberty to deal with his/her portion as he/she deemed fit. Initially, however, when they had purchased the property in 1998, they were registered as joint tenants so that each owner enjoyed the right of survivorship.

[2] Ms. Beverly Davis, the claimant, alleges that she signed a document not fully understanding that she was thereby severing her joint tenancy in the property, such that the property would not pass to her if the other joint tenant, Mr. Leonard Brown, pre-deceased her.

[3] In this action Ms. Davis asks the court to make a declaration that the land, the subject of this suit, belongs solely to her, as a result of her surviving Mr. Brown and therefore to rescind the deed transferring the property to her as tenant-in-common, and to order that the defendants deliver to her the title to premises with the pertinent endorsements cancelled.

The executrices of the estate of the late Leonard Brown are the first and second defendants and the third defendant is his son and a beneficiary. They rely for their defence on the existence of the registered certificate of title and the will of Mr. Brown.

### **The Background**

[4] Ms. Davis and the late Mr. Leonard Brown shared a common-law relationship for about 20 years until he died. They had lived in England where they were both business people. They eventually returned home to Jamaica where they purchased property known as 12 Valley Drive, Red Hills, St. Andrew and the property was registered in their names as joint tenants.

[5] The late Mr. Leonard Brown became terminally ill and that was known by all relevant parties including Mr. Brown himself. According to Ms. Davis, he told her that she would have to sign a document which would allow him to give her greater control over his affairs.

[6] At his bidding, she attended at his lawyer's Chambers and signed the document presented to her by his lawyer for her signature, believing it was in the nature of a Power of Attorney. The document was in fact a transfer from Leonard Brown and Beverley Davis to themselves changing the ownership from joint tenancy to tenancy-in-common.

- [7] It is her evidence that she was not aware that the nature and content of the documents she signed were different from what Mr. Brown had explained to her. She had faith and trust in him and consequently she did not obtain legal advice before she signed the papers.
- [8] The signing occurred on July 16, 1999 and Ms. Davis and the late Mr. Brown left Jamaica for England days later. The transfer was registered on August 4, 1999. Mr. Brown died on August 28, 1999. Ms. Davis continued to occupy the premises believing that she had become the sole surviving owner when Mr. Brown died.
- [9] Mr. Brown's will is dated July 16, 1999 and in it, he purports to devise to his son Mr. Owen Brown his interest in 12 Valley Drive. The executrices filed suit against Ms. Davis in another matter seeking to remove Ms. Davis from the premises, to sell it and divide the proceeds between her and Mr. Owen Brown. It is consequent upon that suit that Ms. Davis brought this action seeking the remedies outlined above.

### **Joint Tenancy**

- [10] Counsel for the defendants submits that Mr. Brown and Ms. Davis had severed the joint tenancy by way of a formal legal document signed by them both, changing their ownership to that of tenants-in-common. Endorsed on the Duplicate Certificate of Title is a transfer from Leonard Brown and Beverley Davis, joint tenants, to Leonard Brown and Beverley Davis as tenants-in-common.
- [11] There is no doubt that a joint tenancy can be severed by mutual agreement between the parties.<sup>1</sup> One important question here must thus be whether there was such mutual agreement.
- Ms. Davis testified that there was none, but Counsel for the executrices relies on the registered title as evidence of such an agreement to sever the joint tenancy.

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<sup>1</sup> Baalman – The Torrens System in New South Wales 2<sup>nd</sup> ed. at p. 350

It is important therefore to examine the circumstances under which the Certificate of Title was endorsed.

### **Indefeasibility of Title**

- [12] The Torrens System of Registration governs the principles affecting the registration of titles in Jamaica. At the very basis of the System is the principle that the registered title of land is indefeasible, except fraud is proved. This is settled law in Jamaica.

Section 70 of the Registration of Titles Act provides:

*“... [T]he proprietor of land or of ... any estate or interest in land ... shall, except in case of fraud, hold the same as the same may be described ... in the certificate of title... .”*

- [13] There is no definition of fraud in the Registration of Titles Act. However, Carey P (Ag), as he then was, opined that:

*“It is right to point out that fraud in this Act means actual fraud, i.e. dishonesty.”<sup>2</sup>*

This has been the approach to matters concerned with fraud.

- [14] Since the Certificate of Title of 12 Valley Drive describes Leonard Brown and Beverley Davis as owning the property as tenants-in-common, this can only be defeated by proof that that endorsement resulted from fraud.

Here there is no pleading of fraud, and there is no one instance of fraud being alleged, but rather several circumstances from which Counsel for Ms. Davis invites the Court to infer fraud. I therefore consider the circumstances to determine if fraud can properly be inferred.

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<sup>2</sup> **Willocks v Wilson**\_30 JLR 297 at 300

### **Circumstances of signing**

[15] Attorney-at-law, Mrs. Betton-Small's evidence is that it had been a few days before the day Mr. Brown signed his will that she went to his Valley Drive home to take instructions from him concerning his will. That was when she explained to him that severance of the joint tenancy would be necessary to enable her to carry out his instructions.

[16] Ms. Davis was at the home at that time but was not actually present at the discussions. Mrs. Betton-Small's evidence is that she had not invited her into the discussions because several persons were at the home and she did not think it appropriate to have such a discussion with others present. Further, she knew that Ms. Davis would be coming to her office.

[17] Mrs. Betton-Small testified that Ms. Davis had signed the documents only after she, Mrs. Betton-Small, had explained the meaning and effect of them to her and after informing her that she could take the documents and seek advice. There is no evidence of the attorney-at-law seeking to contact Ms. Davis before she would have been invited to sign, in order to explain what was to occur and the reason for that being Mr. Brown's need to have severance of the ownership to accommodate his bequests. According to her, Ms. Davis said that she understood and wanted to sign and she recalled no complaint of being under duress to sign the documents.

However, in cross-examination, Ms. Davis said that she did not understand about joint tenancy, but that the lawyer explained to her briefly and then she signed.

[18] The encounter resulting in the signing of the severance document occurred on Friday afternoon. Ms. Davis and Mr. Brown left for England two days later on the Sunday. He had become obviously gravely ill and they were grasping for additional medical help as none was possible here. It may well be inferred that delay was not an option.

## **Surrounding Circumstances of Signing**

[19] There are surrounding circumstances which in my view must be considered to properly determine if fraud is involved as it concerns the purported severance of the joint tenancy.

[20] There is no evidence that the parties had discussed the severance of the joint tenancy which had existed for years and which severance would have affected Ms. Davis greatly, and in all probability, in the very near future as it was necessary to give effect to Mr. Brown's will.

Nor is there evidence of any agreement between the late Mr. Brown and Ms. Davis that she would vacate the premises on his death or before to accommodate his son.

[21] Ms. Davis continued living in the house with no apparent provision to live elsewhere. It is my view that if Ms. Davis had understood that she was, by her signature, causing another person to own the property with her, she would not have been caught napping at the premises, with the new owner filing suit against her for recovery of possession.

[22] Ms. Davis faced the real probability that she would survive Mr. Brown and therefore become the sole owner of the property. Why would she, for no apparent reason, give away half of what would have become hers? There is no evidence of there being such a reason.

The fact that the executrices of Mr. Brown's will had to have recourse to the legal system in an effort to remove Ms. Davis from the premises when she herself is an owner speaks volumes. It indicates to me the real probability that there had been no agreement for her to vacate the premises.

[23] In what may be construed as yet another attempt to ensure that his son, Owen, shared in the property with Ms. Davis, Mr. Brown directed in his will that the premises, 12 Valley Drive, be sold within a year of his death and the proceeds be divided equally between his son and Ms. Davis.

[24] This plan seems to defy logic. If the property had been properly devised to his son, it would have been owned by his son and Ms. Davis in equal shares. Equal sharing of such proceeds would arise by law, without his direction from the grave. Property owner and businessman that he was he would certainly have known that. Why then direct that the proceeds of its sale be divided in equal shares between his son and Ms. Davis? The logic of this arrangement is difficult to see unless it was to ensure that by any means available the property was to be shared equally with his son obtaining a half portion.

[25] I accept the truth of the above circumstances on a balance of probabilities. I conclude from these circumstances that Ms. Davis signed the document without knowing that it might cause her to lose half of her interest in Valley Drive. She was hurried into signing without a full appreciation of what she was doing. If she had appreciated the import of the document and had knowingly signed it, she would have understood that the effect of the document she signed would be to create a situation where Mr. Brown could bequeath to his son a half interest in the property if he saw fit. That would carry with it the right of his son to occupy the premises and to deal with it.

The question now is if fraud is involved.

### **Allegations of Fraud**

[26] The evidence on which Counsel relies for his submission that there is fraud is the following:

- a. Ms. Davis was directed by her trusted common-law husband, the late Mr. Brown to sign documents, having been told they were to allow her to better conduct his business.
- b. Ms. Davis was given the papers to sign in the course of business by an attorney-at-law whom she knew to be Mr. Brown's attorney-at-law and whom she knew conducted business on their behalf.
- c. Ms. Davis was not encouraged or told to obtain legal advice before signing the papers. Nor was she given sufficient time to consider the proposed change in her ownership.

- d. The late Mr. Brown made it clear to her that the papers needed to be signed quickly. The presence of his attorney-at-law at their home, during the week before their departure from Jamaica would add to the urgency of the situation.
- e. She was fearful of him at all times and thought that she could not go back home to Valley Drive without signing the documents.
- f. Her evidence is that she signed thinking that that would give her total control over his affairs.
- g. All actions were done with the understanding that Mr. Brown's death was imminent.
- h. Mrs. Betton-Small's evidence is that she had advised Mr. Brown that he had to sever the joint tenancy in view of certain instructions he had given her regarding his will.
- i. The will with the devise to his son was signed on the same day that the transfer was signed. This means there was the presumption the transfer would have been signed.
- j. The will includes instructions for the attorney-at-law to have carriage of sale of the property.

### **Dishonesty**

[27] In my view the circumstances indicate actual dishonesty by Mr. Brown as it concerns the transfer of the property to create a tenancy in common.

The dishonesty of the circumstances is further exposed by the fact that Mr. Brown states in his will that he had "already given to Beverley Sylvia Davis, the remaining one-half share of the property at 12 Valley Drive ..." That statement was not accurate as she already held a share in the property initially as joint tenant and later, if the tenancy had in fact been severed, she would have held her half portion as a tenant-in-common. In both situations she held the property in her own right without it being "already given" to her by the late Mr. Brown.

[28] The apparent largesse of Mr. Brown to Ms. Davis, being displayed in the will may well be viewed as being a sham. This bequest was empty and was an attempt to hide the truth of his actions which appeared to be wanting in honesty as it



concerns the property at Valley Drive. Indeed it is undisputed that his purported bequests to her concerning bank accounts were also empty.

### **Do the circumstances amount to fraud?**

- [29] The evidence, which is undisputed, portrays Ms. Davis and the late Mr. Brown as having shared not only a business relationship but also a personal one. They were in business ventures together and shared their lives with each other although at various stages they also had other spouses. It is unchallenged that even to the end of his days Ms. Davis cared for the late Mr. Brown, accompanying him in his quest for medical care to England.
- [30] Even if the couple had been only business partners, the circumstances surrounding the changed endorsement might have been properly viewed as being dishonest. But here, where they also shared such a long and personal relationship, the circumstances in my view confirm a dishonest approach by the late Mr. Brown to his partner, whom he instructed to sign the papers, sufficiently dishonest to amount to fraud within the meaning ascribed to it in the **Willocks** case (supra).

### **The legacy**

- [31] It is undisputed that Mr. Brown had expressed the wish to “leave a legacy” for his children. According to Mr. Owen Brown, the differences which existed between Mr. Brown and his other children remained un-reconciled up to his death. The only child named in his will is Owen. This was the only urban property in Jamaica in which Mr. Brown had an interest, but it would only be by severing the joint tenancy that he could create an interest in the property to bequeath to his son.
- [32] Mr. Brown’s will of July 16, 1999, states that he gives to his son Owen Brown “my one-half share and interest **(the joint tenancy having been severed)** in the property at 12 Valley Drive ...” (emphasis mine). However, the document

purporting to sever the tenancy was signed that same day and had not been registered. Such a bequest would have been premature.

[33] However, it is in fact the first bequest listed in the will. It is at the very least curious that the late Mr. Brown sought to give his son, some of the property at a time when he should have understood that it was not his to give more so when the evidence shows he had available to him, the services of an attorney-at-law. However, time was not on his side with his imminent death being probable and having to leave Jamaica to go for medical attention in England within two non-working days of signing his will.

[34] It appears to me that some of what Mr. Brown sought to do was born of his desire to leave a legacy for his son. However, it appears that he did not have sufficient property to leave this legacy and sought to circumvent that situation by purportedly accessing some of the property which he shared with Ms. Davis.

[35] I am fortified in my view that the late Mr. Brown was determined to leave a legacy for his son, by the evidence that he tried to create other property for him to inherit when such property did not exist.

The unchallenged evidence is that Mr. Brown purportedly bequeathed to his son, his fixed deposit account at Jamaica National Building Society when he held the account jointly with Ms. Davis who knew nothing of that arrangement and had not agreed to it. Ms. Davis would have been entitled to all those funds. His son could inherit nothing from that joint account.

[36] Also, it is not disputed that he unilaterally divided funds he had in a joint savings account with Ms. Davis into two separate unequal accounts, one for her and the other larger one for his son Owen. She was unaware of this until after his death when she sought to access the funds.

### **Inference**

[37] In the circumstances of this case, I readily infer that the late Mr. Brown's actions/plans were dishonest i.e. born of fraud, and resulted in his interest in the

property on the Certificate of Title being unlawfully altered from joint tenancy to tenancy-in-common.

The instrument of transfer in my view arose fraudulently and therefore the transfer should not be allowed to stand.

### **Conclusion**

[38] The ownership of the property is lawfully described in the endorsement on the registered Certificate of Title as joint tenancy. This means that once it is proved that Mr. Brown, as a joint tenant, is dead, the right of survivorship applies and the other joint tenant, Ms. Davis acquires the land solely. It is undisputed that Mr. Leonard Brown is dead.

[39] The Order is therefore:

1. the declaration that the land, the subject of this suit, belongs solely to the claimant, Ms Davis is granted
2. the deed transferring the property to Ms. Davis as a tenant-in-common is rescinded;
3. the defendants deliver to Ms. Davis the title to the premises, 12 Valley Drive, St. Andrew with the endorsements to Mr. Brown and Ms. Davis as tenants-in-common cancelled within 120 days of today.
4. Costs to Ms. Davis to be agreed or taxed.