

**IN THE SUPREME COURT OF BELIZE, A.D. 2018**

**CLAIM NO. 26 of 2018**

**FRANZISKA NICHOLSON**

**(as beneficiary under the Will dated 31<sup>st</sup> May 2005  
Of Merickston Laurenzco Nicholson, deceased)**

**CLAIMANT**

**AND**

**ANNA MAGDALENA AHRER NICHOLSON**

**(in her personal capacity and as Executrix of the  
Last Will and Testament of Merickston Laurenzco  
Nicholson, Deceased)**

**FIRST DEFENDANT**

**MERICKSTON NICHOLSON JR.**

**(as a person having the beneficial interest under  
The Estate)**

**SECOND DEFENDANT**

**BEFORE the Honourable Madam Justice Sonya Young**

Hearings

2018  
27<sup>th</sup> November

Written Submissions

Claimant – 11<sup>th</sup> December, 2018  
1<sup>st</sup> Defendant – 14<sup>th</sup> December, 2018  
2<sup>nd</sup> Defendant – 6<sup>th</sup> December, 2018

Decision

5<sup>th</sup> February, 2019

Mr. Said Musa, SC for the Claimant.

Mr. Richard Bradley for the 1<sup>st</sup> Defendant.

Mr. Estevan Perera for the 2<sup>nd</sup> Defendant.

**Keywords: Probate – Tracing Estate Property - Real Property – Severance of Joint Tenancy – Registered Lands Act Cap 194 –The Law of Property Act Cap 190**

**JUDGMENT**

*“You don’t choose your family. They are God’s gift to you, as you are to them.”*

The Most Reverend Desmond Tutu, South African Archbishop of the Anglican Church and  
Nobel Peace Price Recipient

1. The testator, Merickston Nicholson, (who, to avoid confusion with his son of the same name, the 2<sup>nd</sup> defendant herein, shall simply be referred to as the Testator), died leaving a will (the Will). Clause 5 of the Will stated:

*“I give devise and bequeath the remaining portion of the 1500 acres of real property situated immediately North of 40 ½ mile post of the Northern Highway, Belize, that 1,000 acres adjacent to the develop area, known as the “Common Area” and the house which Franziska Nicholson built on the “Common Area” to my daughter Franziska absolutely at the execution of this my will.”*

2. Franziska Nicholson says that her mother Anna, who is also the executor of the Will, wrongly transferred her legacy, bequeathed by Clause 5 (the Property), to Merickston, her brother. Merickston says the Property had indeed been transferred to him by Anna in her private capacity and not as executrix. It had, he said, been jointly owned by Anna and the testator right up to the date of his death. Therefore, when he died it became Anna’s solely through survivorship and she freely transferred it to him as she had every right to do.
3. When the proceedings begun Anna and Merickston shared counsel and their pleadings were jointly presented. As the matter progressed with applications for an injunction and judgment on admission by, and committal proceedings

for contempt against, Franziska, Anna , through her affidavits, began to visibly distance herself from those pleadings. Eventually, practically her entire testimony was in full contradiction to her Defence. However, she never sought to file an amended defence of her own, even after she retained separate Counsel.

- Preliminary Issue by 2<sup>nd</sup> Defendant- Beneficiary's right to bring a claim**
4. An assent or conveyance does not prejudice the beneficiary's right to recover the subject matter of same if it has been assented to or conveyed to the wrong person. Until transfer, the beneficiary's right is said to be inchoate but transmissible to his personal representative. After the assent or conveyance, the person properly entitled to the legacy, is vested with a proprietary right in the legacy. This allows him to trace the asset into the hands of any third party and to sue for its recovery, see: **Re Diplock [1948] Ch.465 and Re Tilley's Will Trusts [1967] Ch.1179.**
  5. This right to trace only applies to volunteers; those who have not purchased for valuable consideration without notice, as Merickston has. Ergo, if the Claimant can prove that all or part of what Anna conveyed to Merickston was in fact properly and specifically bequeathed to her under the Will she is allowed to claim its recovery. She is even allowed to be indemnified out of the estate for any expenses incurred because of the wrongful conveyance.
  6. It is clear, therefore, that Franziska could bring this claim against both Anna and Merickston for recovery of what she purports is her specific legacy under the Will. That she has named Merickston as a person having a beneficial interest under the estate makes no difference in these circumstances. It was made plain, through the pleadings, that he is also

alleged to be a person to whom some part of the deceased's estate had been wrongfully transferred.

7. **There is but one issue in this claim:**

1. Whether Anna wrongfully transferred estate property to Merickston

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Severance of Parcel 303:

8. There could be no doubt that Parcel 303, (the Parcel) part of which is claimed by Franziska as the Property, was jointly owned legally by the Testator and Anna at the time of the Testator's death. Since the legal title could not be severed according to law, the question now is whether the equitable interest in the Parcel was severed before the Testator died. The effect of severance is that when the Testator died, Anna, the survivor would then have the legal title vested in her but she would hold the beneficial interest in equal shares, on trust for herself and the Testator's estate. If there was no severance then the interests, both legal and beneficial, would vest in Anna alone and Anna could do with the Parcel, including the Property, whatsoever she desired.

9. At the time of the Testator's death the Parcel was unregistered. The application to register the Parcel under the Registered Land Act (the RLA) was dated 14<sup>th</sup> April, 2009, and made in the joint names of the Testator and Anna, the Testator having died since the 16<sup>th</sup> February, 2009. This means that the first registration of the Parcel was made after the Testator had already died. The RLA, by section 42, does allow for delayed registration of three months, without a fee, anything beyond that period incurs a penalty.

10. The Court notes that, the Defendants pleaded at paragraph 29 of their Second Amended Defence that they “*were not involved with the application for the First Registration. They did not prepare or present the application. Once they found out that the application had been filed they filed a police report.....*” Senior Counsel for the Claimant, with restraint, refers to the application as “*dubious.*” It certainly seems contrary to the contents of the Will, which the Testator is accepted as having signed and which has never been contested. There was nothing specifically pleaded and no action was taken to impugn the application for registration or the registration itself, therefore, the registration stands as valid and the Court will say no more.

11. Since that first registration, the Testator’s name has been removed from the register, by virtue of an application to the Registrar of Lands made on the basis of his death. The Parcel was then transferred by Anna to Merickston as a gift. The RLA by section 26 explains the effect of registration with absolute title as Merickston now has:

*“Subject to section 30, the registration of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute ownership of that parcel together with all rights and privileges belonging or appurtenant thereto, free from all other interests and claims whatever,....*

*Provided that –*

*(i) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.....”*

12. It is important to appreciate that section 26 is expressed to be subject to section 30 which states:

*“Every proprietor who has acquired land, a lease or a charge by transfer without valuable consideration shall hold it subject to any unregistered rights or interests subject to which the transferor held it and subject also to the provisions of any law relating to bankruptcy and to the winding-up provisions of the Companies Act, but except as aforesaid such transfer when registered shall in all respects have the same effect as a transfer for valuable consideration.”*

13. This all means that if, after the Testator's death, Anna continued to hold the Parcel as a trustee for sale with the Estate of the Testator she would not have had the right to give it away to anyone. So, anyone who received it as a volunteer, did so subject to the rights of the estate and of the beneficiary who was entitled to receive the legacy. Merickston would, therefore, not have the same protection that a purchaser for value would ordinarily have.
14. To determine the status in which Anna held the Parcel after the Testator's death, the Court must enquire as to whether the equitable joint ownership of the Parcel had in fact been severed before the Testator died.
15. Counsel for the Claimant invoked The Law of Property Act (the LPA). He postured that since the Parcel was not registered under the RLA until after the testator had died, the applicable Act was the LPA. That Act allows for the severance of the equitable interest held in joint property in one of two ways; either by giving statutory notice in writing to the co-tenant or by other acts effectual to sever the joint tenancy. That statutory notice need not be in any particular form, but it must be given inter vivos. There could therefore be no severance by a will since a will takes effect upon the death of its maker.
16. Counsel does not refer to a written notice at all but urges that the testator, through his actions and eventually by his gift to Franziska under the Will, made it quite clear that he had severed the joint tenancy. Franziska relied heavily on Anna's testimony that she and the testator had had discussions and made an agreement as to how the Parcel was to be divided and that she, Anna, indicated on a sketch plan the details of the agreement made between them.

17. There is also what is referred to as a declaration signed by Anna and the Testator on 2<sup>nd</sup> July, 2006. It states that the property known as Villa Franziska belongs to Franziska and is not part of the Resort but could be used as such with Franziska's consent. This appears to be the same house the Testator makes reference to in the Will. All this, Anna claims, had been done before her husband passed away. With that, counsel for the Claimant asked the Court to accept that the ownership had been proven to have been severed pursuant to the LPA.
18. Counsel for the Defendant, on the other hand, drew the Court's attention to section 11 of the RLA which provides that:
- "From the date of any Order made by the Minister under section 4, all dealings relating to any land in the compulsory registration area named in that Order shall be made in accordance with this Act, and no dealing made otherwise than in accordance with this Act shall have any validity or effect."*
19. He submitted that, even if the Parcel had not been registered under the RLA at the time the joint tenants purported to sever, once the area in which it was situated had been declared registered land, then the RLA was applicable. Section 1 of the RLA convinces the Court that this interpretation is indeed correct. It reads:
- "This Act may be cited as the Registered Land Act and shall apply to any area declared by the Minister under section 4 to be a compulsory registration area."*
20. The distinction is important because severing a joint tenancy under the RLA is very different to that of the LPA. As expressed in section 103 (2) of the RLA:
- "Provided that where a legal estate (not being settled land) is vested in joint owners beneficially, and any owner desires to sever the beneficial interest, he shall give to the other owners a notice in writing of such desire **and** do such other acts or things as would,*

*in the case of personal estate, have been effectual to sever the beneficial interest, and thereupon under the trust for sale affecting the land, the net proceeds of sale, shall be held upon trust which would have been requisite for giving effect to the beneficial interests if there had been an actual severance.” (Emphasis mine)*

21. Neither the Claimant nor the Defendants offered any evidence which could properly inform the Court of the status of the Property ie when it had in fact been declared to be a compulsory registration area. The Defendants raised this issue quite early in their second amended defence and in submissions made on the narrow issue of severance before the matter got to trial. That bifurcated hearing was overtaken by numerous other applications made by both sides until the Court decided it best to simply proceed to trial. The second Defendant is adamant that it was for the Claimant to prove that the tenancy had been severed according to law and this necessarily includes proving what was the applicable law. He is correct. He who asserts must prove.
  
22. Proof in this situation is not simply that the parcel had not be registered under the RLA at the time of the testator’s death. It requires proof of when the area had been declared for compulsory registration through the production of the Minister’s Order or otherwise. This is most unfortunate for the Claimant since it leaves the Court no choice but to find that she has not proven her case to the requisite standard. There is no need for the Court even to consider whether the joint tenancy had in fact been severed according to either the LPA or the RLA because neither has been proven to be applicable. For this reason the Claim must fail.



**The First Defendant:**

23. Anna Nicholson appeared distraught throughout the trial. She had outbursts where she begged the Court's immediate assistance as she was "hurting" due to the dispute between her children. She subsequently testified that she is old. She says she trusted Merickston and thought he would have done what was right. She had been misled or unduly influenced, by him, to sign documents, transfer property and make decisions. She beseeched the Court to intervene to set aside a number of transactions including the transfer of the Property. She said it had been transferred by mistake and she had no recollection of signing.
24. This evidence contradicted her pleaded defence in its entirety. The law is clear. Rule 10.5 of the Supreme Court (Civil Procedure) Rules mandates:
- "10.5 (1) The defence must set out all the facts on which the defendant relies to dispute the claim.*
  - (2) Such statement must be as short as practicable.*
  - (3) In the defence, the defendant must say –*
    - (a) which (if any) allegations in the claim form or statement of claim are admitted;*
    - (b) which (if any) are denied; and*
    - (c) which (if any) are neither admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove.*
  - (4) Where the defendant denies any of the allegations in the claim form or statement of claim-*
    - (a) the defendant must state the reasons for doing so; and*
    - (b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.*
  - (5) If, in relation to any allegation in the claim form or statement of claim the defendant does not –*
    - (a) admit it; or*
    - (b) deny it and put forward a different version of events, he defendant must state the reasons for resisting the allegation.*

Rule 10.7 reinforces the importance of setting out the substance of the entire defence:

*“10.7 (1) The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission.*

*(2) The court may give the defendant such permission at the case management conference.*

*(3) The court may not give the defendant such permission after the case management conference unless the defendant can satisfy the court that there has been a significant change in circumstances which became known only after the date of the case management conference.”*

25. Notwithstanding that the first Defendant’s pleadings had not been amended and no leave had been sought or given to rely on these new assertions, her Counsel’s submissions focused squarely on demonstrating the existence of and guiding the Court towards making a finding of presumed influence and abuse of confidence. Even more significant was the fact that there had been no claim of any kind made by or seeking any relief for Anna Nicholson. The Court could not comprehend how these submissions were being made under such circumstances. Perhaps they could form the basis of another Claim but they certainly could not be considered in these proceedings.

Disposition:

1. The Claim is dismissed.
2. Costs to the first Defendant in the sum of \$10,000.00 as agreed.
3. Costs to the second Defendant in the sum of \$20,000.00 as agreed.

**SONYA YOUNG  
JUDGE OF THE SUPREME COURT**