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Severing a joint tenancy in Alberta

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Case Commented On: *Dobransky v Roteliuk*, 2018 ABQB 660 and *Smilley v McMillan*, 2018 ABQB 988.

Co-owners in Alberta may choose to hold an estate in land as joint tenants or as tenants in common: *Law of Property Act*, RSA 2000, c L-7, sections 4 and 5 (*LPA*). A joint tenancy carries with it the incident of survivorship - that is, the right of the surviving joint tenant to the entire estate. Despite the fact that there is a presumption in favour of a tenancy in common and that therefore co-owners must indicate expressly that they wish to own as joint tenants and not as tenants in common (*LPA*, section 8), there is general agreement (and this was certainly the position of courts of equity) that it should be easy to destroy or sever the joint tenancy thereby avoiding the incident of survivorship. This post sets out the law of severance and then comments on two recent decisions in each of which the plaintiff sought to get the Court's assistance to complete a severance.

The nineteenth century case of *Williams v Hensman* (1861), 70 ER 862, 1 J & H 546 (Ch) still offers useful guidance on the law of severance:

> A joint-tenancy may be severed in three ways: *in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share*. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the *jus accrescendi*. *Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund - losing, of course, at the same time, his own right of survivorship*. Secondly, a joint-tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, 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 … (emphasis added)

It is perhaps important to emphasize that severance law has never required the agreement of the joint tenants. Any one joint tenant has always been able to destroy for herself the power and the disability associated with the joint tenancy, but only as to her own share (method 1 of severance in *Williams v Hensman*).

In thinking about the law of severance it is useful, even in a Torrens jurisdiction, to think about severance in law and severance in equity. Thus, it was well recognized that if A and B held as joint tenants, an agreement by B to sell her share to C would effect a severance in equity of the joint tenancy between A and B, even if severance in law would require a deed. A severance in equity would be effective against the entire world except as against equity's darling, the bona fide purchaser of the legal estate without notice. This conclusion is based on *Walsh v Lonsdale* (1882), 21 Ch D 9 (CA) and the proposition that equity sees as done that which ought to be done. The Supreme Court of Canada's decision in *Semelhago v. Paramadevan*, [1996] 2 SCR 415, 1996 CanLII 209 (SCC) casts doubt on this proposition in Canada but it must still be the case that a written declaration of trust by B in favour of C will still sever in equity if not in law because it is an effective gift by B to C: see *Sorensen (Estate) v Sorensen*, 1977 CanLII 1648 (AB CA). Furthermore, *Sorensen* confirms that the severance by declaration of trust will be effective even as against the surviving joint tenant in a Torrens system. This is logical since the surviving joint tenant is not a purchaser. Thus, while A might be the owner of estate in law, in equity A holds a 50% interest for herself and a 50% interest in trust for C. C's interest is vulnerable to a party transacting for value on the register unless and until C files a caveat to protect her interest.

Following *Sorensen*, the Alberta legislature, perhaps out of concern that "severance off the register" with no notice to the other party might be used as an instrument of fraud, amended the *Land Titles Act*, RSA 2000, c L-4 (*LTA*) to include what is now section 65 (added by SA 1985, c 48) which provides as follows:

> Registration of transfer affecting joint tenancy
>
> **65** The Registrar shall not register a transfer that has the effect of severing a joint tenancy unless
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> (a) the transfer is executed by all the joint tenants,
>
> (b) all the joint tenants, other than those executing the transfer, give their written consent to the transfer, or
>
> (c) the Registrar is provided with evidence satisfactory to the Registrar that all the joint tenants who have not executed the transfer or given their written consent to the transfer have by
>
> (i) personal service, or
>
> (ii) substitutional service pursuant to a court order,
>
> been given written notice of the intention to register the transfer.

If this provision was intended to abolish severance off the register, there are a number of reasons for questioning whether it achieved its goal. First, the section is titled "Registration of transfer affecting joint tenancy." Thus, it is a section concerned with registration and therefore it deals with severance of the legal estate, rather than severance in equity. Second, the section does not mention severance at all. Third, there are many estates in land (e.g. leasehold estates in Crown lands) that are held outside the *LTA*. Given these considerations it is hard to conclude that this

section was laying out a set of rules for severance rather than simply a set of rules for registration. After all, the more logical statute to deal with the general rules of property law is the *LPA* not the *LTA*. In sum, I believe that section 65 is concerned with severance of the legal estate; it does not touch severance in equity.

The same statute that enacted section 65 of the *LTA* also amended the *LPA* to provide additional flexibility to a joint tenant seeking to sever. In particular, it established the statutory power of a joint tenant to convey to herself as a tenant in common, something that was not possible in the common law. Thus, since 1985, section 12 of the *LPA* has provided that:

> **12(1)** An interest in real or personal property may be validly conveyed
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> (a) by a person to that person jointly with another person,
>
> (b) by 2 or more persons to one or more but not all of themselves,
>
> (c) by 2 or more persons to any one or more of themselves and some other person,
>
> *(d) by a person who holds the property as a joint tenant to that person as a tenant in common,*
>
> *(e) by joint tenants to themselves as tenants in common, or*
>
> (f) by tenants in common to themselves as joint tenants,
>
> to the same extent and in the same manner as the interest might be conveyed to a third party.
>
> ….
>
> **(3)** A transfer by a person as a joint tenant to that person under subsection (1)(d) has, on the registration of the transfer under the *Land Titles Act*, the same effect of severing the joint tenancy as a transfer to another person. (emphasis added)

While subsection (3) might cause a reader to question my earlier conclusion with respect to severance in equity it is my view that if the purpose of subsection (3) was to stipulate that there could be no severance without registration (i.e. no severance in equity) much more explicit language would have been required to achieve this result.

Now to the two recent cases.

Dobransky v Roteliuk

The facts and the judicial history of *Dobransky v Roteliuk* are complicated, but for my purposes the principal points are that: (1) in 1984 WD transferred an estate in land to himself and his daughter MR as joint tenants; (2) in 2009 WD prepared and served a Notice of Intention to Register a Transfer of Land under section 65(c) of the *LTA*; (3) in 2010 MR (the judgment suggests that this was commenced by BC, another daughter who subsequently became WD's personal representative) commenced an action claiming that the transfer was an *inter vivos* gift (and on the concept of an "irrevocable" joint tenancy in this context see an earlier post here); (4) in 2010, in the context of MR's action, Justice Browne issued an order *inter alia* declaring "that

the joint tenancy of William Dobransky [WD] and Marjorie Roteliuk [MR] with respect to the property … is severed effective immediately" and that "[t]he Registrar of the North Alberta Land Registration District be and hereby is directed to register the property in the name of WD ... and MR ... as Tenants in Common"; (5) MR was authorized to file a caveat against WD's interest (presumably to allow her to maintain her argument that the 1984 transfer was a gift); (6) the Registrar declined to register the change in ownership apparently because certain forms were missing; (7) WD died August 2014, and; (8) on May 12, 2015 MR filed an Affidavit of Surviving Tenant with the Land Titles Office and was duly registered as the sole owner.

On those facts, BC as WD's personal representative, brought an application to have the title to the land rectified to give effect to Justice Browne's Order (i.e. to have title issued in the names of WD (estate) and MR as tenants in common). Justice Bokenfohr granted the application. I think that this is perfectly consistent with the state of the law as outlined above. At the very least Justice Browne's Order served to sever the tenancy in equity. MR could not take free of that severance since she was a party to the Order and was not a purchaser for value on the faith of the register; she was in no better position than Mr. Sorensen in *Sorensen v Sorensen*.

Smilley v McMillan

S and M were adult interdependent partners. They were together from 1997 until October 2018. They bought a residential property which they held as joint tenants. S received a cancer diagnosis in July 2017 and a further terminal diagnosis on October 18, 2018. Earlier in October she had told M that she wished to terminate their relationship. S brought this application to sever the joint tenancy. M resisted on the basis that the Court lacked jurisdiction to make the Order.

Justice Hall concluded that he had jurisdiction and granted the Order. In reaching that conclusion Justice Hall referred to two other statutory provisions in addition to those recited above, namely sections 15 and 19 of the *LPA* which are found in Part 3 of that Act dealing with Partition Sale. These provisions read as follows:

> 15 (1) A co-owner may apply to the Court for an order terminating the co-ownership of the interest in land in which the co-owner is a co-owner.
>
> (2) On hearing an application under subsection (1), the Court shall make an order directing
>
> > (a) a physical division of all or part of the land between the co-owners,
> >
> > (b) the sale of all or part of the interest of land and the distribution of the proceeds of the sale between the co-owners, or
> >
> > (c) the sale of all or part of the interest of one or more of the co-owners' interests in land to one or more of the other co-owners who are willing to purchase the interest.
>
> ….
>
> 19 If the interest in land that is the subject of an order is held in joint tenancy, the order on being granted severs the joint tenancy.

Justice Hall agreed with M (at para 35) that these provisions are not available because there was no application for partition or sale before him.

Justice Hall next turned (at para 37) to Rule 1.3 of the Rules of Court which allows the Court to "give any relief or remedy described or referred to in … any enactment" and section 8 of the *Judicature Act* which allows the Court to grant "all remedies whatsoever" to which a party appears to be entitled. Justice Hall concludes that these provisions allow him to grant "the relief" contemplated by section 12 of the *LPA*, that is to say a transfer to oneself as a tenant in common. Furthermore, he concluded (at para 39) that "by bringing this application before the Court, and serving it upon the Respondent, the Applicant has satisfied the requirements of s. 65(c) of the *Land Titles Act*."

In the end Justice Hall made the following Order:

1. It is hereby declared that Ms. Smilley and Mr. McMillan's joint tenancy ownership of the Property is severed, transforming their co-ownership relationship into a tenancy in common;
2. It is hereby declared that Ms. Smilley has transferred the Property to herself as a tenant in common under section 12 of the *Law of Property Act*;
3. It is hereby declared that Ms. Smilley has satisfied the notice requirement set out in section 65(c) of the *Land Titles Act*;
4. The Registrar of Titles is hereby directed to register the Property in the names of Ms. Smilley and Mr. McMillan as tenants in common; and
5. This Order, to the extent necessary, is *nunc pro tunc* to Friday, November 16, 2018;

The principal and fatal flaw in this line of reasoning is that section 12 of the *LPA* is not a remedies section. It simply describes the powers of an owner not the powers of the Court. Justice Hall could no more sever the joint tenancy under this section than he could under section 15 without an application for partition or sale.

While I can understand why Justice Hall might want to reach to make this Order (it seems intuitively just and presumably time was of the essence), what I don't understand is why this application ever came before him. Counsel for Ms. Smilley had a much easier and cheaper option, namely the preparation of a registerable transfer under section 12(1)(d) of the *LPA* plus notice under section 65(c) of the *LTA* capped off by actual registration. Ms. Smilley did not need the Court's intervention.

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