NOVA SCOTIA COURT OF APPEAL
Citation: *Roy v. Cashen Estate*, 2019 NSCA 62

Date: 20190718
Docket: CA 479601
Registry: Halifax

Between:

Deborah Roy

Appellant

v.

Brenda Michalski and Sheila Morgan as Personal Representatives of the Estate of Garnette Belle Cashen and Peter Landry

Respondents

Judge: The Honourable Justice Peter M. S. Bryson

Appeal Heard: May 27, 2019, in Halifax, Nova Scotia

Subject: **Real Property. Termination of Joint Tenancy**

Summary: Mother owned home in joint tenancy with her daughter, Deborah Roy. She wished Deborah Roy and a second daughter, Brenda Michalski, to inherit the home equally. She executed a quit claim deed to herself and Deborah Roy, intending to create a tenancy in common in equal shares. Mother's share would then pass by her will to Brenda Michalski. Deborah Roy was not told of the deed. After she died, Deborah Roy sought a declaration that the quit claim deed was invalid. Alternatively, she argued that it created a tenancy in common by which she now owned a 75% interest in the home.
Application judge declared the deed valid. Brenda Michalski and Deborah Roy were tenants in common each having a 50% interest in the home. Deborah Roy appealed.

Issues: (1) Did the deed sever the joint tenancy?
(2) If so, what percentage interests resulted?

Result: Appeal allowed in part. The quit claim deed severed the joint tenancy, resulting in Deborah Roy obtaining a 75% interest, while her mother retained a 25% interest, now held by the respondent personal representatives. The judge erred in refusing this outcome because it was not intended by Mother. Subjective intention is not relevant to construction of the deed. Estoppel arising from Deborah's silence was not established because no prejudice resulted.

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Judges:	Bryson, Saunders and Hamilton, JJ.A.
Appeal Heard:	May 27, 2019, in Halifax, Nova Scotia
Held:	Appeal allowed in part, per reasons for judgment of Bryson, J.A.; Saunders and Hamilton, JJ.A. concurring
Counsel:	Nicole MacIsaac, for the appellant
	G. F. Philip Romney, for the respondents Brenda Michalski and Sheila Morgan as Personal Representatives of the Estate of Garnette Belle Cashen
	Augustus M. Richardson, Q.C., for the respondent Peter Landry

Reasons for judgment:

Introduction:

[1] Can a joint tenant sever the joint tenancy by conveying her interest to herself and her joint tenant as tenants in common? The Honourable Justice Heather Robertson found that she could (2018 NSSC 186). Deborah Roy appeals that finding, relying on settled principles that a deed to oneself is ineffective at common law. Alternatively, she says that if effective, the deed resulted in her obtaining a 75 percent interest in the property.

[2] For reasons that follow, the latter submission prevails. The appeal should be allowed to that extent.

[3] Deborah Roy is a daughter of the late Garnette Belle Cashen who died on January 3, 2017. Mrs. Cashen owned a home in Dartmouth, Nova Scotia. It was her principal asset. On March 31, 2003, Mrs. Cashen conveyed that property to herself and Deborah Roy as joint tenants.

[4] On October 18, 2004, Mrs. Cashen quit claimed the property to herself and Deborah Roy, reciting her intention of severing the joint tenancy and making them both tenants in common.

[5] Deborah Roy was not aware of the 2004 deed until 2008 or 2009. Mrs. Cashen died in 2017.

[6] Mrs. Cashen also executed a will on October 18, 2004 naming two other daughters as co-executrixes and leaving her estate to her daughter, Brenda Michalski. Peter Landry was the lawyer who drafted the 2004 Deed and the Will. He intervened in the court below and gave evidence that Mrs. Cashen intended that her 50 percent interest in her home would pass through her will to her daughter, Brenda Michalski, so that Deborah Roy and Brenda Michalski would each own a 50 percent interest in her home and thus would be the principal beneficiaries of her estate.

The Issues:

[7] Deborah Roy lists six grounds of appeal in her factum:

1. Did the Learned Trial Judge err in determining that a deed from oneself to oneself and the other joint tenant is a valid conveyance.

2. Did the Learned Trial Judge err in finding that the 2004 Quit Claim Deed destroyed the unity of title and severed the joint tenancy between the Appellant and Mrs. Cashen.
3. Did the Learned Trial Judge err in failing to rule on the central argument of the Appellant, specifically, whether a deed to oneself and the other joint tenant is equally effective to sever the joint tenancy as a deed to oneself and a third party.
4. Did the Learned Trial Judge err in basing Her decision that the deed was valid on the intention of the late Mrs. Cashen, rather than the rules of severance.
5. Did the Learned Trial Judge err in failing to consider that the Appellant at no point consented to the 2004 Quit Claim Deed and that the deed was never delivered to the Appellant.
6. In the event that the 2004 Quit Claim Deed was a valid conveyance, did the Learned Trial Judge err in determining that the deed created an equal and undivided interest between Mrs. Cashen and the Appellant as tenants in common, and not a 25% interest to Mrs. Cashen and 75% to the Appellant, as would have been the result had she in fact conveyed her interest to herself and a third party.

[8] The fifth ground of appeal can be quickly disposed of. The validity of a deed does not turn on the grantee's consent. Nor need it be physically delivered. The grantor's intention to be bound suffices, to be gleaned from all the circumstances (*Re MacNeil Estate*, 2003 NSCA 121, ¶11-12). There is no evidence or argument that Mrs. Cashen did not intend the 2004 deed to be effective.

[9] Respectfully, the other grounds of appeal are largely repetitive. There are only two issues:

1. Is the 2004 deed effective to sever the joint tenancy?
2. If so, what interests were held by the tenants in common thereafter?

The 2004 Deed severed the joint tenancy:

[10] Relying on distinguishable authority, Ms. Roy argues that the 2004 deed should be construed as a deed by Mrs. Cashen to herself and therefore ineffective at common law. In *Penny v. DeLong Estate*, 2013 NSCA 74, this Court reaffirmed

uncontroversial authority that a deed to oneself is ineffective at common law (there have been statutory alterations to this principle in other provinces and in the United Kingdom).

[11] *DeLong Estate* describes how joint tenancies may be severed:

> [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.

[12] The executrices and Mr. Landry maintain that the 2004 deed severed the joint tenancy, because Mrs. Cashen was not simply conveying to herself, but also to Deborah Roy. Section 10 of the *Real Property Act*, R.S.N.S. 1989, c. 385 authorizes a conveyance to oneself and another:

> **Conveyance to self jointly with another or to spouse**
>
> 10. Freehold land may be conveyed by a person to himself jointly with another person, including his spouse, by the like means by which it might be conveyed by him to another person, and may in like manner be conveyed by a husband to his wife and by a wife to her husband, alone or jointly with another person.

[13] Deborah Roy responds that "another person" does not include someone who already holds an interest in the property. She cites no authority. This submission is wrong at law, irrespective of the statute. Although joint tenants have a common interest in one title, more than one person enjoys a right to that title. Deborah Roy's submission transforms the unity of title into unity of title holder.

[14] Mr. Landry also argues that Ms. Roy is bound by the doctrine of election, citing *Smith v. Beals Estate*, 2015 NSCA 93. He maintains that Ms. Roy cannot say the 2004 deed is not effective and that it only conveys a 25 percent interest. This submission confuses election with arguing in the alternative. In *Beals Estate*, Mr. Smith based his claim on the same deed on which the Estate relied, yet argued the deed was valid for him but not the Estate. This was a contradiction. Either the deed was valid or it wasn't. Mr. Smith could not argue "yes" in his case and "no"

for the Estate. That is not Ms. Roy's position, who argues alternatively that (a) the deed is invalid and alternatively (b) if valid, it conveyed an additional 25 percent interest to her.

The Deed created a 75/25 division of interest:

[15] The judge rejected this argument and agreed with Mr. Landry:

> [27] I find myself in agreement with the intervenor. The 2004 Quit Claim deed destroyed the unity of title and severed the joint tenancy. The deed converted the title into a tenancy in common. It did not alter the division of interests between Mrs. Cashen and Deborah. Each continued to share an equal and undivided interest in the property. On her death Mrs. Cashen's equal interest passed to her estate, not to Deborah. The estate received a one half interest in the house. By operation of her Will, Mrs. Cashen's interest went to Brenda. This accomplished Mrs. Cashen's intent to divide the value of the house between Brenda and Deborah.
>
> [28] To consider the argument that by the 2004 Quit Claim deed, Mrs. Cashen only effectively conveyed 25% of the property to herself and 25% to Deborah, with the effect that Deborah, upon her death, would have a 75% interest in the property, would create an absurd result not intended by Mrs. Cashen, whose instructions were clear: "to break the joint tenant agreement between myself and Deborah M. Roy to read as tenants in common".

[16] The judge rejected Ms. Roy's alternative argument that the 2004 deed created a 75-25 division of interest because Mrs. Cashen did not intend that outcome. Ms. Roy correctly objects that Mrs. Cashen's subjective intention is irrelevant (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, ¶58; *Purdy v. Bishop*, 2017 NSCA 84, ¶16). Absent consideration of a "factual matrix", interpretation of a deed is a question of law (*Cook v. Podgorski*, 2013 NSCA 47, ¶12; *Metlin v. Kolstee*, 2002 NSCA 81, ¶70; *Mawhinney v. Scobie*, 2019 ABCA 76, ¶20; *Tim Ludwig Professional Corporation v. BDO Canada LLP*, 2017 ONCA 292, ¶29).

[17] The argument that a 50 percent joint tenant's conveyance to herself and her co-joint tenant would create a tenancy in common of 50 percent each presumes that the grantor could convey her co-tenant's interest. One cannot grant what one does not have.

[18] A joint tenant can only act upon *her* interest. When Mrs. Cashen deeded her home held in joint tenancy with Deborah to herself and Ms. Roy, she could only act upon her half interest. By making herself and Ms. Roy grantees as tenants in

common, she could only be releasing *her* interest, not her daughter's. The following example is illustrative of this point: where there are three joint tenants and one conveys her interest to one of the other joint tenants, only the interest of the conveying joint tenant is severed—the conveyance does not sever the whole of the joint tenancy. The transferee becomes a tenant in common with respect to a one-third interest but is a joint tenant with the remaining tenant with respect to a two-thirds interest (*Jansen v. Niels Estate*, 2017 ONCA 312 at ¶27).

[19] The judge was also attracted to Mr. Landry's submission that some kind of estoppel argument could be raised against Deborah Roy once she learned what her mother had done. Mr. Landry argued, "She knew that Mrs. Cashen had taken an action that Mrs. Cashen thought sufficient to give effect to that desire [of creating an equal tenancy in common]. Yet Deborah stood by and let Mrs. Cashen act in reliance upon her belief that she had effected a severance. Had Deborah objected prior to Mrs. Cashen's death … Mrs. Cashen could have taken additional steps to secure her intention to provide for Brenda."

[20] The judge characterised this as inequitable:

> [29] Nor can an equitable result ensue if the 2004 Quit Claim deed were to be treated as a nullity in light of Deborah's awareness of her mother's wishes and intentions from some time in 2009 forward. This was an admission by her own testimony on cross-examination. She consulted her own legal counsel, received the opinion that the Quit Claim deed was not effective in severing the joint tenancy, and chose to wait until after her mother's death to voice her objection. She stated in her affidavit that she "did not want to upset my mother" as reason for her silence. In my view, this is a disingenuous statement in light of her mother's obvious wish to sever the joint tenancy and benefit two of her daughters, Brenda and Deborah. Deborah ought to have straightforwardly voiced her objection and resolved the matter during her mother's life.

[21] The judge thought that Mrs. Cashen was prejudiced by Deborah Roy's silence:

> [25] I agree that if Mrs. Cashen had been made aware of Deborah's objection to her attempt to sever the joint tenancy and create a tenancy in common between them, Mrs. Cashen would very likely have further consulted her legal counsel to ensure her wishes were effectively carried out at law. She could, for instance, have executed a deed conveying her interest to Brenda outright, rather than via her Will.

[22] Mr. Landry's submissions and the judge's observation assume an erroneous view of the law of estoppel. To found an estoppel one must establish:

1. An unambiguous representation.
2. Reliance on that representation.
3. Detriment to the representee from that reliance.

See: *Downey v. Halifax Port International Longshoremen's Association*, 2012 NSCA 49 at ¶47; *DeLong Estate*, ¶20.

[23] Silence as acquiescence may sometimes constitute a representation, giving rise to an estoppel. Even if one could construe Ms. Roy's silence in this way, the problem here is that there is nothing Mrs. Cashen could have done differently once she had signed the 2004 deed. That deed was effective in law and could not be retrieved by another deed "conveying her interest to Brenda outright, rather than via her Will" as suggested by the judge, because Mrs. Cashen then no longer owned a 50 percent undivided interest in the home. Rectification of the 2004 deed was neither sought nor argued in the court below. Nor could Mrs. Cashen have compensated for her error by making other arrangements in her will because her home was her principal asset.

Conclusion:

[24] Mrs. Cashen's 2004 deed to herself and her joint tenant, Deborah Roy, was effective to terminate the joint tenancy and create a tenancy in common with Mrs. Cashen retaining a 25 percent interest in her home. Deborah Roy's interest increased to 75 percent.

[25] According to Mr. Landry, this result does not accord with Mrs. Cashen's intention. While that is unfortunate, it is the natural consequence of what she actually did. There were other ways she could have severed the joint tenancy without this outcome. An obvious one would have been to grant her interest to her lawyer who would then reconvey to her. The joint tenancy would become a tenancy in common, with Ms. Roy maintaining her 50 percent interest. Or she could have conveyed her interest directly to Brenda Michalski. In any event, the means employed failed to implement the result intended.

[26] Ms. Roy has been partially successful. I would order costs of $2,000.00, inclusive of disbursements, to be paid by the respondents ($1,000.00 from each).

Bryson, J.A.

Concurred in:

Saunders, J.A.
Hamilton, J.A.