

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
Common Law & Equity Division**

**2021  
CLE/gen/00293**

**IN THE MATTER OF** a Deed of Gift dated the 30th September 2002 made between Emily Evans Roker and Emily Evans Roker and Edward E. Roker

**AND**

**IN THE MATTER OF** a Mortgage dated the 23rd May 2012 made between Emily Evans Roker and Edward E. Roker to Scotiabank (Bahamas) Limited.

**AND**

**IN THE MATTER OF** a Last Will & Testament dated the 28th May 2020 of Emily Evans Roker.

**BETWEEN**

**EDWARD E. ROKER**

Plaintiff

**AND**

**DERICK MUNNINGS JR.**

**(EXECUTOR AND TRUSTEE OF THE ESTATE OF EMILY EVANS ROKER)**

Defendant

**Before:** Honorable Justice J. Denise Lewis-Johnson

**Appearances:** Donovan Gibson of Munroe & Associates for the Plaintiff  
Dennis Williams of Bootle-Williams & Company for the Defendant

**Hearing Date:** 7 February 2022

**Civil - Conveyance – Mistake - Defective Title - Validity of Conveyance - Joint Tenancy - Severance – Severance by acts done – Will - Property owned as joint**

**tenants bequeathed to children - Whether joint tenancy severed by Last Will and Testament – Whether joint tenant knew of gift in Will.**

The Plaintiff is the widower of the Deceased, Emily Evans Roker. The Deceased purchased “*ALL THAT piece parcel or lot of land comprising Six Thousand Six Hundred and Twenty-five (6,625) square feet situate in the Western District of the Island of New Providence*” (“the said property”). By Deed of Gift the Deceased conveyed the said Property to herself and the Plaintiff as joint tenants. Together they mortgaged the said Property to Scotiabank (Bahamas) Limited of which the monthly premium was deducted from their respective salaries. Upon the death of the Deceased, the Plaintiff received the proceeds from the Deceased’s life insurance policy as he was named the sole beneficiary. With the proceeds from the life insurance policy, the Plaintiff satisfied the mortgage to Scotiabank (Bahamas) Limited. The Plaintiff instituted these proceedings against the Defendant seeking, inter alia, a Declaration that he is the sole fee simple owner of the said property due to the right of survivorship. The Plaintiff further seeks a Declaration that Clause 2 of the Last Will and Testament of Emily Evans Roker is unenforceable and of no effect as the said property did not form part of her Estate.

The Defendant is the eldest son and Executor of the estate of the Deceased. The Defendant asserts that the joint tenancy created between the Deceased and the Plaintiff is void and of no effect as the Deed of Gift has several deficiencies and thus the conveyance still forms a part of the Estate of the late Emily Roker.

**HELD: Notwithstanding several errors within the Deed of Gift, the intention and conduct of the parties demonstrated that a joint tenancy was created, and a Declaration is granted declaring the Plaintiff to be the owner of the property per the law of survivorship.**

## JUDGMENT

**Lewis-Johnson, J:**

1. By an Originating Summons filed 25 March 2021 the Plaintiff seek the following relief:
  - [1] A Declaration that the plaintiff is the sole fee simple owner of "ALL THAT piece parcel or lot of land comprising Six Thousand Six Hundred and Twenty-five (6,625) square feet situate in the Western District of the Island of New Providence" ("the said property") by virtue of the right or incidence of survivorship.
  - [2] A Declaration that Clause 2 of the Last Will and Testament of Emily Evans Roker is unenforceable and of no effect as the said property did not form a part of the Estate of the Emily Evans Roker
  - [3] An Order compelling the Defendant to release all original title deeds regarding the said property that are in his possession to the Plaintiff
  - [4] An Order that the Defendant vacate the said property forthwith
  - [5] An injunction to restrain the Defendant, whether by himself, his agents or servants or otherwise howsoever from interfering with the Plaintiff's right to occupy and possess the said property
  - [6] Further or other relief; and
  - [7] Costs
2. By Conveyance dated 10 January 2000 and recorded in Volume 8486 at pages 351 to 358, the Deceased purchased the following property from Anthony Adderley: *"All That piece parcel or lot of land comprising six thousand six hundred and twenty-five square feet situate in the Western District of the Island of New Providence."*
3. By Deed of Gift dated 30 September 2002 recorded in Volume 8486 at pages 315 to 318 the Deceased conveyed the said Property to herself and the Plaintiff as joint tenants.

4. By mortgage dated 23 May 2012 recorded in Volume 11681 at pages 599 to 611 the Deceased and the Plaintiff mortgaged the said Property to Scotiabank (Bahamas) Limited to secure the sum of \$306,000.00. These funds were used to provide infrastructure and construct a dwelling home on the said Property. The mortgage monthly premium was being deducted from the salaries of the Deceased and the Plaintiff.
5. Two days after being discharged from Doctors Hospital, the Deceased executed a Last Will and Testament dated 28 May 2020.
6. The Deceased appointed her son, the Defendant, as the sole Executor and by Clause 2 purportedly gave her interest in the said property to her children as tenants in common.
7. At no time before the death of the Deceased was the Plaintiff aware that the Deceased executed a Last Will. The Will was first brought to the attention of the Plaintiff after the funeral in the Chambers of Bootle-Williams & Company.
8. Two days after the execution of the Will, the Deceased was admitted for treatment at Baptist Hospital in Florida. The Deceased died on 28 September 2020.
9. On 4 November 2020, following the death of the Deceased, the Plaintiff received a cheque in the sum of \$350,000.00 which represented the proceeds from the Deceased's life insurance policy with Colina Insurance Limited. The Plaintiff was named as sole beneficiary. With the proceeds from the life insurance, the Plaintiff satisfied the Mortgage to Scotiabank (Bahamas) Limited.

#### **The Plaintiff's Evidence**

10. The Plaintiff asserts his right of survivorship in a joint tenancy as he is the sole survivor. He explained that the essential nature of a joint tenancy may be stated as between themselves joint tenants have separate rights and interests; as against third

parties they have the characteristics of a single owner. A joint tenancy is created where land is conveyed or devised to persons where no words are used which indicate that they are to hold in separate or distinct shares (**See: Re Davies (1950) 1 All ER 120**).

11. The Plaintiff relied on **Cowcher v Cowcher (1972) 1 WLR 425** where it was held that equity follows the law and will presume that the co-owners hold as joint tenants unless it can be inferred that they did not intend to hold on those terms, or where one of the essential unities is absent or words of severance are used.
12. The Plaintiff states that not only the wording of the Deed of Gift but that of the joint mortgage, which proceeds were used to build the matrimonial home, makes him the rightful owner of the property.
13. The Plaintiff contends that the Defendant has adduced no evidence to support a finding that a joint tenancy was not intended or that it was severed thereafter. Despite the Deed of Gift being inelegantly drafted, it is his submission that no evidence was adduced to rebut the presumption of a joint tenancy and thus based on the doctrine of survivorship, on the death of the deceased the Plaintiff received her share solely. Her interest did not fall in her estate and the devise in her Will pertaining to the same is invalid.

### **The Defendant's Evidence**

14. The Defendant's main contention is that due to the fatal defects of the purported Deed of Gift the beneficial title never passed from Emily Roker to Emily and Edward Roker. Subsequently the Defendant asserts that a joint tenancy was never created, and the conveyance forms a part of the Estate of The Late Emily Roker.
15. The Defendant lists the following deficiencies of the recorded Deed of Gift made between Emily Evans Roker to Emily Evans Roker and Edward Roker dated 13 September 2002:

- [1] “The Indenture or Conveyance was made between the GRANTOR Emily Evans Roker and the GRANTEES (Emily Helen Roker and Edward Roker).
- [2] Paragraph B of the Conveyance states “the Grantor has agreed with the GRANTEES to convey the said hereditaments unto herself and the GRANTEE the said Edward E. Roker as joint Tenants”. In this regard the Defendant claims that there is an inconsistency in the agreement between the parties.
- [3] The fourth paragraph of the conveyance reads “by this indenture witnesseth that in pursuance of the premises and in consideration of the said sum of \$10.00 and other good and valuable now paid by the GRANTEES to the GRANTOR) the receipt whereof the grantor hereby acknowledges) the GRANTOR as Beneficial owner hereby grants and conveys unto herself the said GRNATOR and the GRANTEE the said Edward E. Roker...” The Defendant contends that this is not consistent in the practice of conveyancing and causes the Contract or Conveyance to fail.
- [4] That due to the inconsistencies in the Conveyance dated 30 September 2002, that the mortgage made between Emily Roker and Edward Roker and Scotia Bank on May 23 2012 was done using the 2002 Conveyance. The First Schedule of the Mortgage recites:
- All that piece of parcel or lot of land situated in the Western District of the island of new providence comprising six thousand six hundred and twenty-five (6,625) square feet being a portion of a parcel of land granted to Anthony Adderley and propertied in the department of lands and survey in book A 8. At page which said piece of parcel or lot of land has such position boundaries shape marks and dimensions are as shown on the*

*diagram or plan annexed to an Indenture of Conveyance dated the 10th day of January, A.D., 2000 and made between Anthony Adderley of the one part and Emily Evans Roker of the other part and recorded in the registry of Records in the City of Nassau in the island on New Providence aforesaid in the volume 8486 at pages 351 to 358 and is thereon."*

16. The Defendant alleges that the defects were known to those involved as the 2012 mortgage contained a recital of the 2000 Conveyance which is in the sole name of the Deceased and not the 2002 Deed of Gift which bears the names of both the Plaintiff and the Deceased. He questions that if the true purpose was to secure financing in both names, why was the Deed of Gift not used if it was registered in the Registry of Records almost ten years before the execution of the mortgage. The Defendant submits that the use of the Conveyance in the sole name of Emily Evans (later Roker) in the mortgage document is an abnormality and speaks to the faulty and irregular state of the Deed of gift.
17. The Defendant relied on the case of **Ingram v. Little [1961] 1 Q.B. 31** to substantiate his claim that the Deed of Gift should be rendered void as the inconsistencies of the Vendor to the Purchaser is a fundamental aspect of any conveyance.
18. The Defendant further submits that for various reasons, if the Deceased was asked to rectify any irregularities in the Deed of Gift she would have unequivocally refused to do so. The Defendant bases this assertion the Deceased's conduct before her demise. He claims that the Plaintiff had "given up on the Deceased and left her to die", the deceased very seldom during her last few months contacted the Plaintiff, and the Plaintiff had moved on with his life romantically. The Defendant claims that the conduct was enough for the Deceased to express that she wished to divorce the Plaintiff for the way he treated her in her most trying time. It is the Defendant's submission that this conduct operates as severing any joint tenancy in the purported conveyance.

19. It is the case for the Defendant that the purported conveyance (Deed of Gift), is woefully faulty, deficient and void in its present registered state to the point that no competent Counsel in the jurisdiction of The Commonwealth of The Bahamas practicing Conveyancing with reasonable skill and competence, would convey, transfer or dispose of any part or interest contained within the 2002 conveyance (Deed of Gift) without replacing the entire document and or rectification of the fatal errors contained therein as per Standard Conveyancing practice.

### **Issues**

20. The issues for determination are:

- a. Whether the Deed of Gift is valid; and
- b. If the Deed of Gift is valid, whether the joint tenancy was severed- by the Last Will and Testament of Emily Roker

### **The Law and Decision**

21. The Defendant alleges that the 2002 Deed of Gift and the contents therein are a common case of Mistake and due to irregularities, it fails and is void. A mistake refers to an erroneous belief held by one or both parties to a contract at the time of its formation.

22. I am not convinced that the irregularities are so extreme as to render the 2002 Deed of Gift void. Although the Deed of Gift was not drafted in the usual form it contained the necessary substantive parts as required by the Conveyancing and Law and Property Act so as to identify who was the grantor and the grantees, what they were to receive, the consideration of natural love and affection and what interest to be pass. The intention of the parties was clear, that is to create a joint tenancy.

23. For all of these reasons, I am satisfied that the 2002 Deed of Gift is a valid conveyance even though it was executed in an "inelegant manner", as stated by the Plaintiff.



24. **The Law of Real Property, Fifth Edition by Sir Robert Megarry and H.W.R Wade**, at pgs. 417, 418 and 419 describes a joint tenancy as:

**“A gift of lands to two or more persons in joint tenancy imparts to them with respect to all other persons than themselves the properties of one single owner. On the death of one joint tenant, his interest in land passes to the other joint tenants by right of survivorship (jus accrescendi). The right of survivorship does not mean that a joint tenant cannot dispose of an interest in the land independently. He has full power of alienation inter vivos, i.e. during his lifetime, though if, for example, he conveys his interest, he destroys the joint tenancy by severance and turns his interest into a tenancy in common.”**

25. The characteristics of joint tenancy are:

- The jus accrescendi or right of survivorship whereby the interest of one joint tenant in the land will pass automatically to the surviving joint tenant on his death and so on until the whole property is vested in the last survivor as sole owner. This is often deemed the distinguishing feature of a joint tenancy.
- The four unities, that is: unity of possession, unity of interest, unity of title and unity of time.

26. **Section 20 of the Inheritance Act Ch.116** preserves the right of survivorship of a joint tenant to the share of a Deceased joint tenant. It reads:

**20. Where a Deceased person was immediately before his death beneficially entitled to a joint tenancy of any property, the Deceased’s share in the property shall upon his death pass automatically to the surviving joint tenant or tenants and shall not be treated for the purposes of this Part as part of the net estate of the Deceased.**

27. The devise of property as gift under a Will, which was once held by joint tenants, is only effective in the estate of the last surviving joint tenant.

28. It is important to note that a joint tenancy is not to be construed as a permanent structure everlasting between the parties involved. A joint tenancy, and by extension the right of survivorship, may be destroyed on the basis of severance. However, this is limited to the extent that all parties were made aware of the intention to sever.

29. As Lord Denning noted in **Burges v. Rawnsley (1975) 3 All ER 142**:

**“Nowadays everyone starts with the judgment of Page Wood V-C in Williams v. Hensman where he said: ‘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...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 that the interest of all were 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...” at p 146 g to 147 a [Emphasis added]**

Lord Denning then continued: **“In that passage Page Wood VC distinguished between severance ‘by mutual agreement’ and severance by a ‘course of dealing’. That shows that a ‘course of dealing’ need not amount to an agreement, express or implied, for severance. It is sufficient if there is a course of dealing in which one party makes clear to the other that he desires that there should no longer be held jointly but be held in common. I emphasise that it**

must be made clear to the other party.” Ibid at p.147 a to b.  
[Emphasis added]

30. In **Kevin Sands v. Samantha Rolle et al 2020/CLE/gen/00645**, Madam Justice Diana Stewart stated that the Bahamian courts recognizes and adheres to the three rules formulated by Page Wood V-C in **William v. Hensman (1861) 1 John & H 546**, by which a joint tenancy can be severed. These three rules are:

- a) An act of any one for the persons interested operating upon his own share may create a severance as to that share,
- b) Mutual agreement,
- c) Any course of dealing sufficient to intimate that the interest of all were treated as constituting a tenancy in common.

31. Once severance of a joint tenancy has effectively occurred, the joint tenancy shifts into a tenancy in common and each party is entitled to a specific share in the property. At this stage, testamentary dispositions of the property are allowed to take effect.

32. In **Hansen Estate v. Hansen, 2012 ONCA 112** the Ontario Court of Appeal considered that a testamentary disposition of property held by joint tenants fell under the third rule in Williams v. Hensman. Winkler CJO recognized that a testamentary disposition could not, in itself, sever a joint tenancy. He declared:

**“[63] I recognize that a testamentary disposition cannot, in itself, sever a joint tenancy: “the right of survivorship takes precedence over any disposition made by a joint tenant’s will”: Sorensen’s Estate, at p.35, citing Megarry and Wade, The Law of Real Property (London: Stevens & Sons Ltd, 1957) , at p.369. a declared intention not communicated to a co-owner is, on its own, insufficient, on its own, to establish a mutual intention to sever a joint tenancy. And I accept that no greater weight should be given to such a unilateral expression simply because it is found in a testamentary document.**

**That said, the intention shown by Mr. Hansen’s decision to leave his estate to his daughters is relevant in determining the existence of a court of dealing under rule 3. Specifically, his decision to do so supports the case for severance insofar as the decision is consistent with other evidence that the spouses mutually treated their interests in the property as no longer being held jointly.”**

33. **Section 32 of the Wills Act** allows the Court to consider extrinsic evidence of a testator’s intentions where any part of a Will appears to be meaningless and where the language used appears to be ambiguous. Section 32 states:

**32. (1) This section applies to a will — (a) in so far as any part of it is meaningless; (b) in so far as the language used in any part of it is ambiguous on the face of it; (c) in so far as evidence, other than evidence of the testator’s intentions, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.**

34. Accordingly, the question before this Court is whether either the plaintiff or the Deceased, during their lifetime, both acted to sever the joint tenancy and continue as tenants in common.

35. The Court accepts there are three rules formulated by which a joint tenancy can be severed as stated by Madam Justice Diane Stewart in **Kevin Sands v. Samantha**

**Rolle:**

- a. An act of any one for the persons interested operating upon his own share may create a severance as to that share,
- b. Mutual agreement,
- c. Any course of dealing sufficient to intimate that the interest of all were treated as constituting a tenancy in common.

36. If there was no severance, then the Plaintiff, by right of survivorship of the joint tenancy in the matrimonial property, takes the whole of the beneficial interest in that property; whereas, if there were severance the Plaintiff and the beneficiaries would each hold a half share of the beneficial interest in the matrimonial property.
37. Save and except for the Last Will and Testament, the evidence does not demonstrate a shared intention of the parties to sever the joint tenancy and create a tenancy in common. This is substantiated by the fact that the Plaintiff was not cognizant of the Deceased's intention to devise the said property to her children. Based on the Affidavit evidence of the Plaintiff, he only became aware of such an intention after the death of the Deceased. The Court finds his evidence to be credible.
38. The Plaintiff's actions of satisfying the mortgage with the proceeds from the Deceased's life insurance policy even after gaining knowledge of the Will is not suggestive of any agreement or acceptance of the disposition of the property to another. Further, the Plaintiff's acts during his lifetime do not suggest that he intended to own the property as tenant in common. The mortgage was being paid out of both salaries. Additionally, the Plaintiff continued to reside in the property even after the death of the Deceased.
39. The Defendant submitted voluminous suggestions as to statements made by and the intention of the Deceased during the months leading up to her death to sever the joint tenancy. The Defendant asserted that the Deceased acted contrary to the joint tenancy by expressing a desire to divorce the Plaintiff, change the beneficiary on the life insurance policy and that only illness prevented her from acting. However, as she was ill up until her death, she was unable to do so. The Defendant states the Deceased was disappointed in the Plaintiff and activities the plaintiff may have engaged in.

40. Shortly before her death the Deceased executed a will devising to the Defendant and others an interest or her interest in the property. She did not express an intention to sever the joint tenancy the Plaintiff.
41. The Court does not accept that the 2002 Deed of Gift should be declared null and void as the Deceased allowed it to stand for 18 years unchallenged, as a joint tenancy. She executed a mortgage with the Plaintiff in 2012 using that Deed of Gift as security. This mortgage lasted for eight years prior to the Deceased becoming ill. There is no evidence before this Court to suggest any act of severance, whether jointly, individually or by actions.
42. The Court does not accept the Defendant's contention that the Deceased assertions to him and during the last four months of her life were sufficient to sever the joint tenancy. The broken heart or disappointment of a dying spouse in her life partner at a highly emotional moment is not sufficient to meet the legal standard of severance. All evidence suggests a happy marriage and an intention for the Plaintiff and the Deceased to jointly own the property.
43. The Court rejects the evidence of the Defendant.
44. Based on the evidence led, the law and all the circumstances of this case, and for reasons stated above, I find that the Last Will and Testament of the Deceased was not sufficient to devise her interest in the property to her children, as during her lifetime there were no mutual acts which could constitute a severance of the joint tenancy. No individual act or acts by them showed that they treated the property as a tenancy in common. As a result, after the Deceased's death, her share in the said property automatically transferred to the Plaintiff who became the sole owner of the property by way of survivorship.

**The Order**

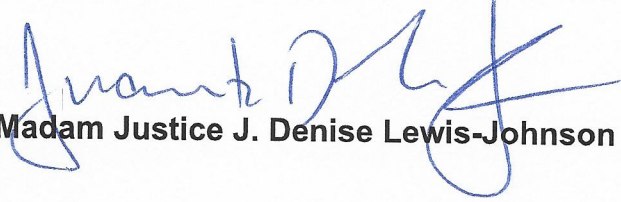
45. This Court makes the following orders:

- [1] The Plaintiff is the sole fee simple owner of "ALL THAT piece parcel or lot of land comprising Six Thousand six Hundred and Twenty-five (6.625) square feet situate in the Western District of the island of New Providence" by virtue of the right of incidence of survivorship;
- [2] Clause 2 of the Last Will and Testament of Emily Evans Roker is null and void and thus unenforceable and of no effect as the said property did not form a part of the Estate of the Emily Evans Roker;
- [3] The Defendant is to release all original title deeds regarding the said property that are in his possession to the Plaintiff; and
- [4] The Defendant is to vacate the said property forthwith.

**Costs**

46. Costs to the Plaintiff to be taxed if not agreed.

Dated this 7<sup>th</sup> day of December 2022

  
Madam Justice J. Denise Lewis-Johnson