IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV1378/2006

BETWEEN	ANDREA MAHFOOD	CLAIMANT
AND	CAROL LAWRENCE (Executor of the Estate of Joseph Anthony Lawrence)	1ST DEFENDANT
AND	MARY LAWRENCE	2ND DEFENDANT
AND	DIANE LAWRENCE	3RD DEFENDANT

Miss Carol Davis for the Claimant

Mr. Samuel Smith for the Defendants

Heard: June 18, September 14 and October 21, 2009

Joint Tenancy - Severance

Straw J

Mrs. Carol Lawrence, the first defendant and executor in the estate of Joseph Anthony Lawrence, has applied to this Court for, *inter alia,* a declaration that the joint tenancy between Andrea Noyon (The Claimant) and Joseph Anthony Lawrence on duplicate Certificate of Title registered at Volume 1129 and Folio 812 of the Registrar Book of Titles has been severed. In the alternative, she seeks a declaration that the said Joseph Anthony Lawrence prior to his death, had been in sole undisputed occupation of the said property for his exclusive use and benefit for over twelve (12) years to the exclusion and dispossession of the other joint tenant Andrea Noyon.

Background

1. The claimant, Mrs. Noyon-Mahfood and the deceased, Joseph Lawrence are registered as joint tenants of the property described above since March 8, 1983. The property is known as Apartment 4, Hampshire House, 4 Rekadom Avenue, Kingston 10.

2. Mr. Lawrence died on March 7, 2005. The first defendant is the widow and the executor of his estate. The second and third defendants are their daughters. Mrs. Noyan-Mahfood is the adopted daughter of the deceased.

3. A letter dated February 5, 1990 from attorneys Millholand Ashenheim & Stone addressed to the deceased is attached to the affidavit of the first defendant/applicant. The letter reads as follows:

> "Re: Transfer of land part of Rekadom - Volume 1129 Folio 812
>
> We enclose the above Instrument of Transfer and our bill for preparation of the same.
> We have the above duplicate Certificate of Title and await any further instructions you may have in the regard."

A document 'Transfer Under the Registration of Titles Act' is attached to the letter. It is undated and unsigned. It speaks to an agreement between the two joint tenants for the sale of the claimant's interest in the said land to the deceased for a consideration of $200,000.00.

There is no evidence that the deceased communicated any intention to the claimant in this regard. The claimant has denied any knowledge of this document.

4. Based on the affidavit's evidence of Mrs. Mahfood, both herself and the deceased occupied the said premises between 1992 and 1994. She then had sole occupancy until 1999 when she went to the United States of America (USA). She stated that she rented the apartment, collected the rent and paid all the expenses including maintenance. Copy

receipts for maintenance payment for various months between 1999 and 2000 are attached to her affidavit. She further stated that in 2001 she migrated to the USA. Arrangements were then made with the deceased for him to collect the rent and pay the expenses.

5. On the 29th day of November 2001, the claimant wrote a letter to Mr. Wentworth Charles (The then attorney for the deceased). It reads as follows:

> "Re No. 4 Hampshire House, Registered at Volume 1129, Folio 812
>
> I refer to yours of October 29, 2001. My consent to the sale of the captioned property is conditional upon the following:
>
> i) That the property be assessed by two reputable independent valuators with a view to obtaining the best valuation (in this regard C. D. Alexander and D.C. Tavares Finson & Company are acceptable);
>
> ii) that the terms and conditions of the Sale Agreement are to my satisfaction;
>
> iii) that the arrangements for division and payment of my share of the net proceeds are satisfactory;
>
> iv) that all the relevant supporting documentation is forwarded to me; and
>
> v) that I am afforded a reasonable opportunity to properly review and consider all the relevant documents.
>
> I wish to advise that in order to facilitate expeditious completion of the sale, Mr. Jose' Griffith shall act as my agent in Jamaica.
>
> In this regard, I am requesting that all the relevant documentation associated with the sale be forwarded to my agent. Appropriate measures would be put in place for the affixation of my signature at the required time. However, I must emphasize that in negotiating the terms and conditions of sale, you allow a reasonable opportunity for communication between me and my agent before any final agreement is reached."

6. On the 13th December 2001, Mr. Wentworth Charles replies to the claimant in the

following terms (see letter dated December 13. 2001):

> "Dear Mrs. Noyan-Mahfood
>
> Re: Apartment Hampshire House
>
> We acknowledge receipt of your letter dated 29th November 2001.
>
> Our Mr. Joseph Lawrence will accept the valuation of either C.D. Alexander or D.C. Tavares Finson & Company. Kindly confirm which you prefer as a valuation by both parties will only create unnecessary expenditure.
>
> As soon as we have your response we will prepare the Agreement for Sale, forward it to you for your signature through your agent Mr. Jose' Griffith."
>
> This letter is noted "cc to Joseph Lawrence."

7. The final piece of documentary evidence is titled "Transfer of Land Under the Registration of Titles Act."

It is dated 7th January 2002 and purports to be signed by the deceased Joseph Lawrence (described as the transferor) and Mary Jodie Lawrence (described as the Transferee). This document states that the Transferor and Andrea Noyon, who are the registered proprietors of the said land are desirous of severing the joint tenancy and wish to hold the land as tenants in common.

It further states that the Transferor is desirous of transferring his interest of half share in the land to the Transferee. Both signatures are purportedly witnessed by the attorney, Mr. Wentworth Charles.

8. Annexed to the affidavit of the first defendant, is a letter dated 23rd July 2008 from Mr. Wentworth Charles to the law firm, Robinson and Clarke. The letter confirms that Mr. Joseph Lawrence gave instructions sometime in 2002 for the severance of the

Joint Tenancy. The letter further states that a Transfer and Declaration of value were prepared.

It is further stated that copies of these documents were obtained from the computer files and enclosed. The copy 'Transfer' when compared by the Court is an exact copy of the one dated 7th January 2002 except that it is undated and unsigned.

It is to be noted also that Mr. Charles indicates that Mr. Lawrence's file was closed in January 2006 and it has not been located.

There is no affidavit from Mr. Charles to confirm that the transfer was signed by the parties and in his presence nor that he attached his signature as the witness.

i. **Adverse Possession**

The court will deal, firstly, with the alternative order sought by the first defendant based on adverse possession.

The factual assertions of the first defendant are to the effect that the claimant has not lived or visited the said property for over 15 years and that herself and the deceased have been the caretaker of the premises, undertaken repairs and seeing to the general upkeep and paying of maintenance, property taxes and insurance.

Mr. Samuel Smith, Counsel for the applicant, has submitted that the claimant has abandoned her interest in the property by her non action. He has further submitted that the copy receipts tendered by her are in issue and that she has failed to exhibit the relevant passport as proof that she was present in the island on the relevant dates.

In order to succeed under this limb, the first defendant would have to establish at least 12 years of adverse possession.

In other words, the first defendant would have to establish that the claimant has done nothing that reflects ownership and has not been in (actual) possession since 1996.

The claimant's affidavit evidence clearly speaks to her occupation of the premises until 1999 and then her collection of rental and management of the property until 2001. Even if the court were to reject the copy receipts exhibited for the period 1999 - 2000, the court accepts that she was in occupation of the premises up to 1999.

Furthermore, the first defendant has not submitted any documents for the period 1999 to 2000 to support her testimony in relation to the collection of rental and maintenance payments during that period.

The court therefore prefers and accepts the evidence of the claimant in relation to the issue of occupation.

The claim for adverse possession would therefore fail.

ii **Has there been Severance of Joint Tenancy during the lifetime of the deceased?**

This is the major issue that has to be examined by the court.

Before the court embarks upon an examination and analysis of the law in relation to the severance of a joint tenancy, the court has to make a particular finding of fact in relation to the signature of the deceased, Joseph Lawrence on the document titled 'Transfer of Land Under the Registration of Titles Act' which is dated January 7, 2002.

The claimant has joined issue with the signature of Joseph Lawrence on the above document and has stated that it is not genuine.

She states in her affidavit (filed on September 29, 2008) at paragraph 9 as follows:

> "--- my dad never made any attempt to buy out my interest and I deny that he signed any transfer. I know my dad's signature, as I was his personal assistant and worked in his business for many years. The signature on the transfer is not my dad's."

On the 30th day of April 2008, Mr. Justice R. Jones made certain orders pursuant to the trial of this matter which included the following:

> "Claimant has leave to obtain original transfer dated 7th January 2002 from Mr. Wentworth Charles and, if available, to refer same to handwriting expert, Mr. Major for an opinion in respect of the signature of Mr. Lawrence. Costs of the opinion to be paid for equally by the claimant and defendant."

The expert, Mr. Carl Major, submitted his report dated August 21, 2008.

The court notes that he refers to the following documents as having been received from Ms. Carol Davis, attorney-at-law:

"a) Photocopy three (3) sheet – three (3) page

"Transfer of Land Under the Registration of Titles Act" document - Instrument of Transfer "made" - dated 7th day of January 2002, between Joseph Anthony Lawrence, Businessman of No. 1 Capri Close, Red Hills, Kingston 19, St. Andrew (hereinafter called "The Transferor") of the first part and Mary Jodie Lawrence, student of No. 1 Capri Close, Red Hills Post Office, St. Andrew (hereinafter called "The Transferee") of the second part, etc.
Second sheet – second page showing "Schedule" and signature which is being questioned, at right middle immediately over the typewritten or printed name – Joseph Anthony Lawrence."

b) Original document – one (1) sheet – one (1) page "Titled" – "Affidavit of Non identity" in the name Joseph A. Lawrence – Instrument # 100128962, or BK 30313 PG 0854 Recorded 03/07/2000, 2:12

p.m., Commission Broward County Deputy Clerk 1931. Instrument acknowledged before Notary Public – State of Florida ------ showing known and or acknowledged signature at lower middle of document – immediately over typewritten or printed name – Joseph A. Lawrence; ---"

He also speaks to receiving five (5) National Commercial Bank, Newport West, Kingston Branch - Lawrence Engineering Limited cheques all with signatures of drawers.

Mr. Major compared the questioned signature on the Transfer, with the specimen signature of Joseph A. Lawrence on the "Affidavit of Non Identity" and the signatures of Joseph Lawrence on the five (5) cheques.

The questioned document as well as the other documents were attached to his report. The court notes that the Questioned Document is an exact duplicate of the transfer document dated January 7, 2002.

In the opinion of the expert, the signature of 'Joseph Arthur Lawrence' on the questioned document 'A' when compared with the known signatures of Joseph Lawrence on the 'Affidavit of Non Identity' and the five (5) cheques together described as 'B' showed significant differences between both sets. At page seven (7) of his report, he states that he is of the opinion that the person who wrote the signature in group 'A' is a different person from the individual who wrote the seven (7) signatures of group B. In other words, the author of the signature of Joseph Lawrence on the Transfer dated January 7, 2002, is not the author of the signatures accepted as being written by the deceased on the Affidavit of Non Identity and the cheques. He gives clear and coherent reasons for his findings in the report. The court has also had the opportunity to view all the documents.

Mr. Smith has submitted that the court should disregard the evidence of the expert as he was not given the original transfer as ordered by Mr. Justice Jones.

Mr. Major states as follows at page five (5) of his report:

> "1. Of all the documents received, only the "Transfer of Land" document which is the 'Questioned' one, is a photocopy of which line quality is outstandingly clear for observation of features, which is of significance and provides very good material for detailed examination provided the Questioned document listed at 'A' above was generally reproduced from source document which is at issue in this matter."

The claimant has not put any evidence before this court as to why the original transfer was not obtained and given to the expert.

Common sense would suggest that it would be in the hands of the defendants. They have not produced the original document either. So neither side has accounted to this court for the absence of the original document.

The court can treat this matter in two (2) ways:

Firstly, the court can place no reliance on the document at all and ignore any evidence that flows from its use. Alternatively, it could be treated as an exhibit produced by the defendants which was submitted by the claimant to the handwriting expert. In that event, the court accepts the opinion of Mr. Major as reliable and cogent. The court, therefore, makes a finding that the signature of Joseph Lawrence on the photocopy 'Transfer' dated January 7, 2002 is not that of the deceased.

At any rate, the effect would be the same, whatever course is adopted, as the document could not be relied upon by the defendants as an act of the deceased.

The Law

There are 'four unities' that must be present before a joint tenancy can be said to exist. These are the unities of possession, interest, title and time. In a tenancy in common, only the unity of possession is required as a precondition. The process by which joint tenancy is converted into a tenancy in common is known as severance.

The authors of **Elements of Land law** (fourth edition), Kevin Gray and Susan Francis Gray speak of the implications of the UK Law of Property Act of 1925 (page 1055, para 11.69 et al). It is noted that there can be no severance of a joint tenancy of a legal estate:

> *"11.71 Severance is a process now confined to equitable joint tenancy --- the Law of Property Act, 1925 provides two major categories of severing event. The 1925 Act introduced a convenient form of severance by written notice but also took care to preserve the classic law of severance laid down in Williams v Hensman by Page Wood V-C."*

The UK Law of Property Act, 1925 does not apply to the Jamaican jurisdiction so the law to be considered in relation to the issue of severance would be that contained in the Sir Page Wood's V-C formulations.

The methods of severance of a joint tenancy before 1926 were promulgated by Sir Page Wood V-C in **Williams v Hensman** (1861) Volume 70 ER 862 at 867.

A joint tenancy may be severed in three ways:

1. An act of anyone of the persons interested operating upon his own share.

   "Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund ---" (supra).

Mummery LJ in **Marshall v Marshall** 1998 EWCA Civ 1467 states (at page 3) that this category of severance would occur where one joint tenant disposes of his share to a third party by way of sale or security:

> . *"It may even occur where there is a specifically enforceable agreement for such a disposition"*

2. By mutual agreement.
3. By any course of dealing sufficiently to intimate that interest of all were mutually treated as constituting a tenancy in common (mutual conduct) "---it will not suffice to rely on an intention with respect to the particular share, declared only behind the backs of the other persons interested. You must find in this class of cases a course of dealing by which the shares of all the parties to the contest have been effected as happened in the cases of **Wilson v Bell** (1843) 5 EQR 501 and **Jackson v Jackson** (1804) 9 Ves Jun, 591 per **Williams v Hensman**" (supra).

The facts of the present case must therefore fall within at least one of the above-mentioned categories in order for the court to find that the joint tenancy has been severed.

Mr. Samuel Smith has submitted on behalf of the applicant that severance has occurred by virtue of category one and secondly by virtue of category three i.e. by alienation and by a course of dealing.

1. **Alienation**

In **First National Securities Limited v. Hegerty,** 1985 QBD 850, a husband and wife purchased a house as joint tenants in 1978. On the 10th December 1979, the husband purporting to act on behalf of both himself and his wife successfully applied to the plaintiffs for a loan and two days later, executed a legal charge on the house in favour of the plaintiffs. The wifes' signatures were forged.

After the husband fell in arrears, the plaintiffs brought an action for the payment of money on October 31, 1980 and obtained a Provisional Charging Order in relation to the husband's interest in the house. The wife filed for divorce on March 17, 1981 and sought ancillary relief, claiming, *inter alia,* a transfer of the husband's interest in the house. The Master refused to make the Charging Order absolute.

On appeal, it was held by Bingham J that the Charging Order should be made absolute. Bingham J (per page 854 (b) expressed that since the wife was not a party to the loan, she incurred no liability. He stated as follows:

> *"If the husband and wife were up to then equitable as well as legal joint owners of the house, I think that this deposition by the husband was a sufficient act of alienation to sever the beneficial joint tenancy and convert the husband and wife into tenants in common. In any case the deposition was in my view effective to create a valid equitable charge in favour of the plaintiffs of the husband's beneficial interest in the house."*

The Court of Appeal affirmed the judgment of Bingham J.

In the Jamaican case of **Bryhild M Gamble v Hazel Hankle** 27 JLR, 115; the deceased joint tenant had signed an indenture purporting to convey to the defendant his interest in property (owned jointly with his wife) by way of a deed of gift.

Wolfe J held that the deed of gift evidenced a dealing with an interest in land which manifests a clear intention to sever the joint tenancy and to create a tenancy in common and the wife's right to *jus acresendi* was therefore extinguished.

Defendant's Submission re Alienation

In order to support his argument that there was alienation by an act of the deceased, Mr. Smith is relying on a document attached to an affidavit of Mrs. Noyon

filed on April 11, 2006. This document is titled 'The Registration of Titles Act Transfer of Land.'

This document purports to transfer the disputed property by both joint tenants to the three defendants – "in consideration of natural love and affection." It bears five (5) signatures, those of the transferors, Joseph Lawrence and Andrea Noyon and those of the three defendants. The signatures of the three (3) defendants are dated on the 22nd February 2005. Apart from that, the date of the transfer itself is not clear.

This document was the subject of a previous trial in an action brought by the claimant, Mrs. Noyon Mahfood against the three defendants.

Apparently, a transfer of title to the defendants had been registered in relation to the disputed property on the basis of this document. The claimant stated that her signature had been forged and she had not signed this document. The report of a handwriting expert, Mr. William Smiley was put into evidence which supported the contention of the claimant. At the end of the trial, the court ruled that the transfer was fraudulent and ordered the Registrar of Titles to correct the Certificate of Title by cancelling the above-mentioned transfer.

Ruling of Court in relation to reliance on above-mentioned document

In the application before this court, neither party indicated at the commencement of the hearing that they would be relying on this document. In fact, the affidavits of the first defendant in support of the Notice of Application in the present proceedings do not refer to previous affidavits filed in relation to the previous hearing nor to any facts relating to the said document.

However, Mr. Smith has asked the court to have regard to it and submitted that since the signature of the deceased on that document was never challenged, it should be accepted by the court. He further submitted that the court should therefore find that the said transfer is evidence of an act of the deceased acting upon his own share which indicates an intention to sever the joint tenancy. He submits that the fact of the forgery would be similar to the forgery of the wifes' signatures in **First National Securities Limited** (supra).

Ms. Davis objected to any such reliance on the document as there was no disclosure by the defendants of their intention to rely on it for the purposes of the present trial. She further submitted that, if such an intention had been declared, she would have requested that the signature of the deceased be sent to a handwriting expert for examination and verification.

The court agrees with the submissions of Ms. Davis on the point. Counsel was advised that, in the circumstances, he ought to have requested an adjournment if he had intended to rely on the said document. Since this was not done, it would be inequitable to allow the defendants to do so now, at the time of submissions.

The court has to consider whether there are any acts of alienation by the deceased revealed from the evidence having regard to the letter dated 5th February 1990 and documentation sent to the deceased by his attorneys, Millholland Ashenheim & Stone, as well as the correspondence between the claimant and Mr. Wentworth Charles in 2001 in relation to the sale of the property and division of proceeds.

The inference to be drawn is that the deceased, at some time in 1990, considered purchasing the claimant's interest in the joint tenancy.

As was stated previously, this 'intention' of Mr. Lawrence in 1990 was never communicated to the claimant.

In relation to the correspondence in 2001, the intention was communicated to the claimant but the negotiations were aborted.

The effect of a unilateral declaration of intention to sever

A mere declaration of intention by one joint tenant to sever without the agreement of the other cannot be said to be an act of the intending joint tenant 'operating on his own share' so as to affect a severance (see **Davies v Davies** (1983) WAR 305, at 307 per Burt CJ) unless it is incorporated in a written notice (per the UK LPA, 1925 Section 36 (2)) or contained in a specifically enforceable agreement to alienate the share concerned (see **Partriche v Powlet** (1740) 2 ATK 54 at 55, 26 ER 430 at 431 per Lord Hardware LC).

In view of the above circumstances and the authorities, the defendants have failed to prove that the deceased did any act 'operating on his own share' from which the court could make a finding that there was an intention to treat the joint tenancy as severed.

b. **Mutual Agreement**

Although the defendants are not relying on this second category, the court still has to examine if there is any evidence of an agreement to sever by the joint tenants. Mummery J in **Marshall v Marshall** (supra) pg 3, states as follows in relation to this second category:

> *"There need not be an express agreement in terms to sever or to hold the property as tenants in common. There may be an agreement to sever where the agreement is to deal with the property in a way which necessarily involves severance. The agreement need not be actually performed or be specifically enforceable or even be legally binding.*

As pointed out by the Court of Appeal in Burgess v Rawnsley, the significance of an agreement is as an indication of a common intention to sever, rather than as giving rise to enforceable contractual obligations and rights."

In **Burgess v Rawnsley**, 1975 Law Reports, pg 429, the two joint tenants, a widow and a widower (the defendant) had bought a house in their joint names, each providing half of the purchase price.

The widow, H, (who was a tenant in the said house, occupying the downstairs flat) bought the house as a matrimonial home in contemplation of marriage to the widower. She was minded to live in the upstairs flat and said that the defendant had never mentioned marriage to her. They did not marry and the defendant did not move into the house. There was evidence of an oral agreement between H and the defendant in 1968, whereby she agreed to sell her share in the house to him for £750.00 but that she subsequently refused to sell. H died in 1971. His daughter, the plaintiff and administratrix, claimed that there was a resulting trust or alternatively, that the joint tenancy had been severed in equity. The trial judge declared that the house was held by the defendant on trust for the plaintiff and herself in equal shares. On appeal, it was held that the beneficial joint tenancy of H and the defendant had been severed by the defendant's oral agreement to sell her share to H, even though the agreement was not specifically enforceable.

In that case, Sir John Pennycuick stated at pg 448b (per curiam), that the policy of the law, particularly having regard to Section 36 (2) of the Law of Property Act, 1925, was to facilitate severance at the instance of either party but a declaration by one party un-communicated to the other cannot operate as a severance.

Is there any evidence of a mutual agreement between the parties, express or implied or is there any evidence of a common intention to sever? The letter exchanged between the claimant and the deceased's attorney, Mr. Charles is indicative of negotiations or conduct towards an agreement for the sale of the property and division of proceeds. However, it appears to have been exploratory and did not reach any fruition. There is no evidence that the valuation was done, that the parties agreed on an amount to be paid to either one as in **Burgess v Rawnsley**, or the property was to be sold and proceeds divided in any particular manner.

Mr. Lawrence died in 2005 and there is no evidence of any further correspondence between the parties after 2001. This court is of the view that there is no evidence of any mutual agreement between the joint tenants, expressed or implied, to sever the joint tenancy.

(c) **A Course of Dealing between the Parties**

The final category for the court's consideration is whether severance has occurred by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.

In **Marshall v Marshall** (supra) Mummery J, in discussing this third category stated as follows (at page 3):

> *'The course of dealing may include abortive negotiations between the joint tenants for a rearrangement of their interests, if that course of dealing, even though it does not lead to a contractual agreement, indicates a common intention on the part of the joint tenants that the joint tenancy should be regarded as severed.*
>
> *I refer to the judgment of Sir John Pennycuick in Burgess v Rawnsley, at page 447D-E. Whether or not such a common intention can be inferred must depend on the particular*

circumstances of each case. Sir John Pennycuick in Burgess v Rawnsley, at page447B said:

"One would not ascribe to joint tenants an intention to sever, merely because one offers to buy out the other for X pounds and the other makes a counter offer of Y pounds."'

It is important to note that rule 3 of Page Wood's V-C formulations is not to be taken as a mere subheading of rule 2.

Sir John Pennycuick in **Burgess v Rawnsley** 1975 3 All ER pg 142 at 153h – 154, in discussing rule 3 states as follows:

"It covers only acts of the parties, including, it seems to me, negotiations which, although not otherwise resulting in any agreement, include a common intention that the joint tenancy should be regarded as severed."

Both Browne LJ and Sir John Pennycuick disagreed with the opinion of Lord Denning MR that even if the facts in **Burgess v Rawnsley** (supra) did not give rise to an agreement between the parties, it would be sufficient to infer an intention by both parties that the joint tenancy should be severed (See Lord Denning (supra) page 148c); Browne LJ page 151d; Sir John Pennycuick (page 153f). Sir John Pennycuick states as follows (supra):

"I do not doubt myself that where one tenant negotiates with another for some rearrangement of interest, it may be possible to infer from the particular facts a common intention to sever even though the negotiations break down. Whether such an inference can be drawn must I think depend on the particular facts. In the present case the negotiations between Mr. Honick and Mrs. Rawnsley, if they can be properly described as negotiations at all, fail, it seems to me, far short of warranting an inference. One could not ascribe to joint tenants an intention to sever merely because one offers to buy out the other for X pounds and the other makes a counter offer of Y pounds."

Mutuality vs. Unilateral Declaration of Intention

It would appear that mutuality of intention is important in order to support a finding of a course of dealing although there are authorities that support the view that a unilateral declaration of intention by one joint tenant to sever that is communicated to the other is sufficient to sever the joint tenancy (see **Burgess v Rawnsley** 1975 Law Reports, 429 per Lord Denning MR at 439).

In **RE Drapers Conveyance, Nihan Porter & Another**, 1969 Law Reports, pg 486, a wife issued a summons under Section 17 of the Married Women's Property Act, 1882 asking for an order that the house held by herself and her husband as joint tenants be sold and the proceeds of sale distributed in accordance with their respective interests. In her affidavit in support of the summons she relied, inter alia, on the presumption of advancement arising from the fact that the house was brought in their joint names and added a further reason why she was entitled to a half share.

Plowman J found that the summons which was served on the husband before he died coupled with her affidavit clearly evinced an intention on the part of the wife that she wished the property to be sold and the proceeds distributed equally. He held therefore that the beneficial joint tenancy would be severed (page 492c).

In **Harris v Goddard** (1983) 3 All ER, 242, the above case was distinguished. The wife, a joint tenant of premises along with her husband, had petitioned for divorce and sought relief in the terms of Section 24 of the Matrimonial Clauses Act 1973 asking, "that such order may be made by way of transfer of property and/or settlement of property and /or variation of settlement in respect of the former matrimonial home --- and

otherwise as may be just." The husband died sometime after the date fixed for hearing of the petition.

It was held that the petition did no more than invite the court to consider at some future time whether to exercise it jurisdiction and if it did so in one or more of three different ways. It did not therefore operate as a notice in writing (served pursuant to Section 36(2) of the 1925 Act (UK)) to sever the joint tenancy in equity.

It is important to note, however, that Lawson LJ speaks to unilateral action to sever a joint tenancy as now being possible in context only of the service of notice under the 1925 Act. He states as follows (at pg 246a):

> *"Before 1925 severance by unilateral action was only possible when one joint tenant disposed of his interest to a third party."*

He, however, agreed with the decision of Plowman J in **RE Drapers Conveyance** (supra) that the summons and the affidavit together effected a severance during the life time of the husband:

> *"I agree that it did, but it is not clear from the judgment whether the judge regarded the summons or the affidavit or both as notices in writing or whether the service of the summons and filing of the affidavit were acts which were effectual to sever the joint tenancy." (Per page 246g)*

Dillon LJ agreed with the decision of Lawton LJ and stated (page 247a) that the case of **RE Wilks, Child v Bulmer** (1891) 3 Ch 59, although correct in its time, would be decided differently now because of Section 36.

In **RE Wilks** (supra), a fund had been carried over in an administrative action for the benefit of three (3) infant plaintiffs as joint tenants. One of the plaintiffs, upon attaining the age of 21 years instructed his solicitors to pay his one-third share to him.

The solicitor obtained leave to add an application to a pending summons for the payment of the said share. The plaintiff, **Wilks** completed his evidence but the amended summons was not reached. He died. The court held that there had not been a severance as nothing was done by **Wilks** or on his behalf to amount to a severance. The trial judge stated that in order to effect a severance, the act of the joint tenant must be of a final and irrevocable character which effectively stops him from claiming any interest in the subject matter.

This principle was followed in the case of **Nielson-Jones v Fedden** (1975 Ch 222, 1974 3 All ER, – 38). Walton J held that no conduct is sufficient to sever the joint tenancy unless it is irrevocable. He criticised **IN RE Drapers Conveyance** (supra) as being clearly contrary to the existing well established law.

In **Neilson-Jones**, (supra), a husband and wife entered into negotiations that the property they held as joint tenants should be sold. Each received £200.00 out of the deposit paid by the purchaser. There was also a declaration made by the husband in correspondence that he wished to sever the joint tenancy and this was made clear to the wife.

Walton J stated (pg 45):

> *"The question then is, can such a declaration – a unilateral declaration – ever be effective to sever a beneficial joint tenancy? It appears to me that in principle there is no conceivable ground for so saying that it can. So far as I can see such a mere unilateral declaration does not in any way shatter any one of the essential unities. Moreover, if it did, it would appear that a wholly unconscionable amount of time and trouble has been wasted by conveyancers of old in framing elaborate assignments for the purpose of effecting a severance, when all that was required was a simple declaration."*

Lord Denning MR in **Burgess** (supra) at pg 14, considered Walton J's decision in **Neilson-Jones v Fedden** to be incorrectly decided. He stated that the husband and wife entered on a course of dealing sufficient to sever the joint tenancy. Also, the declaration by the husband communicated to the wife was sufficient.

He also stated that he doubted whether **RE Wilks** could be supported and that the application by **Wilks** was a clear declaration of his intention to sever and it was made clear to all concerned.

Sir John Pennycuick (pg 153) also stated as follows:

"2. *Section 36 (2) of the Law of Property Act 1925 has radically altered the law in respect of severance by introducing an entirely new method of severance as regards law, namely notice in writing given by one joint tenant to the other.*

3. *Pre-1925 judicial statements, in particular that of Sterling J in RE Wilks must be read in light of the alteration in the law, and in particular I do not see why the commencement of legal proceedings by writ, or originating summons or the swearing of an affidavit --- should not in appropriate circumstances constitute notice in writing within the meaning of Section 36(2).*

4. ---

5. ---

6. ---

7. ---

8. *The forgoing statement of principles involves criticism of certain passages in the judgments of Plowman J and Walton J in the two cases cited. These cases, like all other cases, depend on their own particular facts, and I do not myself wish to go on to apply these other statements of principle to the actual decisions in these cases."*

In light of the fact that there is no equivalent to the UK Law of Property Act 1925 in this jurisdiction, this court is in agreement with the conclusions of my sister,

McDonald-Bishop J, that a unilateral intention even if communicated is insufficient within the context of category 3 of the formulations of Sir Page Wood V-C in **Williams v Hensman** (supra). In the unreported case of **Bertram Cooper** (as executor in the estate of **Lucille Coleman) v Linford Coleman**, SC 2004/HVC01803 delivered on 15th June 2007, McDonald Bishop J states (page 15, para 39):

> *"The fact that this third method also speaks to mutuality strongly indicates that there is some element of mutuality needed on the part of the interested parties in relation to their treatment of the common property ---:*

This view is reinforced by the definition of 'mutual conduct' by the authors of **Gray and Francis Gray** (supra) para 11.96, pg 1070:

> *"'Mutual conduct' has been taken to comprise any conduct of the joint tenants which falls short of evidencing an express or implied agreement to sever but which nevertheless indicates an unambiguous common intention that the joint tenancy should be severed. Severance by 'mutual conduct' requires neither an express act of severance, nor a contract, nor a declaration of trust. It requires merely a consensus between the joint tenants, disclosed by a pattern of dealings with the co-owned property, which effectively excludes the future operation of the right of survivorship*" (see Szabo Boros (1967) 64 DLR 2d 48 at 49 per Davey (JBC)

Is there a course of dealing that evinces an intention to sever the joint tenancy?

The court must now examine the facts of this particular case and apply the law to the facts. Ms. Davis submitted on behalf of the claimant that the court must examine the circumstances and the actions of the parties to identify an act of severance which clearly shows that the parties intended to deal with their share of the property in a separate way.

Mr. Smith submitted that the following facts show such a course of dealing:

1. The letter dated February 5, 1990 from the attorney for the deceased along with the Transfer which was prepared.

It is important to note that this document (Transfer) was never signed by the deceased, neither is there any evidence that it was communicated to the claimant, although both parties occupied the premises jointly between 1992 and 1994.

2. The correspondence between the claimant and Mr. Wentworth Charles (attorney for the deceased) in 2001 concerning the proposed sale of the premises.

He points in particular to the following words by the claimant in her letter:

> *"(iii) that the arrangements for division and payment of my share of the net proceeds are satisfactory."*

Mr. Smith submitted that these words indicate an intention to sever. He further submitted that although no actual sale took place, the claimant was notified of an intention to sever the joint tenancy and as stated in the case of **Burgess v Rawnsley,** mutuality of intention is sufficient to sever the joint tenancy.

These negotiations were inconclusive and apparently aborted. The court notes also that the letter is not written by an attorney on behalf of the claimant and it is titled 'without prejudice.'

After 2001, there is no evidence of any correspondence between the parties and no valuation report in relation to the said property. The letters gave no indication as to how the proceeds would be shared.

Ms. Davis submitted that the evidence shows that the parties contemplated selling the property in 2001, however, it was never sold. She further submitted that, although the letter from Mr. Charles speaks to him receiving instructions from the deceased to sever the tenancy, the document (Transfer dated 07.01.01) which evidences these instructions has been established to be fraudulent.

The court has already ruled that the above document cannot be relied upon by the defendants.

The court notes that between 2001 and 2005 when Mr. Lawrence died, there were no further acts by him in relation to the issue of severance of the joint tenancy.

The only remaining issue for determination therefore is whether the inconclusive negotiations between the joint tenants in relation to their respective 'shares' can amount to 'mutual conduct.'

Lord Denning MR stated that the facts in **Burgess v Rawnsley** (supra) were indicative of severance by mutual conduct. In his view, this included any 'course of dealing in which one party makes clear to the other that he desires that their shares should no longer be held jointly but be held in common (supra 439C).

However, both Browne LJ and Sir John Pennycuick, the other members of the Court of Appeal, disagreed with him as to whether the facts amounted to a course of dealing (see pg 444E and 447 A-B respectively).

In that case, the trial judge had found that there was evidence of an oral agreement between the joints tenants that one had agreed to sell her share in the house to the other for £750.00 but that she subsequently refused to sell.

In the present case under consideration, there had been no agreement reached as to how the proceeds would be shared.

The court also takes note of a copy of the Last Will and Testament of Joseph Lawrence dated 22nd September 2004.

Judge

There is no evidence that probate has been granted. However, the first defendant is the executor of the estate and no issue has been taken by the defendants that it is not a true copy of Mr. Lawrence's will.

The court notes that all three defendants are beneficiaries under the will. The claimant is not. The court also notes that various properties are left to the beneficiaries but the disputed property is not mentioned at all in the will.

Ms. Davis has submitted that this is of great significance as it shows that the deceased never intended severance of his share of the said land which was intended to be inherited by his daughter, the claimant.

The court agrees with her on this point. In light of all the circumstances, this court is not of the view that the particular facts of this case falls within Category 3 of Sir Page Wood's V-C formulations, that is, 'a course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.'

The court is of the view that the facts of this case fall short of "a consensus between the joint tenants, disclosed by a pattern of dealings with the co-owned property which effectively excludes the future operations of the right of survivorship."

(See **Gray and Francis Gray** (supra)) para 11.96.

Notice of Application filed on April 24, 2008 is refused.

Costs to the claimant to be agreed or taxed.