

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

SVGHCV2011/0397

**IN THE MATTER OF AN APPLICATION BY EDMUND SMITH FOR PARTITION OF A PARCEL OF
LAND SITUATE AT ORANGE HILL**

BETWEEN

**EDMUND SMITH (Deceased)
(By representative Jasmine Josette Ellis-Davy
and/or Bernard Brown pursuant to rule 21.7 of the CPR)**

CLAIMANT

and

CAROL JARDINE

DEFENDANT

Consolidated with

SVGHCV2012/0177

BETWEEN

CAROL JARDINE

CLAIMANT

and

JOSETTE ELLIS DAVY

1st DEFENDANT

MARLON DA SILVA

2nd DEFENDANT

Appearances:

Mr. Emery Robertson Snr. for the claimant and 1st and 2nd defendants.
Mr. Duane Daniel for the defendant/claimant.

2016: Nov. 15
Dec. 7

JUDGMENT

BACKGROUND

- [1] **Henry, J.:** Edmund Smith deceased reportedly fathered around 40 children including Carol Jardine, Marlon Browne, Josette Ellis-Davy and Marlon Da Silva. He owned approximately an acre of land at Orange Hill on which he built his house and resided. From all accounts, he maintained an excellent relationship with Carol Jardine. As he got older, he agreed to transfer the subject property to himself and her as joint tenants. Subsequently, unhappy differences arose between them and he instituted action against her in 2011 for partition of the land. He alleged that she refused to take care of him financially as she had previously agreed and that he wished to have his own separate parcel of land from which to make a living to cater for his personal needs. Ms. Jardine opposed the claim.
- [2] The matter was not resolved during Mr. Smith's lifetime. After his demise, Marlon Browne and Dr. Josette Ellis-Davy were substituted to represent his estate in the claim he brought against Ms. Jardine. Marlon Da Silva took up occupation of the subject house shortly before Mr. Smith's death. Ms. Jardine brought her own action against him and Dr. Josette Ellis-Davy in which she sought a number of reliefs including vacant possession of the property; a declaration that she owned it absolutely; and damages for trespass. Both actions were consolidated and set down for trial on November 15th, 2016. After the trial had partially progressed, Ms. Jardine indicated to the court that she wished to withdraw her claim. It was dismissed and all remedies claimed in that suit by her were denied.
- [3] The trial proceeded in relation to the sole issue of the long-standing action for partition. Dr. Ellis-Davy, Mr. Browne and Mr. Da Silva seek an order that the estate is entitled to at least a half of the subject property and that it should be divided equally among all the beneficiaries of Mr. Smith's estate. Ms.

Jardine conceded that the issue of partition is no longer alive and that the only remaining question is, to what share in the subject property is she and the beneficiaries of Edmund Smith's estate entitled? She submitted that she is entitled to one half of the entire property.

ISSUE

- [4] The sole issue is to what share in the disputed property is Ms. Jardine and Edmund Smith's estate entitled?

ANALYSIS

Issue – To what share in the disputed property is Ms. Jardine and Edmund Smith's estate entitled?

- [5] The subject property is registered by Deed of Gift No. 2779 of 1999¹. It was executed between the donor Edmund Smith and donees Edmund Smith and Carol Jardine nee Dabriel as joint tenants. Dr. Josette Ellis-Davy, Marlon Da Silva and Bernard Brown confirmed this. The deed was produced into evidence by Ms. Jardine. The schedule describes the property as:

'... parcel of land situate at Orange Hill in the Parish of Charlotte ...
containing ... 44,176 sq. ft. as is more particularly shown and described
on the plan drawn by Kenneth Da Silva ... bearing plan number C1161 ...
butted and bounded on the North by the Windward Highway on the South
by Lot No. 2 on the East by the Windward Highway and on the West by Lot
No. 4 on Plan C888 ...'.

- [6] Carol Jardine acknowledged that she and her late father Edmund Smith owned the subject property at Orange Hill as joint tenants. She attested that he died intestate on 19th April 2012 and she produced a death certificate in proof. Ms. Jardine alleged that Marlon Da Silva moved into the property two days before Mr. Smith died and told her that Dr. Ellis-Davy gave him permission to do so. She averred that prior to his death Mr. Smith lived on the property alone, that neither Dr. Ellis-Davy nor Mr. Da Silva lived there before and that their occupation of the property took place after Mr. Smith's demise. Mr. Da Silva acknowledged that Edmund Smith's name does not appear on his birth

¹ Registered on 26th August, 1999.

certificate. Notwithstanding, there seems to be little dispute that he is recognized as one of the deceased's many children. He testified that he lived with Edmund Smith on and off for three years before he died. He stated that he stayed in the house after his father's death and has lived there since.

- [7] Ms. Jardine testified that Edmund Smith's name does not appear on Dr. Ellis-Davy's or Mr. Da Silva's birth records and that they have made no application for posthumous declaration of paternity to effect such entry. She complained further that the property is no longer kept in the condition it once was has fallen into disrepair, and been diminished in value. She claimed that items were removed from it which she purchased including a stove, dining chairs, fridge, dressing table, coffee table space saver, two seater from a living room set, two beds, gas bottle head and hose, area rugs, cds, VCR player, toaster, kettle, curtains, tv, various items of crockery and linen. Mr. Da Silva denied removing any items from the property. He testified that the rug was wet and he removed it as it was smelling up the house. Those concerns arose from Ms. Jardine's claim and were disposed of when she discontinued her action.
- [8] Ms. Jardine recounted a list of services she provided for Mr. Smith following his hospitalization in 1988. In this regard, she stated that he suffered a mini stroke and was admitted to the hospital in Georgetown. She alleged that she took him clothing and other necessities and on his release she took him lunch each weekend, paid for the services of a domestic helper to clean for him and do his laundry, arranged for him to visit the doctor and dentist, paid the insurance premiums and license registration for his passenger van and assisted him with payment of child support. She explained that she oversaw the construction of his new property, purchased furniture for the house and paid his land and house taxes and all of his funeral expenses.
- [9] Ms. Jardine indicated that her father transferred part ownership of the property to her out of gratitude for all she had done for him. She testified that no condition was attached to her taking an interest in the property and there was no stipulation that she take care of him in exchange. She maintained that everything she did for her father was out of love and affection and not by contractual obligation.
- [10] Ms. Jardine acknowledged that she and her father had a falling out in 2010 and that he instituted proceedings to sever the joint tenancy. She admitted that she opposed the suit and that she did not

agree with him. Ms. Jardine denied entering into settlement discussions with her father to partition the land or that the land was not surveyed with a view to partitioning it. She was quite adamant. She also denied that any agreement was arrived at regarding how to partition the land. She testified that Mr. Smith told her that on his death the property would be hers. She initially asserted that the entire property now belonged to her. However, she subsequently accepted and submitted that she was entitled to a half share. She was insistent that she is entitled to a ½ share of both the land and house.

- [11] Ms. Jardine's witnesses Helen Baptiste, Sydney Cumma, Battica Abbott-Balcombe, Edwin Thomas and Talmon Medica testified about Ms. Jardine's relationship with Edmund Smith and the assistance she rendered to him as recounted by her. They were not cross-examined. Their testimony did not shed any light on the issue under consideration.
- [12] Dr. Josette Ellis-Davy testified that when her father became old, he had an arrangement with Ms. Jardine whereby Ms. Jardine undertook to take care of him in exchange for a share in his property. She alleged that around 2008 and 2009, her father consistently complained to her that Ms. Jardine failed to honour her commitment to him, was neglecting and verbally abusing him and threatened to send him to the Lewis Punnett home – a home for the elderly. Ms. Jardine denied this. Dr. Ellis-Davy alleged that things got so bad that the electricity was disconnected and Mr. Smith was left in the dark. Dr. Ellis-Davy averred that she had to assist her father with payment of child support in April 2011.
- [13] Dr. Ellis-Davy testified that her father was devastated, depressed and helpless and he tried to sell a piece of the land but was prevented from doing so by Ms. Jardine. She averred that Mr. Smith realized that he could do nothing with the property without Ms. Jardine's consent and he therefore obtained legal advice as a result of which he decided to sever the joint tenancy to regain control of his house. She stated that Mr. Smith, deceased determined that the other half would go to Ms. Jardine for all she had done for him. She indicated that after his disputes with Ms. Jardine, her father asked her to take care of him and she gladly accepted. She stated that she proceeded to Cuba to pursue post graduate studies and left her brother Marlon Da Silva and husband Wilmoth Davy to care for her father.
- [14] Dr. Ellis-Davy indicated that no survey was conducted to effect partition of the property while her father was alive because he did not have the means to pay for the survey and Ms. Jardine insisted

that he bear the cost.

- [15] Bernard Brown testified that his father Edmund Smith married his mother Magdalene Browne in 1966 and the union produced 3 children. He did not add any material details to the issue at hand. His testimony revolved around a description of the relationship his father had with his mother and siblings and the final days of Mr. Smith's life.
- [16] Mr. Edmund Smith swore an affidavit on 14th October, 2011 which was filed² on this matter. None of the parties relied on its contents. It was not considered. It is clear from the evidence that there is no love lost among the parties. Sadly, as so often happens in this jurisdiction, the deceased's children are fighting passionately over his property. I believe Dr. Ellis-Davy's account regarding the reasons why Mr. Smith sought to partition the subject land. I also accept her testimony that Mr. Smith still intended Ms. Jardine to retain a half share in the property. From all accounts, Mr. Smith was fiercely defensive of his right to choose how to socialize even if Ms. Jardine did not approve of his wishes to associate with younger women. This appears to have been one of the ancillary reasons for the rift in that relationship. It is unnecessary for present purposes to particularize the background to that subplot.
- [17] Ms. Jardine has submitted that since the Deed of Gift does not apportion specific shares to the owners and the law presumes that joint tenants own undivided half shares in property held by a joint tenancy, her share is one half of the subject property. She relied on the cases of **Re Draper's Conveyance**³ and **Williams v Hensman**⁴ in support. She contended that there was no common intention between her and Edmund Smith regarding how severance was to be effected. She argued that it is fair, equitable that she be awarded a half share in the property and that it would be unjust, inequitable and unconscionable to strip her of her status as a joint and equal owner and place her among the other beneficiaries of Edmund Smith's estate on intestacy.

² On 17th October, 2011.

³ [1969] 1 Ch 486.

⁴ (1861) 1 J & H 546.

- [18] Dr. Ellis-Davy, Mr. Marlon Da Silva and Mr. Browne posited that joint tenants can hold property in unequal shares. They contend that when Mr. Smith died, the joint tenancy was already severed. They argue that it would be inequitable to award a ½ interest to Ms. Jardine and the court should look at the parties' intentions and determine what is just. Like Ms. Jardine, they mentioned that the deed did not contain any statement as to the proportion in which Mr. Smith and Ms. Jardine held the property. They urged that each of Mr. Smith's 40 children was entitled to share equally in the subject property. No legal authority was cited in support of this contention. I can find none.
- [19] Dr. Ellis-Davy's, Mr. Browne's and Mr. Da Silva's written submissions were filed belatedly⁵, some eleven days after the deadline for filing. They consisted of short sentences and jottings which in some parts were disjointed. Only those portions which are coherent will be considered. They submit that the joint tenancy was severed by Mr. Smith by the filing of his application for partition. Like Ms. Jardine, they also relied on the learning in **Re Draper's Conveyance**³.
- [20] It is trite law that a joint tenancy creates legal interests in property whereby the owners hold the legal estate equally in undivided shares. The decisions in **Re Draper's Conveyance** and **Williams v Hensman** correctly articulate the applicable English law regarding severance or partition of a joint tenancy. Those cases illustrate that a joint tenancy may be severed:
- (1) by the owners by:
 - (a) mutual agreement; or by one of them:
 - (b) them dealing with the property in a manner which demonstrates a mutual agreement that the property is owned by them as tenants in common; or
 - (2) by one of the owners making a declaration of his desire to sever the joint tenancy.
- [21] In **Re Draper's Conveyance**, it was held that severance of a beneficial joint tenancy was effected by a summons and the affidavit in support seeking such an order. In that case, the court examined the provisions of section 36 of the Law of Property Act, 1925 which prohibited severance of the legal estate in a joint tenancy but permitted severance of the equitable interest. It held that by filing a summons for partition, the petitioner wife had successfully severed the equitable interest held by her and her husband in the subject property.

⁵ On November 28th, 2016.

- [22] In **Williams v Hensman**, the court found that the parties who were joint tenants, conducted their affairs in relation to the property as if they held distinct and separate shares in it. The court held that by their conduct, they had demonstrated that they owned individual shares and had thereby effected a severance of the joint tenancy.
- [23] In Saint Vincent and the Grenadines, the applicable statutes are the Partition Act⁶ and 31 Hen.8 c.1 Act for Joint Tenants and Tenants in Common, 1539, the latter of which was retained as part of the domestic law by the Schedule to the Application of English Law Act⁷. Both statutes reflect the legal position which obtained in England prior to enactment of the Law of Property Act 1925. The principles applied in the referenced cases are therefore of some application in the case at bar. To the extent that they are relevant they are adopted and applied for present purposes.
- [24] The Act for Joint Tenants and Tenants in Common, 1539⁸ among other things empowered a joint tenant to institute action in court to partition the joint tenancy. This power was not limited to severance of a beneficial joint tenancy but extended to a legal joint tenancy or tenancy in common⁹. Partition in those circumstances was effected formally by order of court referred to as a writ of partition. The writ of partition was abolished in England but effectively subsists in Saint Vincent and the Grenadines by virtue of this legislation.
- [25] The Partition Act¹⁰ stipulates that an action for partition includes an action for sale and distribution of the proceeds¹¹. It also authorizes the court (if it was satisfied that such order would be more beneficial to the parties) to make an order for sale of the property instead of an order dividing it.¹² In exercising its discretion to order sale instead of partition, the court is required to take into account all

⁶ Cap. 327 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

⁷ Cap. 12, Part II of the Schedule.

⁸ Sections 1 to 3.

⁹ City of London Building Society v Flegg and another [1988] A.C. 54.

¹⁰ Cap. 327 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

¹¹ Section 15.

¹² Section 3.

material circumstances including the nature of the property, the number of interested or presumptively interested parties and the absence or disability of any party.¹²

[26] It is trite law that where persons own the beneficial interest in land as joint tenants, none of them is entitled to a distinct and separate part of the land. They each own all of the land. Accordingly, the last surviving joint tenant will succeed to complete interest of the property on the death of the other joint owners, unless the joint tenancy is earlier severed. Severance or partition of an express joint tenancy results in each owner obtaining an equal share.¹³ Mr. Smith deceased and Ms. Jardine are the sole joint tenants.

[27] The principle affirmed in **Re Draper's Conveyance** established that one joint tenant may sever the joint tenancy by instituting legal action to accomplish this. Applying that principle to the facts of the instant case, Mr. Edmund Smith achieved such a result by filing his application on 17th October, 2011. The joint tenancy created by Deed of Gift 2779 of 1999 was therefore severed on that date and I so find. From that date, Ms. Jardine and Mr. Smith became tenants in common in equal shares in respect of their ownership of the subject land. Accordingly, Mr. Smith's estate and Ms. Jardine are each entitled to a one half share in the subject property.

[28] Neither party supplied evidence of the orientation, physical or other features of the subject property. In the absence of such particulars, the court is unable to ascertain if the property can be equitably and conveniently divided to the parties' optimum benefit. No valuation was produced in the proceedings. In all the circumstances, I have formed the view that it is more beneficial to order sale of the subject property and division of the proceeds between the parties. I therefore order that the parties arrange a valuation of the subject property to facilitate sale on or before February 28th, 2017.

[29] The parties are to collaborate in selecting the valuator, advertising the sale and meeting the related expenses including payment of outstanding property taxes. Mr. Da Silva is required to grant access of the subject property to the agreed valuator, sales agent and/or auctioneer and prospective purchasers. He is to vacate the property on or before January 31st, 2017 and deliver all keys to the

¹³ Halsbury's Laws of England, Vol. 23 (2016), para. 20.

Registrar of the High Court who will be responsible for executing the conveyance to the new owner and disbursing the proceeds of sale. The Registrar is required to hold any sums due to Edmund Smith's estate, in an interest bearing account pending the appointment of a legal personal representative by the probate division of the High Court. On such appointment, the Registrar will pay those funds to such legal personal representative for distribution to the beneficiaries of Mr. Smith's estate in accordance with the law.

[30] None of the parties have prevailed in these proceedings. It is therefore fitting that each party should bear his or her own costs. That is the order.

ORDER

[31] It is accordingly declared and ordered:

1. The joint tenancy in the subject property was severed on 17th October 2011 when Mr. Edmund Smith filed his application to partition the subject land.
2. Edmund Smith's estate and Carol Jardine are each entitled to a one half beneficial interest in the subject property described in Deed of Gift No. 2779 of 1999.
3. The property registered by Deed of Gift 2779 of 1999 is to be sold by public auction or private treaty on or before February 28th, 2017.
4. The parties are to jointly arrange for:
 - (1) a valuation of the property to be conducted on or before 23rd December, 2016 by a licensed property valuator and agree a date for inspection of the property. For this purpose, Marlon Da Silva, his servants and/or agents are to grant full access to the valuator to carry out this inspection.
 - (2) the subject property to be sold by public auction or private treaty on a fixed date, and for such sale to be advertised in at least three consecutive issues of two newspapers circulating in Saint Vincent and the Grenadines, the first such publication to be made on or before 6th January, 2017.

- (3) sale of the said property by:
 - (a) private treaty by an agreed real estate agent; or
 - (b) public auction by an agreed auctioneer;to the highest bidder or offeror, at a minimum price of at least 80% of the market value ascribed in the valuation referenced in sub-paragraph (1); with the stipulation that the full purchase price is payable in cash, by bank draft or certified cheque to the Registrar of the High Court.
- (4) the selected real estate agent or auctioneer to transmit to:
 - (a) the Registrar of the High Court within 24 hours of such agreement the:
 - (i) details of any concluded sale; and
 - (ii) full purchase price.
 - (b) Ms. Carol Jardine, Mr. Bernard Brown, Dr. Josette-Davy and Mr. Marlon Da Silva or their duly appointed agent the details of any concluded sale.
- 5. The parties are to jointly meet the expenses associated with the valuation, advertisements, services provided by the real estate agent and auctioneer, land taxes and all related expenses including all vendors' fees associated with preparing and registering the deed of conveyance to the new owner. Alternatively, those expenses are to be raised from the property and paid from the proceeds of sale.
- 6. Any of the parties interested in the sale may submit an offer or bid to purchase the said property and such offer or bid shall be considered by the real estate agent or auctioneer in like manner as any other.
- 7. The defendant Marlon Da Silva, his servants and/or agents are directed to:
 - (1) grant free and full access of the property, between the hours of 5.00 pm and 7.00 pm Monday to Friday, and between the hours of 4.00 pm and 6.30pm Saturday and Sunday except Christmas Day, Old Year's Day or any public holiday to:
 - (a) any interested purchaser who expresses an interest in viewing the property for the purpose of making a bid or offer; and
 - (b) the agreed real estate agent and auctioneer, to enable them to make all necessary arrangements related to the sale.

- (2) On or before 31st January, 2017, deliver up vacant possession of the subject property and deliver all keys to the subject property to the Registrar of the High Court.
8. On receipt of the full purchase price, the Registrar of the High Court is directed to forthwith:
- (1) deliver the keys to the subject property to the purchaser;
 - (2) execute a deed of conveyance transferring the subject property to the purchaser; and
 - (3) arrange for registration of the conveyance and delivery of the registered Deed of Conveyance to the purchaser.
9. The Registrar shall apply the proceeds of sale towards:
- (1) firstly, payment of any expenses associated with the sale of the subject property, including the valuation, advertisements, real estate agent and/or auctioneer's fees, land taxes and registration and transfer fees; and
 - (2) secondly, payment to Carol Jardine and the legal personal representative of Edmund Smith's estate each, 50% of the balance.
10. The registrar shall hold the sums due and payable to the legal representative of Edmund Smith's estate, in trust, in an interest bearing account at a licensed financial institution until the appointment of such legal personal representative by the probate division of the High Court.
11. Each party shall bear his or her own costs.

[32] I wish to thank counsel for their submissions.

.....
Esco L. Henry
HIGH COURT JUDGE