NOVA SCOTIA COURT OF APPEAL
Citation: ***Penny v. DeLong Estate***, 2013 NSCA 74

Date: 20130618
Docket: CA 408754
Registry: Halifax

Between:

Ronald V. Penny

Appellant

v.

Donald Bruce Powers, Personal Representative of the Estate of John Hamilton DeLong and George Lewis, Personal Representative of the Estate of Helen Lewis

Respondents

Judges:	Oland, Fichaud and Bryson, JJ.A.
Appeal Heard:	June 3, 2013, in Halifax, Nova Scotia
Held:	Appeal is dismissed with costs of $2500, inclusive of disbursements, payable by the appellant to the personal representative of the Estate of Mr. DeLong, per reasons for judgment of Bryson, J.A.; Oland and Fichaud, JJ.A. concurring.
Counsel:	Augustus Richardson, Q.C., for the appellant John Washington, for the respondent, for the DeLong Estate Brian Church, Q.C., for the respondent, for the Lewis Estate, (not present)

Reasons for judgment:

[1] Following oral argument the court dismissed the appeal with reasons to follow – these are they.

[2] The appellant invites this court to embrace the novel proposition that a deed ineffective at law to sever a joint tenancy should be effective in equity based solely on the uncommunicated intention and conduct of one party. The chambers judge was not persuaded (2012 NSSC 369); neither are we.

[3] In 1973 the late John H. DeLong acquired two acres of land in Port Greville in Cumberland County. He later conveyed the property to himself and Helen Lewis as joint tenants. Unknown to Mr. DeLong, Ms. Lewis executed and registered a quit claim deed from herself to herself in 2010. The deed says it was executed for "the purpose of severing the joint tenancy between the current owners". Ms. Lewis died in 2011. Mr. DeLong knew nothing of the 2010 deed nor of Ms. Lewis' professed intention that the joint tenancy between them be severed. Mr. DeLong died in September, 2012

[4] Ms. Lewis' deed was prepared by Ronald V. Penny. He was granted leave to intervene in the proceeding before Justice Gerald R. P. Moir and he is the appellant.

[5] The parties agree on the facts. The question is whether the chambers judge erred in law in rejecting the appellant's arguments. The parties agree that the standard of review is correctness.

[6] The parties also agree on much of the law. They agree on the character of a joint tenancy. They agree on how joint tenancies may be severed. Where they part company is whether or not a deed by Ms. Lewis to herself ineffective at law could be given effect in equity.

Joint Tenancy:

[7] Joint tenancy is a very old doctrine of the common law and was well settled by the 18th century. William Blackstone says in his *Commentaries on the Laws of England*: Vol. 2 (Chicago: The University of Chicago Press, 1979)] at 180:

> The *properties* of a joint estate are derived from it's unity, which is fourfold; the unity of *interest*, the unity of *title*, the unity of *time*, and the unity of

> *possession*: or, in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

[8] The most significant consequence of holding land in joint tenancy is the right of survivorship. While there is only one title, more than one person enjoys that title. Blackstone says:

> This is the natural and regular consequence of the union and entirety of their interest. The interest of two joint-tenants is not only equal or similar, but also is one and the same. One has not originally a distinct moiety from the other; … while it continues, each of the two joint-tenants has a concurrent interest in the whole; and therefore, on the death of his companion, the sole interest in the whole remains to the survivor.

[9] These principles have been confirmed by innumerable courts over the intervening years (for a recent example, the appellant cites *Gill v. Hurst*, 2011 NSCA 100 at ¶ 47).

[10] A joint tenancy ceases – that is to say the single title ceases – upon severance which can occur in three ways:

1. By one party acting upon his or her own share – usually by a conveyance to someone else;
2. By mutual agreement between the joint tenants;
3. By words or conduct demonstrating a mutual intention to treat the joint tenancy as severed

See: *Williams v. Hensman*, [1861] EWHC Ch J51, per Sir W. Page Wood, V.C.

[11] The parties acknowledge that the only type of severance applicable here is that of a party acting on his or her own share or interest.

[12] The parties also agree that at common law a deed from a joint tenant to herself is not effective (*Rye v. Rye*, [1962] 1 All E.R. 146 (H.L.) at p. 150; *Presseau v. Presseau Estate*, 2010 NSSC 201 at ¶ 30 to 33). It conveys nothing. In reviewing the jurisprudence on this point it is important to keep in mind that the common law rule has been changed by the wholesale property law reform of 1925 in the United Kingdom and by statutory amendment of the common law in a number of Canadian jurisdictions. Nova Scotia has made no legislative change to the common law rule that a deed to oneself is ineffective.

The Role of Equity:

[13] The appellant correctly argues that equity can effect a severance of a joint tenancy in certain cases. For example, if one joint tenant expresses a clear intention to hold her interest in trust for another, then she will have been found to have disposed of her interest, (*Re Mee*, [1971] B.C.J. No. 694) BCCA). Similarly an agreement to convey one's joint tenant interest to a third party is a severance because the contract itself creates an equitable interest which passes to the third party, (*Lysaght v. Edwards* (1876), 2 Ch. D. 499 at 506, per Sir George Jessel, M.R.).

[14] The appellant submits that the conduct of Ms. Lewis in signing and recording a deed is a "binding and irrevocable declaration" whereby equity would recognize that unity of title had been destroyed. But the cases relied upon by the appellant do not support that submission. The "irrevocable declaration" in *Mee*, was in fact the creation of an enforceable trust in which legal and beneficial title were separated and a present equitable interest was created in favour of a third party. Likewise in *Stonehouse v. Attorney General of British Columbia* (1960), 26 D.L.R. (2d) 391, aff'd, [1962] S.C.R. 103, the "irrevocable" act of the joint tenant was the execution of a deed which in law was effective to convey title to a third party, without registration. In each of these cases it was not the joint tenant's declaration or intention that was effective to sever the joint tenancy; it was the act of *actually transferring* the interest in question – by trust and deed, respectively.

[15] The appellant also relies upon the comments of Justice Stirling in *Re Wilks: Child v. Bulmer*, [1891] 3 Ch. 59 that a joint tenant may sever his interest where his conduct: "… be such as to preclude him from claiming by survivorship any interest in the subject matter of the joint tenancy". Of course, this begs the question of what conduct achieves that result. In *Wilks*, a joint tenant had applied to sever the joint tenancy by way of a partition of interest. No final hearing occurred and no order issued. So despite the expressed intention of the applicant, no severance was effected.

[16] Canadian courts have not endorsed the severance of a joint tenancy by unilateral declaration, (*Walker v. Dubord*, 14 B.C.A.C. 81, (B.C.C.A.); *Sorensen v. Sorensen*, [1977] 2 W.W.R. 438 (Alta. S.C.A.D.). This is consistent with the principle that none of the "unities" of joint ownership is thereby destroyed. Certainly a unilateral declaration could create evidentiary problems, (Bruce Ziff, *Principles of Property Laws*, 3d ed. (Scarborough: Carswell 2000) at 311). This would be especially problematic where conveyancing and commercial practice favours certainty.

[17] The appellant also relies upon some *obiter* remarks of Justice Goodman in *Re Murdoch and Barry* (1976), 10 O.R. (2d) 626:

> In the present case the intention of the late Patricia Murdoch was clearly expressed in her affidavit of marriage status attached to the deed. She then executed and caused to be registered the deed in question. That constituted an irrevocable act on her part, the purpose of which was to sever the joint tenancy and it was an act which, in my opinion, constituted more than a mere declaration of intention but, rather, an endeavour on her part to carry out by her act the intention expressed in her affidavit. ***Even if the conveyance in question were not deemed to be a severance of the joint tenancy pursuant to the provisions of s. 42 of the Conveyancing and Law of Property Act, the declaration of intention in the affidavit coupled, with the execution and registration of the deed would, in my opinion, have effectively estopped her from claiming by survivorship*** any interest in the subject-matter of the joint tenancy in the event that she had survived the applicant. As she had by the conveyance precluded herself from claiming by survivorship any interest in the property, and following the dictum of Stirling, J., I conclude that by such acts she destroyed the joint tenancy.
>
> [Emphasis added]

[18] The chambers judge swiftly disposed of this argument:

> [15] There are two fundamental problems with the assertion that Ms. Lewis' invalid deed, and its registration, found an estoppel against Ms. Lewis that she can use to make the invalid deed achieve its purpose. Firstly, no interested party heard her. Secondly, had an interested party heard her it would be up to that person to decide whether or not to hold her to her word.
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> …
>
> [19] Therefore, I do not agree with the conclusion expressed in *obiter* in *Re Murdoch and Barry*. There was no estoppel because no interested party heard anything.

[19] With respect, Justice Goodman's *obiter* comment is simply wrong. It describes no recognized category of estoppel and is unsupported by authority. Nor is it sound in principle. An invalid deed which conveys nothing cannot sever a joint tenancy. A unilateral and uncommunicated act of one joint tenant that is ineffective at law should not be rescued by equity in the absence of inequitable conduct by the other joint tenant. For similar reasons, the *obiter* comments of Justice Tidman in *Roby's Estate v. Buley* 97 N.S.R. (2d) 191 at ¶ 34 cannot be relied upon by the appellant.

[20] The appellant criticises the chambers judge for saying that there was no communication of Ms. Lewis' intention to Mr. DeLong. He argues that communication is not always required for estoppel to arise and cites the case of the by-stander who watches someone improve his land without commenting. But the key to such cases is that one party innocently prejudices himself usually to the other's advantage, who looks on in silence. It is unsurprising that where a party has been so prejudiced (and the other arguably enriched), the latter may be precluded from asserting his strict legal rights. (See for example proprietary estoppel: *Maritime Telegraph and Telephone Company v. Chateau LaFleur Development Corporation*, 2001 NSCA 167 at ¶ 50.) No such circumstances obtain here.

[21] Finally the appellant resorts to the idea of "fairness" and says that if the roles were reversed, it would be unfair for Ms. Lewis to claim her right of survivorship against the estate, had Mr. DeLong predeceased, in light of her expressed intention to sever the right of survivorship. Two responses may be made. First, if Ms. Lewis' deed to herself was ineffective at law, it changed neither party's position; and so it would not be unfair for either to continue to rely on their existing legal rights. But more specifically, it could never be unfair or inequitable for Mr. DeLong to rely on his legal rights when he neither said nor did anything to prejudice Ms. Lewis. No estoppel can arise against him owing to *Ms. Lewis'* behaviour.

[22] The chambers judge did not err in law. The appeal is dismissed. I would order costs of $2500.00, inclusive of disbursements, payable by Mr. Penny to the personal representative of the Estate of Mr. DeLong. No costs should be paid to or by the personal representative for Ms. Lewis, who did not participate in the appeal.

Bryson, J.A.

Concurred in:

Oland, J.A.

Fichaud, J. A.