

When is a registered joint tenancy not a joint tenancy and not even co-ownership?

By Nigel Bankes and Jonnette Watson Hamilton

Cases Considered:

[Lutz v Lutz, 2012 ABQB 300](#); [Lemoine v Smashnuk, 2008 ABQB 193](#)

On a statutory application to terminate co-ownership under Part 3 of the *Law of Property Act*, [RSA 2000, c L-7](#), can a court conclude that there was no co-ownership?

Lucas Lutz wanted to buy a house but did not qualify for a mortgage. Lucas' brother, Eric, agreed to help. The deal was structured so that title to the house was transferred to Lucas Lutz and Eric Lutz as joint tenants. Two mortgages used in financing the purchase were granted by both Lucas and Eric; one was paid off but the other still secured an outstanding balance of approximately \$90,000. Lucas made all of the subsequent mortgage payments. Lucas and Eric both lived in the house and paid utilities, but Eric moved out after 7 years, in 2006. Up until 2006, Eric also made payments to Lucas that Lucas characterized as rent and Eric characterized as contributions to the mortgage payments. There was no written agreement between Lucas and Eric.

Lucas made an application to the court for an order terminating the co-ownership and transferring Eric's interest to him. Eric did not contest that application but wanted to be reimbursed for his contributions to the mortgage payments.

Madam Justice Marsha C. Erb concluded that there never was a joint tenancy between Lucas and Eric because the four unities which define joint tenancies were not present at the outset and, in particular, there was no unity of possession. She therefore granted an order (at para 25) that "Eric Lutz be removed from title when he is no longer at risk for the Royal Bank of Canada loan..." The principal reason given for this conclusion was that Eric is a "bare trustee."

The Court's order may well be a just and equitable result, but that, of course, is not enough. There must be judgment according to law. Otherwise all that we have is justice in the eye of the beholder.

The first problem with the Court's order is that Lucas' application was made under section 15 of the *Law of Property Act*, which provides 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.

The snag is that Justice Erb's order does not fit within the universe described in section 15. Section 15 does not permit a court to find that there was no co-ownership and order the conditional removal of one registered owner from the title. It does allow a court to terminate the co-ownership by making one of the three orders in section 15(2): a physical division, a division of the sale proceeds, or a between co-owners. In *Ross v McRoberts*, [1999 ABCA 227](#) an issue arose as to whether a court could choose a combination of the remedies listed in section 15(2). The Court of Appeal held (at para 16, emphasis added) that the Chambers Judge was correct to conclude he had no such jurisdiction; "the use of the words "shall" and "or" in s. 15(2) suggests the mandatory as well as disjunctive nature of the three possible directions."

A second and related problem is that the issue is not so much whether there is a joint tenancy but whether the facts reveal any form of co-ownership at all, whether a joint tenancy or a tenancy in common. To create a joint tenancy, four unities must exist — unity of title, unity of time, unity of possession and unity of interest — but tenants in common have only a unity of possession (Bruce Ziff, *Principles of Property Law*, 5th ed, at 336-37). Unity of possession means that each co-owner's rights must relate to the same piece of property; each is equally entitled to possession of the whole of the property. Absent unity of possession there is no co-ownership.

Justice Erb concluded that the brothers "did not have equal possession of the property [and] accordingly, no unity of possession existed" principally on the basis (at para 19) that "[t]here is no suggestion that Eric could have demanded or expected to occupy the property to any greater extent than his part of the lower level." By deciding that there is no unity of possession, Justice Erb effectively concluded that there is no co-ownership, period. Again, that may well be a correct conclusion — at least in equity (it is difficult to reach that conclusion in law given the uncompromising language of sections 60 and 62 of the *Land Titles Act*, RSA 2000, c L-4 on the effect of registration). However, it is not clear that the Justice Erb really appreciated that the absence unity of possession must mean that there is no co-ownership — see her comments (at para 22) that "specifically" there can be no "right of survivorship" — which of course is simply a characteristic of a joint tenancy.

The third problem is that Justice Erb elides a step in concluding (at para 22) that Eric is a bare trustee. The step missing is the conclusion that Eric is a trustee. Again, the ultimate conclusion may well be correct but Justice Erb needs to say something about how Eric becomes a trustee using the familiar categories: express trust, implied trust, resulting trust, or constructive trust (*Water's Law of Trusts in Canada*, 3d ed, at 19-22). There are different requirements that must be present and proven to constitute each type. There is not, however, a category called simply "bare trust." The term "bare trustee" describes the duties of a trustee; it is not a form of trust (*Water's Law of Trusts in Canada*, 3d ed, at 32).

In reaching her conclusions, Justice Erb relies heavily upon *Lemoine v Smashnuk*, [2008 ABQB 193](#), a decision of Madam Justice Andrea Moen. Unfortunately, the *Lemoine* decision suffers

from two of the three problems we identified with the *Lutz* decision. A failure to follow the approach in *Lemoine* accounts for the third problem.

The facts in *Lemoine* were similar in that Lemoine added her friend Smashnuk to the title as a joint tenant when he agreed to co-sign the mortgage. He also contributed some labour and materials to renovations, for which he was paid in part. There was no written contract between the parties (and Justice Moen does allude to a potential Statute of Frauds problem). The issue, as in *Lutz*, was whether Smashnuk was entitled to any of the equity in the house. Lemoine applied, as in *Lutz*, under section 15 of the *Law of Property Act* for an order terminating the co-ownership without the payment of compensation to Smashnuk. The Order that Justice Moen made — under general property law and because “equity demands” — required that Smashnuk’s name be removed from the title at such time as he was completely removed as a “personal guarantor” for the loan (at para 46).

The main issue in *Lemoine* was whether Smashnuk really was a co-owner, despite the title saying that he was a joint tenant. Justice Moen determined (at para 31) that there was never any intention by either of the parties that Smashnuk be able to demand occupancy of the property, and therefore there was no unity of possession (i.e. no co-ownership). Neither was there any unity of interest, she concluded, because Smashnuk’s only interest in the property was his liability on the mortgage (at para 35). Justice Moen therefore concluded that Smashnuk was not a joint tenant, without noting that he was not a co-owner at all.

In considering what Smashnuk’s interest really was, Justice Moen examined the parties’ intent, suggesting the creation of an implied trust. However, as in *Lutz*, she merely finds Smashnuk to be a “bare trustee” (at para 42) without specifying what type of trust or how it arose.

Justice Moen considered the remedies under section 15 of the *Law of Property Act* only as an alternative to her property law-based decision. The only applicable remedy would be an order requiring Smashnuk to sell his interest to Lemoine for a price set by the Court under section 15(2)(c). The Court found that Smashnuk was not entitled to any compensation (at para 59), but was entitled to be protected from any liability by having his name removed from the mortgage. Thus, Justice Moen made the same order under the *Law of Property Act* as she did under general property law.

Although we do not disagree with the results reached in either *Lutz* or *Lemoine*, the reasons do not fully support the conclusions. In particular we think that these types of cases — which all involve informal arrangements which lawyers (and judges) must slot in to pre-existing conceptual categories (or create new ones, recall for example, Justice Denning’s judgment in *Errington v Errington*, [1952] 1 KB 290) — require a more careful analysis of the legal relationships between the parties in both law and equity.