

SUPREME COURT OF QUEENSLAND

CITATION: *Re Clive Anthony Nicholson* [2004] QSC 480

PARTIES: **CLIVE ANTHONY NICHOLSON**
(applicant)
and
THE PUBLIC TRUSTEE AS TRUSTEE OF THE
ESTATE OF JULIE ROSE NICHOLSON (DECEASED)
(respondent)

FILE NO/S: 175/04

DIVISION: Trial division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 3 February 2004

DELIVERED AT: Brisbane

HEARING DATE: 2 February 2004

JUDGE: Atkinson J

ORDER:

CATCHWORDS: REAL PROPERTY – GENERAL PRINCIPLES – INCIDENTS OF ESTATES AND INTERESTS IN LAND – JOINT TENANCY AND TENANCY IN COMMON – INCIDENTS - JOINT TENANCY – SEVERANCE – OTHER CASES – unlawful killing of one joint tenant by another – whether accused has benefit of severance – legal title – constructive trust

Property Law Act 1974, s 38, s 41
Re Barrowcliff [1927] SASR 147, referred
Cleaver v Mutual Reserve Fund Life Association [1892] 1 QB 147, considered
Helton v Allen (1940) 63 CLR 691, cited
Re Keitley [1992] 1 VR 583, cited
Kemp v The Public Curator of Queensland [1969] Qd R 145, referred
Public Trustee v Evans (1985) 2 NSWLR 188, cited
Public Trustee v Fraser (1987) 9 NSWLR 433, cited
Rasmanis v Jurewitsch (1968) 88 WN (Pt 1) (NSW) 59, referred
Re Stone [1989] 1 Qd R 351, followed
Schobelt v Barber (1966) 60 DLR (2d) 519, cited

Re Thorpe (1961) 80 WN NSW 61, referred
Troja v Troja (1994) 33 NSWLR 269, cited
Wright v Gibbons (1949) 78 CLR 313, referred

COUNSEL: K Boulton for the applicant

SOLICITORS: Saunders Downing Hely Solicitors

- [1] The applicant, Clive Anthony Nicholson, is in custody at the Arthur Gorrie Correctional Centre having been charged with the murder of his wife, Julie Rose Nicholson. He deposes that he intends to plead not guilty to that charge. The committal is due to be heard in April 2004. The court has no information apart from that contained in the applicant's affidavit, as to the circumstances of Mrs Nicholson's death.

- [2] In his affidavit filed in this matter, the applicant deposes in paragraph 9:
 "Following the death of my wife in or about July 2003, I placed her body into the seaway at Southport in the State of Queensland. To the best of my knowledge, my wife's body has not since been located."

There is no admission by Mr Nicholson that he was responsible for the death of his wife nor is there anything other than his expression of opinion that she is in fact deceased. There has been no judicial determination that the applicant's wife, Julie Nicholson, has in fact died.

- [3] The applicant and Julie Nicholson have one child, Elizabeth Claire Nicholson, born on 11 August 1999 who resides with her cousin, Theresa Broughton.
- [4] Since the disappearance of Julie Nicholson and the arrest of Clive Nicholson, their matrimonial home has remained unoccupied and their motor vehicle has remained garaged at the matrimonial home unused. The home is situated at 8 Robyn Street, Southport, more particularly described as Lot 46 on registered plan 91029, County of Ward, Parish of Nerang, City of Gold Coast, Title Reference 50243346 ("the matrimonial home"). The matrimonial home is subject to a mortgage in favour of Perpetual Trustees Victoria Limited with an amount of approximately \$52,000 owing pursuant to that mortgage. The motor vehicle is a Honda CRV, registration number 208 HBH (the "motor vehicle").
- [5] The applicant has applied for orders pursuant to s 38 and s 41 of the *Property Law Act 1974* that trustees for sale of the matrimonial home be appointed and for the appointment under s 41 of the *Property Law Act* of trustees for the sale of the motor vehicle. The application seeks orders that the net proceeds of sale of the matrimonial home and the motor vehicle after the payment of expenses be held, as to one half, on trust for the applicant and the balance on trust for such person or persons as the Court may direct. On the hearing of the application, it was sought in the alternative that trustees for sale be appointed, that the matrimonial home and the motor vehicle be sold and the net proceeds held on trust pending the outcome of the criminal proceedings against the applicant.

- [6] Both the matrimonial home and the motor vehicle are held in joint tenancy. In the usual course, on the death of one joint tenant the other joint tenant or tenants would be entitled to the whole of the property by survivorship: see *Wright v Gibbons* (1949) 78 CLR 313 at 323.¹ However, this legal rule is subject to a rule of public policy, the forfeiture rule, which prevents a potential beneficiary from benefiting from killing another person.² Thus, in *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, Fry LJ held in respect of an insurance policy at 156:
- “It is against public policy to allow a criminal to claim any benefit by virtue of his crime; she is therefore, disentitled to claim the proceeds of the policy in question and the executors, who are her trustees, are equally disentitled ... The principle of public policy invoked is, in my opinion, rightly asserted. It appears to me that that no system of jurisprudence can with reason include amongst those rights which it enforces rights directly resulting to the person asserting them from the crime of that person.”
- [7] The forfeiture rule may be applied strictly unless modified by statute as has been the case in New South Wales and the Australian Capital Territory in the *Forfeiture Act 1995* and the *Forfeiture Act 1991* respectively which are based on the United Kingdom *Forfeiture Act 1982*.
- [8] The effect of the rule is somewhat different in its application to a joint tenancy from its application to the estate of a deceased person. The essential feature of a joint tenancy is the right of survivorship which means that, upon the death of one joint tenant, that person’s interest in the property is entirely extinguished in favour of the other joint tenant or joint tenants: see the helpful discussion in “*The Forfeiture Rule*” by the Tasmanian Law Reform Institute, Issues Paper No 5, December 2003 at pages 10 and 11. Property which is the subject of a joint tenancy does not form part of the estate of a deceased person.
- [9] The effect of the killing of one joint tenant by another joint tenant was discussed by McPherson J in *Re Stone* [1988] 1 QdR 351. In that case, Philip Stone was found not guilty of murder of his wife, Vera Stone, but guilty of manslaughter on the ground of diminished responsibility. Mr and Mrs Stone had been, prior to her death, proprietors of the fee simple estate in land as joint tenants. His Honour first referred to earlier authority in which courts had held that the action of one joint tenant in killing another effected a severance of the joint tenancy (see *Re Barrowcliff* [1927] SASR 147 and *Kemp v The Public Curator of Queensland* [1969] QdR 145). His Honour then considered cases in which it had been held that the killing of one joint tenant by another did not affect the incidence of survivorship inherent in a joint tenancy, subject to the imposition of a constructive trust upon the killer to the extent to which his or her interest was enlarged by the killing of his or her co-owner (see *Re Thorpe* (1961) 80 WN NSW 61 at 63 and *Rasmanis v Jurewitsch* (1968) 88 WN (Pt 1) (NSW) 59). His Honour determined that the latter approach was preferable.

¹ If Julie Nicholson has not died, then the joint tenancy is undisturbed.

² See B Cardozo, *The Nature of the Judicial Process*, Yale University Press, New Haven, 1921, p43 quoted by the author in A Dillon, “*When Beneficiary Slays Benefactor: The Forfeiture ‘Rule’ Should Operate as a Principle of General Law*” (1998) 6 APLJ 254.

- [10] This is a view with which I respectfully agree. A joint tenant who has unlawfully killed his or her co-owner acquires the legal title to the property by right of survivorship but holds that title on constructive trust for those who, because of his or her criminal act, have a better claim to it.
- [11] In this case, the question of whether others have a better claim to the property will have to await at least until the determination of the criminal proceedings against the applicant. He is entitled to the presumption of innocence. It may be that he will be found not guilty of murder or manslaughter in which case, subject to civil proceedings,³ the equitable title may remain with him. It may be that he will be found guilty of murder in which case he would retain the bare legal title but would either have no equitable interest in the property⁴ or may have an equitable interest as to half the property.⁵ It may be that he will be found guilty of manslaughter in which case questions might arise as to whether the rule of forfeiture should be strictly applied.⁶ All of these matters are at present the subject only of speculation.
- [12] The estate of Mrs Nicholson has not been administered. Indeed, on the material before me, it appears that there is no administrator or trustee of her estate. Absent an order for sale, the matrimonial home will remain unoccupied indefinitely and the motor vehicle unused. It is appropriate therefore to grant the applicant's application that the jointly owned property, being the matrimonial home and the motor vehicle, be sold. I propose to order that Gregory Alan Downing and Gregory Michael Hely, both solicitors of this court who have given their consent, be appointed to hold the property consisting of the matrimonial home and the motor vehicle on statutory trust for sale, to sell and hold the net proceeds of sale of the property, after payment of all expenses of sale and discharge of any mortgage or encumbrance, on trust until the determination of the criminal proceedings which have been commenced by the charging of Clive Nicholson with the murder of Julie Rose Nicholson or order of the court. I shall hear submissions as to the precise form of the order.

³ See *Helton v Allen* (1940) 63 CLR 691 at 709; *Public Trustee v Evans* (1985) 2 NSWLR 188; *Public Trustee v Fraser* (1987) 9 NSWLR 433.

⁴ *Re Stone* [1989] 1 QdR 354.

⁵ *Rasmanis v Jurewitsch* (1968) 88 WN (Pt 1) (NSW) 59 at 64; *Schobelt v Barber* (1966) 60 DLR (2d) 519.

⁶ See the debate helpfully set out in A Dillon, "When Beneficiary Slays Benefactor: The Forfeiture 'Rule' Should Operate as a Principle of General Law"; *Troja v Troja* (1994) 33 NSWLR 269; *Re Keitley* [1992] 1 VR 583.