Neutral Citation Number: [2011] IEHC 515

THE HIGH COURT

2010 410 SP

IN THE MATTER OF THE ESTATE OF CELINE CAWLEY LATE OF ROWAN HILL, WINDGATE ROAD, HOWTH IN THE COUNTY OF DUBLIN DECEASED

AND

IN THE MATTER OF QUESTIONS ARISING IN THE COURSE OF THE ADMINISTRATION OF THE SAID ESTATE

BETWEEN

CHRISTOPHER CAWLEY AND SUSANNA CAWLEY

AND

BY ORDER GEORGIA LILLIS

PLAINTIFFS

AND

EAMON LILLIS

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 6th day of December, 2011.

1. Factual background

1.1 Celine Cawley (the Deceased) died on 15th December, 2008. She was survived by her husband, the defendant, and her daughter, the third plaintiff (the Beneficiary), who was her only issue. When these proceedings were initiated by special summons which issued on 15th June, 2010, the Beneficiary was a minor, having been born on 24th November, 1992. By order of the Court (Laffoy J.) made on 27th June, 2011, it was ordered that the Beneficiary, who had attained her majority, be joined as a co-plaintiff in these proceedings.

1.2 The Deceased died testate, having executed her last will and testament on 7th June, 1993. By her said will the Deceased appointed the defendant to be sole executor thereof. She devised and bequeathed all of her property to the defendant for his own use and benefit absolutely and appointed him sole residuary legatee. However, the Deceased made alternative provision in her will, which was to apply should the defendant predecease her or should he not survive her by thirty days. Should either of those events occur, the Deceased appointed the first and second plaintiffs (the Personal Representatives) to be executors and trustees of her will and she directed that they should hold the whole of her estate upon the trusts set out.

1.3 On 29th January, 2010 the defendant was convicted after a trial by a Judge sitting with a jury at the Central Criminal Court of the manslaughter of the Deceased. On 5th February, 2010 he was sentenced to a period of six years and eleven months imprisonment having been so found guilty, the said sentence to commence on 4th February, 2010. Not having appealed against conviction or sentence, the defendant is currently serving the term of imprisonment.

1.4 The conviction of the defendant for the manslaughter of the Deceased has certain implications in relation to the distribution of the estate of the Deceased by virtue of the application of s. 120 of the Succession Act 1965 (the Act of 1965). Sub-section (1) of s. 120 provides:

> "A sane person who has been guilty of the murder, attempted murder or manslaughter of another shall be precluded from taking any share in the estate of that other, except a share arising under a will made after the act constituting the offence, and shall not be entitled to make an application under section 117."

After, in the succeeding sub-sections, providing for other circumstances in which persons are excluded from succeeding to the estate of a deceased person, sub-section (5) of s. 120 provides:

> "Any share which a person is precluded from taking under this section shall be distributed as if that person had died before the deceased."

By application of those provisions, the defendant is precluded from succeeding to any interest in the estate of the Deceased. Accordingly, the Beneficiary, being the only issue of the Deceased and having reached the age of eighteen years, is solely beneficially entitled to the residuary estate of the Deceased under the trusts declared in her will.

1.5 Subsequent to his conviction, the defendant executed a renunciation whereby he expressly renounced his right to probate of the will of the Deceased. On 24th March, 2010 letters of administration with the said will annexed of the estate of the Deceased were granted by the Court to the Personal Representatives, being the persons appointed by the Court pursuant to an order of the Court (O'Neill J.) dated 1st March, 2010 made pursuant to s. 27(4) of the Act of 1965. The defendant acknowledged that he had no entitlement to the assets of the Deceased, that is to say, assets that were held by the Deceased in her sole name.

1.6 The issues raised in these proceedings relate to assets which were not held in the sole name of the Deceased but were held in the joint names of the Deceased and the defendant, which will be referred to collectively as "the joint assets". In summary those joint assets are the following:

(a) The former family home of the Deceased and the defendant known as Rowan Hill, at Windgate Road, Howth in the County of Dublin, which is registered on Folio 31534F of the Register of Freeholders, County Dublin (Rowan Hill). On 16th February, 2000 the Deceased and the defendant were registered as full owners with absolute title on the said Folio. The most recent valuation of Rowan Hill which has been put before the Court was carried out by Sherry Fitzgerald on 1st November, 2011. The value ascribed to the property at that date was €750,000. However, the opinion was expressed by the valuer that, "if the house had no unfortunate history", the value would be in the region of €1m to €1,100,000. From the submissions made at the hearing of the proceedings on 16th November, 2011, it is clear that both sides are *ad idem* that the current value of Rowan Hill is in the region of €750,000 to €800,000. I note from the correspondence put in evidence, and in particular from the letter of 17th May, 2011 from the plaintiffs' solicitors to the defendant's solicitors, and also from the written submissions of counsel for the plaintiffs, that, while a charge is still registered against Folio 31534F, it was discharged before the death of the Deceased.

(b) A dwelling house, 32, Tramway Court, Sutton, County Dublin (32, Tramway Court). The title to 32, Tramway Court is an unregistered title and the property was acquired by the Deceased and the defendant as joint tenants in fee simple by virtue of a conveyance dated 25th January, 2002. Sherry Fitzgerald put a value of €220,000 on that property as at 1st November, 2011. Once again, it appears that both sides are *ad idem* as to the current market value of that property (in the region of €190,000 to €220,000), which is let to tenants. I note that a mortgage raised in connection with the acquisition by the Deceased and the defendant of this property was also discharged before the death of the Deceased.

(c) Two bonds in joint names, which appear to have a current value in the region of €45,000.

(d) Two joint bank accounts, one with Permanent TSB and the other with Bank of Ireland, which had credit balances aggregating approximately €24,500 at the date of the death of the Deceased, but which appear to have been operated by the defendant after that date.

I have no doubt that issues will arise in relation to the value of the joint assets consequential on the outcome of these proceedings. For example, the balance on one of the accounts referred to at (d) above has reduced since the death of the Deceased and, apparently, the other account is overdrawn. While I have recorded those facts, it is important to emphasise that the Court is not concerned with that type of detail on this application.

1.7 What is of significance is that it is common case that the properties Rowan Hill and 32, Tramway Court remained vested in the Deceased and the defendant as joint tenants at the date of the death of the Deceased, not as tenants in common.

1.8 A lot of other factual matters were averred to in the various affidavits filed on the special summons: the affidavits of the second plaintiff sworn on 18th June, 2010 and 16th November, 2010; the affidavits of the defendant sworn on 1st November, 2010 and 20th January, 2011; and the affidavit of the Beneficiary sworn on 28th June, 2011. Conflicts of evidence arise on the affidavits. However, in my view, the facts which I have outlined above are the only facts which are relevant to the determination of the issues which are before the Court and there is no conflict as to those facts.

1.9 Finally, the Court was informed that the Deceased and the defendant jointly owned real property in France, which is the subject of proceedings in that jurisdiction. Those proceedings have no bearing on the issues before the Court.

2. The questions to be determined by the Court

2.1 The questions which the plaintiffs have requested the Court to answer, arising out of the administration of the estate of the Deceased, in the events which have happened, are as follows:

(A) In circumstances where one joint tenant causes the death of the other joint tenant, does the right of survivorship operate?

(B) If the answer to question (A) above is in the negative, is the estate, right, title and interest of the surviving joint tenant forfeit?

(C) If the answer to question (B) above is in the affirmative, does the interest that is forfeit pass to the estate of the Deceased joint tenant?

(D) If the answer to question (A) is in the negative and the answer to question (C) is in the negative, is a severance of the joint tenancy effected in all the circumstances?

(E) If the answer to question (D) above is in the affirmative, is it necessary to conduct an inquiry into the contributions made by the joint tenants in relation to the beneficial entitlement of each co-owner?

(F) What is the interest of the defendant (if any) in the properties held jointly in all the circumstances?

2.2 In addition to the foregoing questions, the reliefs sought by the plaintiffs on the special summons include the following:

(a) the determination of any other question arising in relation to the matters in the proceedings as to the Court may seem proper;

(b) an order directing all necessary accounts, directions and inquiries; and

(c) if necessary, an order directing an inquiry and account in relation to the contributions to the acquisition of the properties owned jointly by the Deceased and the defendant and the funds standing to the credit of the joint accounts (i.e., the joint assets).

Further or other consequential orders and reliefs are sought, together with an order providing for the costs of the proceedings.

2.3 Apropos of question (E) and the necessity or otherwise to direct an inquiry or account in relation to the contributions to the acquisition of the joint assets, my understanding of the position adopted by both sides at the hearing was that, not only was it accepted that Rowan Hill and 32, Tramway Court were held as joint tenants by the Deceased and the defendant at the date of the death of the Deceased, but it was also common case that, in the event of a finding of severance, the estate of the Deceased and the defendant would each become entitled to an undivided moiety of the properties and funds. Accordingly, at this juncture, I do not

propose addressing question (E) or the necessity for an account or inquiry as sought in the terms set out at paragraph (c). If my understanding as to the position of the plaintiffs is incorrect, subject to the observations at the end of this judgment, if necessary, I will hear further submissions on this aspect of the matter. However, as it was not alluded to at the hearing, I would remind the parties that the Deceased and the defendant were husband and wife when the properties were acquired and the bonds and the bank accounts were put in place. That being the case, the equitable doctrine of advancement may come into play, although, having regard to the evidence as to the respective financial strengths of the Deceased and the defendant, the caveat issued by Professor Delany in *Equity and the Law of Trusts in Ireland* (5th Ed.) at p. 172 may be relevant.

3. The respective positions of the parties in outline

3.1 Counsel for the plaintiffs submitted that the principle to which there was given statutory force in s. 120(1) of the Act of 1965 had been recognised at common law before that statutory provision was enacted. The rationale underlying the principle embodied in the provision is that to allow a person who causes the death of another to benefit from the assets of the deceased would mean that that person would benefit from his or her crime, which is contrary to public policy. Counsel cited a number of authorities in support of that proposition (*Amicable Society for a Perpetual Assurance Office v. Bolland & Ors*. [1830] II Dow & Clark 630; *Cleaver v. Mutual Reserve Fund Life Association* [1892] 1 QB 147; and *In the Estate of Crippen* [1911] P 108). On the basis of the public policy imperative, counsel for the plaintiffs submitted that, by analogy to s. 120(5) of the Act of 1965, the defendant should be deemed to have predeceased the Deceased and that, in consequence, the joint assets, which had been formerly jointly owned by the Deceased and the defendant, should pass to the estate of the Deceased. It was submitted that the approach advocated fits the factual matrix, in that the Deceased was approximately five years younger than the defendant and, as a woman, as a matter of probability, she would have survived the defendant and become solely entitled to the joint assets by right of survivorship. Therefore, it was argued, if the defendant were to acquire any interest in the joint assets, he would, in effect, be benefiting from his crime.

3.2 Counsel for the plaintiffs did, however, recognise that there are authorities from other common law jurisdictions under which it has been held that, when the death of one joint tenant was caused by the other joint tenant, the joint tenancy was severed. An alternative approach, which has been adopted in other common law jurisdictions, was to treat the person who caused the death as holding the property on a constructive trust for himself or herself and the estate of the deceased person. It was urged on behalf of the plaintiffs that, if the Court were to find that the estate of the Deceased is not solely entitled to the joint assets, the Court should favour the severance approach rather than the constructive trust approach. Further, it was submitted that, in appropriating the properties and funds to the estate of the Deceased and the defendant, the Court should have regard to the fact that, because of the act of the defendant, the value of Rowan Hill has diminished. However, it was recognised that that argument may be for another day.

3.3 Counsel for the defendant did not contest the fundamental public policy principle that a person should not benefit from his own crime. However, he departed from the thrust of the case which had been made in the affidavits filed on behalf of the defendant, which was that the defendant became solely beneficially entitled to the joint assets and that the estate of the Deceased had acquired no interest in them. In effect, for the first time, at the hearing it was conceded on behalf of the defendant that he was not solely beneficially entitled to the joint assets. That concession was made late in the day, notwithstanding that a proposal was made on behalf of the plaintiffs in an open letter dated 17th May, 2011 to the defendant's solicitors that, notwithstanding their belief that there was legal argument to the effect that in all the circumstances the estate of the Deceased should be entitled to one hundred per cent of the joint assets, in an effort to resolve the matter, the plaintiffs would agree to the question raised on the special summons being answered on the basis that there was a severance of the joint tenancy. Accordingly, the position adopted on behalf of the defendant at the hearing was that the joint tenancy terminated on the death of the Deceased caused by the defendant's wrong, in consequence of which either –

> (a) the defendant holds the joint assets on a constructive trust for the estate of the Deceased and himself, or
>
> (b) the joint tenancy in the joint assets has been severed, so that the estate of the Deceased is entitled to one half share thereof and the defendant is entitled to the other one half share.

In support of that argument counsel for the defendant submitted that the defendant had vested rights in the joint assets subject to the operation of the *jus accrescendi*, which depended on which of the joint tenants died first. Those rights were property rights which enjoyed the protection of Article 40 of the Constitution. The defendant cannot be penalised further by being excluded from his property rights, which he enjoyed for eight to nine years, by being forced to forfeit them, it was submitted.

3.4 On the issue of whether the Court should adopt the severance approach or the constructive trust approach, counsel for the defendant submitted that it would be more convenient if the share of the estate was arrogated to the estate, so that the Personal Representatives may administer it. However, he stressed that the defendant is entitled to an undivided moiety or half share of the joint assets. He also submitted that to make an adjustment on the basis of the alleged diminution in value of Rowan Hill would constitute a penalty on the defendant, and he made the point that, in any event, property valuations fluctuate from day to day.

4. The issues

4.1 Having regard to the submissions made at the hearing, in my view, the primary issues for determination by the Court are:

> (a) whether, as contended on behalf of the plaintiffs, the entirety of the joint assets form part of the estate of the Deceased and the defendant has no interest in, or entitlement to, them or any part thereof; or
>
> (b) whether –
>
> (i) severance occurred on the death of the Deceased, so that the estate of the Deceased and the defendant are equally entitled to the joint assets, or,
>
> (ii) alternatively, the joint assets have accrued to the defendant solely but, as to a moiety thereof, are held by him on a constructive trust for the estate of the Deceased.

4.2 The resolution of those issues primarily turns on the application of established principles of law and equity in the area of real property law, which is highly technical, rather than the exercise of discretion by the Court.

5. The law: general observations

5.1 Apart from a newspaper report of a Circuit Court action in 1998, counsel for the plaintiffs was unable to point to any case in this jurisdiction in which the issues which arise in this case were considered and adjudicated on. The newspaper report (a report by Mr. Ray Managh in the Cork Examiner on 9th October, 1998) concerned the estate of Mrs. Esther McCann and the ownership of a house in

Dublin which had been jointly owned by Mrs. McCann and her husband, Frank McCann. At the time of the application to the Circuit Court, Mr. McCann was serving a life sentence for the murder of Mrs. McCann and a foster child. It is recorded in the report that counsel for Mr. McCann accepted that his client could not benefit from his crime and that the normal rules relating to survivorship could not be applied. Her Honour Judge Dunne decided that, although there was no specific decided case on the point, the effect of the murder was to sever the joint tenancy. Mr. McCann could not inherit or succeed to the interest of Mrs. McCann in the property, which, apparently, would devolve on her mother.

5.2 Counsel for the plaintiffs also pointed out that there is an *obiter dictum* in the judgment of the Supreme Court delivered by Finnegan J., with whom the other two Judges of the Supreme Court agreed, in *Mahon v. Lawlor* [2010] IESC 58 to the effect that a joint tenancy is severed "by homicide", referring to Megarry & Wade on *The Law of Real Property* (4th Ed.) and Challis on *Law of Real Property* (3rd Ed.).

5.3 The Court has been referred to authorities from other common law jurisdictions which are germane to the issue the Court has to decide, namely, from the United Kingdom, Canada and New Zealand.

6. United Kingdom authorities
6.1 There is a useful summary of the current state of the law in the United Kingdom in Megarry & Wade on *The Law of Real Property* (7th Ed., 2008) where it is stated at para. 13 – 049:

> "One consequence of the rule that no one may benefit in law from his own crime, is that, in general, if one joint tenant criminally kills another, the killer cannot take any beneficial interest by survivorship. This rule of public policy, commonly known as the 'forfeiture rule', applies to cases of deliberate and intentional homicide, where the killing is murder, manslaughter or aiding and abetting a suicide. It has not been conclusively settled in England whether the application of the rule causes the automatic severance of the joint tenancy or whether a constructive trust is imposed to prevent the killer from obtaining any benefit from his crime. Where there are just two joint tenants, the answer will be the same on either view."

In a footnote, the editors point out that in Australia the courts impose a constructive trust and that there are persuasive reasons for preferring that approach, citing, *inter alia*, *Rasmanis v. Jurewitsch* (1979) 70 S.R. (N.S.W.) 407.

6.2 As the editors of Megarry point out in the same paragraph, the Court in the United Kingdom now has a statutory power, under the Forfeiture Act 1982 (the Act of 1982), to modify the application of the forfeiture rule in cases where a person has unlawfully killed another, save where he or she has been convicted of murder. The Court may do so only if it is satisfied that, having regard to the conduct of the offender and of the deceased and to such other circumstances as may appear material to it, the justice of the case so requires. In the exercise of the statutory power, the Court may hold that the right of survivorship applies, notwithstanding that one joint tenant killed another. As I have recorded, counsel for the defendant acknowledged that he could not urge the Court that the right of survivorship applies in this case. However, in considering recent English authorities referred to below, it is necessary to keep those statutory provisions in mind.

6.3 The decision of the Chancery Division of the English High Court in *Re K. Deceased* [1985] 1 Ch. 85 post-dated the Act of 1982. The only passage from the judgment of Vinelott J. which I consider to be of assistance for present purposes is the following passage (at p. 100):

> "As I have mentioned the matrimonial home (which is registered land) was vested in the deceased and the widow as joint tenants at law and in equity. Mr. Barlow on behalf of the widow accepts that the forfeiture rule unless modified by the Act of 1982 applies in effect to sever the joint tenancy in the proceeds of sale and in the rents and profits until sale. I think that concession is rightly made. There is curiously no reported case on the point in England but it has been held in other jurisdictions where the law was similar to English law before 1925 that where one of two joint tenants murders the other while the entire interest vests in the survivor the law imports a constructive trust of an undivided one-half share for the benefit of the next of kin of the deceased other than the offender: see *Schobelt v. Barber* . . . , and *In re Pechar, decd*. . . . . Under English law since 1925 the result is more simply reached by treating the beneficial interest as vesting in the deceased and the survivor as tenants in common."

To put that passage into its factual context, the widow, with the intention of frightening the deceased, her husband, and deterring him from following her out of the room, picked up a loaded shotgun and released the safety catch. The gun went off killing the deceased. The widow was charged with murder, but the Court accepted a plea of guilty to manslaughter and she was placed on probation. In opting for the automatic severance approach, Vinelott J. seems to have attached considerable weight to the changes in relation to joint tenancies introduced in England in the Law of Property Act 1925 (in relation to which, *cf. Wylie* on *Irish Land Law*, 4th Ed. fn. 24 at p. 462).

6.4 The passage from the judgment of Vinelott J. quoted above was approved by Mummery L.J. in the Court of Appeal of England and Wales in *Dunbar v. Plant* [1998] Ch. 412. In his judgment, Mummery L.J., in the context of considering the ownership of a house and other assets jointly owned by the deceased and the defendant, Ms. Plant, in circumstances where it had been found that Ms. Plant had criminally aided and abetted the suicide of the deceased, who was her fiancée, stated (at p. 418):

> "The house has been sold for £35,000. It is not in dispute that the forfeiture rule, unless modified under the Act of 1982, applied to effect a severance of the beneficial joint tenancy in the house and that Miss Plant was therefore entitled to an equal half share in the proceeds as tenant in common. (This concession was correctly made: see *In re K. Deceased.* . . .).

7. Canadian authority
7.1 The headnote in the report of the judgment of the Ontario High Court in *Schobelt v. Barber* 60 D.L.R. (2d) 519, which dates from 1966 and was referred to in the passage of the judgment of Vinelott J. quoted at para. 6.3 above, summarises the effect of the judgment as follows:

> "Where one of two joint tenants murders the other the usual rule of survivorship applies and the full interest in the property accrues to the survivor. However the court will then impose a constructive trust so that the survivor holds the property as to an undivided interest share for the benefit of the deceased joint tenant's next of kin."

The essential facts under consideration by the Ontario High Court were that Mr. Barber and Mrs. Barber had owned real estate in

Ontario, the subject of the proceedings, for six or seven years as joint tenants before the death of Mrs. Barber in 1965. Mr. Barber was charged with the murder of Mrs. Barber and in May 1966 he was convicted of non-capital murder. Mrs. Barber's sister brought the proceedings, on behalf of herself and all of the next of kin of Mrs. Barber, claiming that it was contrary to public policy that Mr. Barber should be able to deal with the real estate as his own because of the death of his wife at his own hands. In my view, the reasoning of Moorhouse J. in his judgment is particularly instructive and persuasive. He said at the outset that he was informed by counsel that they had been unable to find a Canadian precedent.

7.2 In addressing the question he posed as to what was the destination of the rights in the real estate, Moorhouse J. distinguished between changes of ownership of property held on joint tenancy and of other forms of property as a consequence of a death, stating (at p. 522):

> "The problem of those who hold as joint tenants and not as tenants in common differs from that of a beneficiary under an insurance contract, the devisee under a will or an heir upon intestacy in that the survivor's right previously in existence is enlarged by the death while in the other situations mentioned the right is brought into being by the death. In the joint estate the survivor does not take the moiety of the other or as his successor but takes by right under the instrument creating the joint tenancy."

In answering the next questions he posed, whether the Court should interfere in the destination of the property and, if it should, how that could best be done, Moorhouse J. analysed several courses open to the Court by reference to academic commentary on an earlier Canadian authority (*Re Pupkowski* 6 D.L.R. (2d) 427, a decision of the Supreme Court of British Columbia) by Prof. R. St. J. MacDonald in 35 *Can. Bar Rev*. (1957). The options considered by Moorhouse J., and his views on them, may be summarised as follows:

> (1) The normal rule might apply whereby the whole estate accrues to the survivor. Moorhouse J. rejected that option on the basis that it not only violates the rule that a man cannot benefit directly from his own wrongful act but it is contrary to public policy that he should be permitted to do so. He pointed out that the law of joint tenancies had developed in a manner that one joint tenant might either voluntarily (or involuntarily) determine the joint tenancy and to that extent the *jus accrescendi* might be thus defeated, though the remaining joint tenant would still have his undivided interest as a tenant in common. The logic underlying the rejection of that option, in my view, is irrefutable. In any event, as I have made clear, contrary to the position adopted by the defendant in his replying affidavits, it was acknowledged at the hearing by his counsel that he cannot take the entire interest in all of the joint assets by right of survivorship.
>
> (2) The *jus accrescendi* could be held to be inoperative because of the crime, in which event the survivor would take nothing. As regards that option, Moorhouse J. stated:
>
> "To give effect to this view would in my opinion be imposing a further penalty on the survivor who has been sentenced for the crime of which he has already been convicted. It would be a return to the principle of forfeiture which has been abolished by the Criminal Code . . . ."
>
> (3) The full interest might vest in the survivor and then it might be held that the victim can be deemed to have died after the wrongdoer. As I understand how this option would operate, it would mean that the wrongdoer would take a life interest in the whole property and on his death the entire property would pass to the estate of the victim. As regards that option, Moorhouse J. stated:
>
> "In my respectful opinion this solution could only be accomplished by much legislation. That is something which in my opinion is beyond the function of the Court."
>
> (4) The Court might apply the normal rule, namely, that the full interest accrues to the survivor, but with the Court impressing it with a trust and declaring that the survivor holds an interest, meaning, as I understand it, an undivided share, as constructive trustee for the victim's heirs or devisees. Moorhouse J. stated that, in view of the claim made in the case before him, i.e., to an undivided half, that option more closely met the demands of justice on the facts than any other avenue open to him."

7.3 On the facts before him, Moorhouse J. declared that the defendant in his personal capacity was a constructive trustee of the whole property for himself as to an undivided one-half and as to the remaining undivided one-half for the next of kin of the deceased, Mrs. Barber. Earlier in his judgment, having quoted a passage from a text published in the USA, *Scott on Trusts* (1st ed., vol. 3, p. 2383), to the effect that, in the absence of a statute otherwise providing, it would seem that the legal title should pass to the murderer and that he is chargeable as a constructive trustee and that, by imposing a constructive trust upon the murderer, the Court is merely compelling the murderer to surrender the profits of his crime and thus preventing his unjust enrichment, Moorhouse J. explained his preference for that solution as follows (at p. 525):

> "This I know is but a feeble attempt to undo the advantage gained by the wrongdoer. It is true it takes away a right previously possessed, i.e., the *jus accrescendi*, and to that extent it is a forfeiture, but he could have terminated that incident lawfully – by his own act he could have converted the estate into a tenancy in common. It seems to me the method I adopt interferes less with the rights acquired by the joint tenants under the original document than any other method apparent to me and yet conforms to the established rule of public policy. It does not I think add murder to the approved methods by which one joint tenant may convert a joint tenancy into a different estate whereby he acquires an estate he could not himself have acquired but for the crime."

The declaration made in that case was that Mr. Barber, in his personal capacity, held the property upon trust, one-half for himself and the other one-half for the next of kin of Mrs. Barber.

8. New Zealand authority

8.1 The decision in *Schobelt v. Barber* was cited in the decision of the Supreme Court of Auckland, New Zealand in *Re Pechar, decd*. [1969] NZLR 574, which was also cited in the passage from the judgment of Vinelott J. quoted at para. 6.3 above. It is unnecessary for present purposes to consider the complicated facts of, and issues in, that case save to say that Hardie Boys J. had to consider whether Ante Grbic, who had been found not fit to plead on charges in connection with the death of his wife whom he had stabbed to death and who had been detained in a mental institution, was entitled to succeed to property held by him and his wife as joint tenants.

8.2 Having referred to various authorities, including *Cleaver v. Mutual Reserve Fund Life Association* (referred to at para. 3.1 above),

Hardie Boys J. stated (at p. 585):

> "These citations from authority . . . satisfy me that precisely the same principles should be applied to a joint tenancy and that, at least, Ante Grbic cannot claim the whole estate as having survived his wife whom he murdered.
>
> But what happens to his own co-extensive and co-existing right? I see force in the argument that, forfeiture and escheat having been abolished, for as long as he himself lived his crime would not deprive him of that right; it was a right in law which he enjoyed prior to the crime and, whilst he cannot enlarge that interest and promote his survivorship to beneficial ownership of the whole estate by murdering his joint tenant, there is nothing in the authorities which I have read which deprives him of the whole of what he already has.
>
> If, however, one stopped there, it would be ignoring the fact that his crime has got rid of the joint tenant who throughout his natural lifetime had a co-existing and co-extensive right the same as his own. He has indeed enlarged his rights during his lifetime to the extent of having removed the joint tenant whose interest was equal with his own."

In addressing the question he posed at the beginning of the second paragraph in the above quotation, Hardie Boys J. resorted to the second edition of *Scott on Trusts* (2nd Ed., 3203, para. 493.2) and the author's analysis of the various solutions adopted by the American courts in husband and wife cases. He opted for the fifth of Scott's alternatives, which he summarised (at p. 586) as that "the murderer is chargeable as a constructive trustee of his victim's estate of one half of the property".

8.3 The manner in which Hardie Boys J. gave effect to that option was more complex than one would have anticipated. He answered the question whether Ante Grbic was entitled to succeed as surviving joint tenant to any property held by himself and his late wife as joint tenants as follows (at p. 588):

> "The legal title to any property held by Ante Grbic and Marina Kathleen Grbic as joint tenants passes by survivorship to the said Ante Grbic but that such property is held by the said Ante Grbic as to one-half thereof as a constructive trustee for the estate of Marina Kathleen Grbic so that throughout the natural life of Ante Grbic one-half of the income arising from such property is held in trust for the estate of Marina Kathleen Grbic and upon the death of said Ante Grbic one-half of such property is held in trust for the estate of Marina Kathleen Grbic."

On the basis of his subsequent comments, it would seem that, in answering the question thus, Hardie Boys J. intended that the trust under which the survivor held his own share should be framed in such a way that he would not be in a position to legally dispose of his interest as tenant in common. I can understand the objection of counsel for the plaintiffs to the imposition of that type of constructive trust in this case. I cannot see how it would be fair to the beneficiaries of the estate of the victim to declare the constructive trust in a manner which would effectively postpone their obtaining control of, or the realisation of, the estate's share of the property formerly jointly held, whether by partition, sale in lieu of partition and a division of the proceeds, or otherwise, until after the death of the criminal.

8.4 Some observations made by Hardie Boys J. earlier in his judgment in relation to the technical issue of the passing of title are of relevance. He referred to an earlier decision of an Australian Court, *Re Thorp and the Real Property Act 1900* [1962] NSWR 889, in which Scott's propositions and the necessity of finding some means of giving effect to the rule laid down in the Cleaver case had been discussed. In that case, Jacobs J., having pointed out that forfeiture and escheat had been abolished in Australia, stated that the legal title had to pass to the surviving joint tenant and what the Court was concerned with was whether a trust should be engrafted on the legal title. Hardie Boys J. (at p. 587) quoted the following observations of Jacobs J.:

> "This is not altogether a satisfactory or logical conclusion because it relegates the enforcement of the principle of public policy to the realm of equity and does not introduce it into the common law from which it sprang. However, there is no way, it seems to me, consonant with the preservation of the principles of real property, in which effect could be given to the modern doctrine. I therefore think that it is best to leave the legal devolution of title untouched and to hold that the principle of public policy should be enforced by the medium of the trust."

As noted by Hardie Boys J., Jacobs J. was only concerned with the devolution of the legal title and he did not address the beneficial provisions under the constructive trust.

8.5 Finally, I think it is worth recording that Hardie Boys J. considered that his judgment had the same effect as the judgment of Moorhouse J. in *Schobelt v. Barber*, and the judgment of Street J. in *Rasmanis v. Jurewitsch* referred to at para. 6.1 above. He quoted the effect of the decision of Street J. from the headnote of the report as follows (at p. 588):

> "Where A. and B. are registered proprietors of an estate in fee simple as joint tenants of land under the Real Property Act 1900, as amended, and A. murders B., the legal estate in the land becomes vested in A., but in equity he holds it in trust for himself and the legal personal representative of B. as equitable tenants in common in equal shares."

On the facts, Street J. also had to address the situation, which does not arise in this case, where there had been a third joint tenant, holding with A. and B.

9. Conclusions on the current ownership of the joint assets

9.1 I have two preliminary observations to make in relation to the approach I propose adopting to determining the issues outlined at para. 4.1 above. First, I consider that, in determining how, and to whom, the joint assets passed on the death of the Deceased, the relevant law is that which applied at the date of the death of the Deceased. Secondly, I consider that the proper approach is to apply the law to the facts as they were immediately before the death of the Deceased, that is to say, that the joint assets were jointly owned by two joint tenants. I make that point because it is clear from what follows the passage from Megarry & Wade, which I have quoted at para. at 6.1 above, and the decision in *Rasmanis v. Jurewitsch* referred to earlier, that, where property has been jointly held by three or more joint tenants, answering the question whether, in the event of a homicide of one joint tenant by another, there is an automatic severance or a constructive trust is imposed gives rise to different results depending on the answer. In a case involving three or more joint tenants it would be necessary to assess the implications of those differences. However, in the context of the facts of this case, such implications are merely academic.

9.2 The Deceased died before the coming into operation of the Land and Conveyancing Law Reform Act 2009 (the Act of 2009), which came into operation on 1st December, 2009. Accordingly, the devolution of the legal title to the properties at Rowan Hill and 32, Tramway Court on the death of the Deceased falls to be determined in accordance with the common law principles applicable at the date of her death. In my view, applying those principles, on the death of the Deceased the legal estate in those properties

accrued to the defendant solely by right of survivorship. In particular, having regard to the relevant common law principles, in my view, it is not possible to conclude that the legal estate in the joint tenancy was automatically severed on the death of the Deceased. While those conclusions resolve the question in relation to the devolution of the legal title, the crucial questions which have to be determined are whether, on the death of the Deceased, the legal title to those properties became impressed with a constructive trust and, if it did, what are the terms of the trust.

9.3 As I have stated at para. 3.3 above, the defendant conceded at the hearing that on the death of the Deceased he did not become solely beneficially entitled to the joint assets. Rather he acknowledged that the joint assets are beneficially owned in equal shares by the defendant and the estate of the Deceased. In making that concession, the defendant, through his counsel, properly, if belatedly, acknowledged that the law, as a matter of public policy, will not permit him to obtain a benefit or enforce a right resulting from the crime he committed against the Deceased. That concession also narrowed the issues which the Court has to determine.

9.4 The issue which remains for the determination of the Court is whether, as was contended by counsel for the plaintiffs, public policy considerations necessitate that the estate of the Deceased should become solely beneficially entitled to the joint assets to the exclusion of the defendant. In addressing that issue, it seems to me that the proper approach is to identify the nature of the interest which each of the joint tenants enjoyed in the properties at Rowan Hill and 32, Tramway Court immediately prior to the death of the Deceased. They had concurrent rights to possession in those properties and each had the hope of his or her interest being enlarged into sole ownership by the operation of the *jus accrescendi,* if he or she survived the other. Under the law in force at the time, each had power to prevent the *jus accrescendi* ultimately applying by unilaterally severing the joint tenancy at any time prior to the death of the first of the joint tenants to die. It is true that, if the Court were to hold that the defendant now has a beneficial interest to the extent of one-half share in those properties, his entitlement to a specific share therein will have been accelerated by reason of the death of his co-owner. However, the reality of the situation is that, prior to the coming into force of ss. 30 (which voids unilateral severance of a joint tenancy) and 31 of the Act of 2009, during their joint lives either the defendant or the Deceased could have achieved the same result by taking steps to unilaterally sever the joint tenancy. It is also true that, if the tragic events of 15th December, 2008 had not occurred, the Deceased might have survived the defendant and become solely legally and beneficially entitled to those properties. However, as Hardie Boys J. stated in Re Pechar (at p. 587), referring to the third edition of Megarry & Wade, "any joint tenancy involves a chance and the chance is an 'all or nothing chance'". It follows that at the material time, that is to say, immediately before the death of the Deceased, there were a number of possibilities as to the ultimate destination of the joint assets, which would have turned on a number of imponderables, for example, whether one or other of the joint tenants would sever the joint tenancy and which of the joint tenants would die first. In my view, it is not possible to form a view, even as a matter of probability, as to where the ownership of those properties would have ultimately vested, if those tragic events had not occurred.

9.5 Accordingly, if the Court were to hold that on the date of the death of the Deceased the joint assets accrued to the defendant solely and were held by him on a constructive trust for himself and the estate of the Deceased in equal shares, that outcome, viewed objectively at that time, could not be regarded as conferring a benefit on the defendant as a result of the crime he committed. On the other hand, if the Court were to hold that the defendant on that day held, and continues to hold, the entire interest in the joint assets on trust for the estate of the Deceased solely, the Court would effectively be interfering with the defendant's existing rights in the joint assets. In the absence of legislation empowering the Court to so interfere with the defendant's existing rights at the date of the Deceased's death, in my view, the Court has no power or jurisdiction to do so. In particular, I do not consider that it would be proper to determine, by analogy to s. 120(5), that the ownership of the joint assets following the death of the Deceased should be determined on the basis that the defendant should be deemed to have pre-deceased the Deceased. Section 120 deals with the distribution of property owned by the deceased person, not with the distribution of property in which an unworthy potential successor has rights. Whether legislation, which would have the effect which counsel for the plaintiffs urged the Court to bring about in relation to the joint assets would be justified having regard to social justice and the exigencies of the common good so as to be able to withstand attack on the grounds of repugnancy to the Constitution, is not a matter on which it would be appropriate for the Court to express a view. However, I am satisfied that, in the absence of legislation conferring express power on the Court to interfere with the defendant's existing rights to the joint assets, the Court has no such power or jurisdiction.

9.6 Accordingly, the answer to the questions raised at para. 4.1 above are as follows:

(a) the entirety of the joint assets do not form part of the estate of the Deceased to the exclusion of the defendant; and

(b) while severance did not occur on the death of the Deceased, the joint assets have accrued to the defendant solely but as to one half share thereof they are held by him on a constructive trust for the estate of the Deceased.

To put it in another way, I find that on the death of the Deceased the joint assets became vested in the defendant upon a constructive trust as to one-half share thereof for the defendant in his own right and as to the other one-half share thereof upon the trusts applicable thereto as part of the estate of the Deceased.

10. Consequential considerations

10.1 Counsel for the plaintiffs emphasised that the Beneficiary, understandably, wants finality to be brought to the issues which have arisen in relation to the joint assets. The finding I have made at para. 9.6 above has determined the ownership of the joint assets following the death of the Deceased. As was recognised by counsel for the plaintiffs, it may be necessary for the Court to consider further, having heard further submissions, how the Beneficiary's objective of bringing finality to this matter can be achieved. However, Court intervention will only be necessary if agreement cannot be reached between the parties to achieve that end. With a view to assisting the parties, but without prejudging any issue which remains to be determined, I would make the following observations.

10.2 There can be no doubt that the optimum solution would be for agreement to be reached between the plaintiffs and the defendant as to the mode of division of the joint assets between them to satisfy their respective shares therein and for the defendant, as trustee, to transfer (by conveyance or otherwise) the assets to be appropriated to the estate of the Deceased in satisfaction of the share to which the estate is entitled, or, alternatively, to participate in the realisation of the assets and a division of the proceeds of sale thereof, if that is the agreed solution. That would enable the Personal Representatives to complete the administration of the estate of the Deceased. Adopting that approach would avoid further litigation of these proceedings and the legal and other costs which litigation would entail. However, if agreement cannot be reached between the parties, then the plaintiffs will have to give consideration to seeking relief in these proceedings under s. 31 of the Act of 2009. The Personal Representatives and the defendant being co-owners in equity of the joint assets, as regards Rowan Hill and 32, Tramway Court, it is open to the Court, on the application of the Personal Representatives, to make orders granting various reliefs under s. 31, including an order for partition of land amongst co-owners, an order for the sale of land and distribution of the proceeds of sale, or such other order relating to land as appears to the Court to be just and equitable in the circumstances of the case. Further, as regards the legal estate, in the event of lack of co-operation by the defendant qua trustee, it would be open to the Court to make a vesting declaration pursuant to s. 26 of the Trustee Act 1893.

10.3 *Prima facie*, the defendant must account to the plaintiffs for his dealing with the joint assets since the death of the Deceased, for example, for the rent which he received out of No. 32, Tramway Court. Again, the optimum solution would be for the plaintiffs and the defendant to reach agreement in relation to such accounting and, as appropriate, to factor in the result in the division of the joint assets. However, if agreement cannot be achieved, this aspect of the proceedings will have to be dealt with either by the Court or referred to the office of the Examiner of the High Court to conduct necessary inquiries and accounts. If either process is necessary, the final resolution of the issues between the parties will be delayed and further costs will accrue.

10.4 I propose adjourning the proceedings for a sufficient period to allow the parties to attempt to reach agreement in relation to the outstanding matters.

11. Legislation

11.1 The issues raised in these proceedings demonstrate that, ideally, there should be legislation in place which prescribes the destination of co-owned property in the event of the unlawful killing of one of the co-owners by another co-owner. Such legislation would have to have regard to the changes in relation to co-ownership of real property affected by the Act of 2009. It would also have to address from a policy perspective the complications which arise in a situation where there are three or more co-owners.