

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT**

**COMMON LAW & EQUITY DIVISION  
2006/CLE/GEN/00926**

**BETWEEN**

**DONNA MARIA FORBES**

**PLAINTIFF**

**AND**

**WALDON THADDEUS FORBES**

**DEFENDANT**

**Before:** Stephen G. Isaacs

**Appearances:** Miss Courtney Pierce for Plaintiff  
Mr. Gavin Cassar and Miss Robyn Lynes for Defendant

**Hearing Date:** 3 & 4 May 2010

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**J U D G M E N T**

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By an Originating Summons filed 14 September 2006 the Plaintiff has sought the following reliefs:

- (1) A declaration that the Plaintiff is legally entitled to the beneficial interest in the freehold premises situate at Lots Number Forty-four (44) and Forty-five (45) in Block Number Twenty-nine (29) in Englerston Subdivision in the Southern District of the Island of New Providence.
- (2) A declaration that the Conveyance made the 7<sup>th</sup> day of August A.D. 2001 between Thaddeus Forbes and the Defendant and is recorded at the Registry of Records in Volume 8178 at pages 264 to 269 is null and void and of no effect.
- (3) Possession of the said land and downstairs apartment occupied by the Defendant
- (4) An Injunction to restrain the Defendant by himself his servants or agents or otherwise howsoever from remaining on or continuing in occupation of the said downstairs apartment.
- (5) Damages or *mesne profits* at the rate of \$500,00 per month from the said 1<sup>st</sup> day of June A.D. 2005 until possession is delivered up.
- (6) Further or other relief.
- (7) Costs.

2. From the Affidavits of the Plaintiff filed 14 September 2006 and 27 November 2008 the background facts are that the Plaintiff's mother Francita Forbes (Francita) purchased Lots 44 and 45 of Block 29 in the Englerston Subdivision by way of Conveyance dated 4 July 1960.

3. By Conveyance dated 22 October 1963 Francita Forbes conveyed the subject property to herself and her husband Thaddeus Forbes (Thaddeus) as tenants in common in fee simple.

4. By Conveyance dated 18 June 1997 Francita and Thaddeus conveyed the property to the Plaintiff and Thaddeus as joint tenants. The Plaintiff paid her mother \$25,000.00 as consideration for the transfer of her interest, and has paid all taxes, insurances and utility bills due on the property since 1985, some 12 years prior to the Conveyance.

5. What followed was the preparation of two Conveyances, one dated 29 January 2001 which was executed but never recorded. The second Conveyance of 7 August 2001 was indeed recorded. This Conveyance shows a consideration of \$15,000.00. Both Conveyances purported to transfer the entire interest of Thaddeus to the Defendant.

6. There was also a Conveyance of 24 February 2004 of the property from the Defendant back to his father Thaddeus, which was executed but never recorded.

7. The Defendant is relying on the Conveyance of 7 August 2001 to establish his entitlement to Thaddeus' interest in the subject property. Additionally the Defendant is relying on his father's Will dated 23 June 2004 which purports to leave his father's interest in the property to the Defendant, bearing in mind the Defendant's efforts to re-convey the property back to his father in February 2004. His father died on 14 October 2004.

8. Under cross examination the Plaintiff said that she borrowed the \$25,000.00 from a bank to purchase the property; paid the stamp duty of \$1,000.00 and paid for her mother's divorce in the amount of \$1,200.00. She also referred to a Magistrate Court Summons dated 25 September 1997 taken out by her to have the Defendant evicted from the property. This action occurred shortly after the Conveyance of the property to her and her father as joint tenants.

9. With regard to the unrecorded Conveyance of the property from her father to the Defendant dated 29 January 2001, she had never seen it until she appeared in the Magistrate's Court.

10. There is a letter of 2 September 2008 by the Plaintiff's mother to Mrs. Stephanie Wells, Attorney-at-law indicating that her husband's wish was for the Defendant to have a share of the property. This letter was obviously written after Thaddeus had died, he being one of two joint tenants.

11. She also said that the Defendant brought tenants to the property between 1997 and 2002 and he collected all the rent.

12. When re-examined she explained that she never knew of any Conveyance of the property prior to this action except that prepared by Arnold Forbes Esq. of 7 August 2001 which she was made aware of when she first attempted to evict the Defendant. She did not know of the purported Re-Conveyance of the property from the Defendant to her father.

13. She said that her father never asked her to sever her tenancy, nor did he express any desire to sell to the Defendant.

14. Ambrose Forbes (Ambrose), the eldest sibling of the parties swore an Affidavit dated 22 December 2009 and testified that in 2004 their father discovered that the Defendant had him sign a Conveyance under the representation that it was a surety note. The witness was asked by his father to take him to Arnold Forbes Esq. to have a Re-Conveyance prepared. The witness recalled his father explaining that he believed he was signing a different document when he signed the Conveyance and that no consideration was paid.

15. Ambrose paid \$330.00 for the Re-Conveyance to cover stamp duty. This document was eventually executed by his father as well as the Defendant. The document was never recorded. Ambrose was of the opinion that his father never intended to convey the property to the Defendant.

16. When cross-examined, Ambrose said that his father showed him the Conveyance of 7 August 2001 and said "this has to change".

17. Ambrose identified the Will of his father prepared by Stephanie Wells dated 23 June 2004 naming the Defendant as executor and leaving all real and personal property to the Defendant. The Will of 19 March 2004 was identified which named Ambrose as executor and left all real and personal property to Ambrose. This earlier Will was prepared by T. Langton Hilton & Co., Attorneys.

18. Armed with the June Will, the Defendant instructed the police to approach Ambrose with the Will in hand to drive home the point that the Defendant owned the property.

19. When re-examined Ambrose explained that he and his father went to the offices of Arnold Forbes before his father suffered a stroke.

20. The Defendant in his evidence identified his Affidavits filed 8 August 2007 and 6 October 2009. He described an arrangement whereby he occupied the lower floor of the building on the property, and the Plaintiff occupied the upper floor. He stated that the Plaintiff barred up the apartment to prevent him having access after their father died. He claims to have been his father's favourite, and that he took care of his father. He claims that his mother gave her interest to the Plaintiff in 1997 and that his father gave the Plaintiff and his mother notice in 2001 that he was to take his father's interest.

The Defendant claims that the Plaintiff reacted by writing cold hearted letters to her father. I note here that the exhibited letters appear to be personal business arrangements and nothing more.

21. By his second Affidavit, he referred to the Conveyance of 7 August 2001 and stated that the property was thereby properly conveyed to him. He alleges that his parents separated shortly after his mother purchased the property in 1960, and that his father built the top floor of the building. He refused to move after the Plaintiff acquired a legal interest and she resorted to the Magistrate's Court. He claims to be shocked and hurt that his sister would want him out of the home where he has resided since the age of two.

22. He claims to have turned over rental income from an apartment on the upper floor to be divided between the Plaintiff and their father. He referred to receipts evidencing payments to a Mr. Newbold on the Plaintiff's behalf.

23. His father suffered a stroke in March 2004 and he claims to have hired a caretaker for \$60 to \$80 daily, which he changed to weekly in cross examination. He later referred to cheques written to Fontella Dean, but it is noted that those cheques are written on the Plaintiff's account and signed by the Plaintiff.

24. He alleges that the Plaintiff falsely accused him of harassing her and would summon the police.

25. In cross-examination the Defendant's credibility was severely tested. His claim to have lived at the property since he was two years old fell apart as he confirmed that he lived in San Salvador for three to four years, in Eleuthera for one year and in South Beach for two years with his mother.

26. He stated that he took care of his father financially, physically and emotionally, but he also stated that he collected his father's pension which was placed in a bank account to which he had access.

27. He could not produce a cheque for \$15,000 but said instead that his father promised to give the property to him. He said later that he started paying for the property on leaving high school. He denied having his father sign a Conveyance with the belief that he was signing as surety for a safe deposit box.

28. He said that he does not know his family and did not recall having threatened any of them when confronted with a police report, which report records the following:

- |     |               |   |
|-----|---------------|---|
| (1) | 8 August 1997 | Arrested for assault with a dangerous instrument/threats of harm - <b>Case dismissed 9 September 2007</b> |
| (2) | 3 May 2004    | Threats of Harm report by Plaintiff against Defendant   |
| (3) | 28 April 2004 | Threats of death report by Plaintiff against Defendant  |
| (4) | 17 May 2005   | Threats of death report by Plaintiff against Defendant  |
| (5) | 24 June 2004  | Damage to property report by Plaintiff against Defendant  |

29. With regard to collecting rent between 2000 and 2002 he said that he paid his father first and paid the Plaintiff's portion to Mr. Newbold. He also said that he "thought" that he received money from Mr. Newbold. He claims that the Plaintiff never collected her share from Mr. Newbold, so he collected it and purchased appliances.

30. He said he is not aware that his mother put him out of the South Beach residence for chocking his nephew.

31. He made a number of other claims such as installing a telephone after he came out of school, refilling prescriptions every other week (presumably after his father became ill).

32. When re-examined he said that he used to give his father cash since he started working, and that the pension was paid directly to his father's account. He denied knowing anything about a security box. He again claimed to have paid \$15,000.00 for the property.

33. He denied knowing anything about the re-conveyance to his father, notwithstanding that his signature appears thereon.

34. Finally Arnold Forbes, gave evidence by his Affidavits filed 11 November 2009 and 18 January 2010. He prepared the Conveyance of 7 August 2001 after advising Thaddeus that he had to sever the joint tenancy in order to convey his interest to the Defendant. He said that the Plaintiff refused to agree to sever.

35. His evidence that Thaddeus notified the Plaintiff is not documented and cannot therefore be considered as there is no direct evidence to support this position.

36. He said the Conveyance of 29 January 2001 was ineffectual for technical reasons and he advised Thaddeus accordingly. He also said that Thaddeus instructed him to reverse the Conveyance of 7 August 2001 in February 2004. The witness claims that Thaddeus telephoned him afterward and said he was pressured to sign the reversal by Ambrose. The witness thereon claims to have cancelled the reversal of the Conveyance. He said that on speaking with Ambrose himself, who expressed his displeasure with the Defendant having the property, he collected \$330.00 from Ambrose to appease him but held the money in escrow. Those funds were later returned to Ambrose.

37. In cross-examination the witness, he said that Thaddeus never came to his office alone, although he did separate him, at which time Thaddeus confirmed that he wanted to convey to the Defendant. He said that the Plaintiff was on speaker phone when Thaddeus asked her to sever the joint tenancy. He said in re-examination that the Plaintiff was hostile on the speaker phone.

38. The pivotal issue before the Court is whether or not the joint tenancy was severed. If it was indeed severed, Thaddeus would only have been able to convey his half interest in the property, and not the whole interest of himself as well as that of the Plaintiff.

39. It is a principle of law that a joint tenancy arises out of the four unities, that is, time, possession, interest and title. Each joint tenant holds the whole title jointly and nothing separately (see Vol 24 Halsbury's Laws of England 1<sup>st</sup> Ed 1912).

40. A joint tenancy can only be severed by agreement, by the Court by way of a partition order, by a release or grant.

41. The Conveyance of 18 June 1997 by Francita and Thaddeus as tenants in common to Thaddeus and the Plaintiff as joint tenants created a joint tenancy.

42. The case of *R v Llangunnor 1831 and Ad 616* was offered by the Defendant to establish that extrinsic evidence may be admitted to prove payment of consideration and to prove when it was paid.

43. This case can only assist the Defendant if payment by the Defendant can be proved. It is common ground that the Plaintiff paid \$25,000.00 to Francita as consideration. I will return to this point later.

44. The Defendant has argued that Thaddeus and the Plaintiff intended to maintain a business relationship and to keep their interest separate based on evidence that the Plaintiff paid rent to Thaddeus. No evidence was given in chief or in cross examination that the Plaintiff paid rent to Thaddeus. This argument has no base on which to stand.

45. The Plaintiff must be a party to the Conveyance of 7 August 2001 to the Defendant in order to sever the joint tenancy. Her evidence is that she knew nothing of that Conveyance (see *Patriche v Powlet 26 ER 430*).

46. The 4<sup>th</sup> Edition of The Law of Real Property by Megarry and Wade at page 394 expresses the principle as follows:

***“The interest of each joint tenant is the same in extent, nature and duration for in theory of law they hold but one estate. This has important consequences ... (4) Any legal act, e.g., a conveyance or lease of the land or a surrender of a lease requires the participation of all of the joint tenants; one cannot dispose of it by himself, for he by himself has not the whole estate in it.”***

47. The Defendant suggested that the Court can rectify the Conveyance of 18 June 1997 by inserting the words “tenants in common” and deleting the words “joint tenants”. However, such an order by a Court must be based on the consent of the parties, to correct a mistake, or on clear circumstantial evidence that a tenancy in common was intended. Where one of two joint tenants has not acquiesced or agreed to a severance of interest, the Court has no authority to look behind a Conveyance.

48. The case of *Williams v Hensman (1861) 1 John & Hem 546* referred to by the Defendant as authority that a joint tenant can sever his interest seems to have been misinterpreted. That case expressly states that a joint tenant has a right of survivorship only in the event of no severance. There has been no severance in the instant case. It is noted that Williams as well as the local case of *Miller v Wallace BHS J. Civ App No 36 of 2001* both involved the passing of property to a number of beneficiaries together under a Will.

49. Further, Williams expressly states that it is not sufficient to rely on an intention of one joint tenant declared only behind the back of the other joint tenant. In the instant case the Plaintiff never knew of the Conveyance of 7 August 2001 by Thaddeus to the Defendant until she took legal action against the Defendant.

50. Even accepting the evidence of Arnold Forbes it is seen that Thaddeus did not persuade the Plaintiff to agree to a severance. In any event the Re-Conveyance by the Defendant to Thaddeus would void any severance potentially created by the Conveyance of 7 August 2001. Apart from the Re-Conveyance remaining unrecorded there is no evidence of what Arnold Forbes did to “cancel” it.

51. With regard to the last Will of Thaddeus, the property in question, suffice it to say, was not available to Thaddeus to pass on to anyone without the consent of the Plaintiff. The Plaintiff’s right of survivorship remains intact.

52. Finally the Defendant has argued that there has been a severance in equity. He relies on the same arguments posited to establish the other grounds for a finding that a severance has occurred.

53. The fact that Thaddeus added a floor prior to the Conveyance to himself and the Plaintiff is not a circumstance to be considered for the very reason that the construction pre-dates the Conveyance to himself and the Plaintiff as joint tenants.

54. The argument that the Plaintiff alone having paid the consideration is evidence that it was the intention of the parties to hold the property as tenants in common is a false argument. The case of *Malayan Credit Ltd v Jack Chia-MPH Ltd 1986 P.C.* offered by the Defendant seems to have the opposite effect to the Defendant's submission. Had Thaddeus contributed to the consideration, the stamp duty, legal fees etc., there may have been an argument that an equitable tenancy in common could have been created. In the instant case there is no evidence that Thaddeus paid anything, which would lead a Court to the conclusion that he held his interest in trust for the Plaintiff even if the Conveyance described him and the Plaintiff as tenants in common.

55. The Defendant's strongest argument is that he paid his father \$15,000.00 for his share. From the evidence the Defendant testified to a number of inconsistent avenues by which the \$15,00.00 was paid, and/or how he acquired an interest in the property. His evidence reveals the following:

- (a) His father wanted him to have the property
- (b) His mother wrote a letter expressing her late husband's intention to leave the property to the Defendant (It is noted here that his mother had already been paid \$25,000.00 by the Plaintiff for her interest)
- (c) The Defendant thought it was more than \$15,000.00 "for the years I took care of him"
- (e) He always intended to purchase the property and that some of the money he had given to his father over the years was specifically toward purchasing the property.
- (f) He paid a lump sum of \$15,000.00 sometime between January and August 2001.

56. It is also to be remembered that most if not all the money alleged to have been spent on or for the benefit of his father by the Defendant came either from his father's old age pension or from the units that the Defendant rented.

57. There is no evidence of a receipt of any funds from the Defendant to Thaddeus. On a balance of probabilities it becomes impossible to believe that the Defendant paid any money of his own to Thaddeus with an intention to acquire an interest in the property.

58. In the result the Plaintiff is entitled to the reliefs claimed in the Originating Summons save for *mesne profits* at the rate of \$500.00 per month from 1 June 2005 until possession is delivered up.

59. On the issue of *mesne profits* the Plaintiff is entitled to \$500.00 per month from the date of this judgment until possession is delivered up. The reason is that had this matter proceeded as a classic Originating Summons action, without any dispute as to facts, the matter would have long since been resolved. The Defendant cannot be blamed for the time this matter has taken to come to a conclusion.

60. The Plaintiff is also awarded her costs in this action to be taxed if not agreed.

**Dated the 15<sup>th</sup> day of October A.D. 2010**

Stephen G. Isaacs J.