

Chapter 11: Assessment question

In 1986 four friends, Steven, Julia, Mark, and Tracey, purchased a cottage called 'The Retreat' for the purpose of a holiday home. The Retreat was unregistered title situated in an area which had not yet become an area of compulsory registration of title. The conveyance to them contained no express declaration of a trust for sale. The purchase money was provided equally and at the time of the purchase Tracey was only 17 years of age.

In January 2005 Julia became short of cash and therefore obtained a bank loan which was secured on her interest in The Retreat.

Some months later, Steven also found himself in financial difficulties. However his solution to the problem was to create frequent arguments with the others in which he would demand that they 'buy him out'. These outbursts were ignored by the others and Steven eventually stopped using The Retreat.

In October 2005 Steven and Julia were killed in a car accident. By their wills Steven left all his property to his mother Violet, and Julia left all her property to her sister, Karen.

Mark is keen to sell The Retreat and has just found a purchaser who wants an early completion. Tracey vehemently opposes the proposed sale as since the deaths of Steven and Julia she has been living at The Retreat permanently. Violet is in agreement with Mark, but Karen is uncertain.

Advise Mark as to:

1. exactly who owns The Retreat and in what proportions;
2. his prospects of forcing a sale.

Specimen answer

The Legal Ownership of the Retreat

As the friends were co-owners, a trust for sale was imposed on them in 1986. However, only Steven, Julia and Mark became trustees, as Tracey was under 18 and only adults can be appointed trustees. Tracey would not become a trustee on her attaining the age of 18.

The only event after 1986 to affect the trusteeship of the legal title is the death of Steven and Julia. This event (as a result of the survivorship rule) leaves Mark as the only trustee, though not (as we shall see) the sole beneficiary.

Can Mark sell without a court order?

In theory, yes, in practical reality, no. Mark appears to be a sole surviving joint tenant, so he might try and take advantage of the Law of Property (Joint Tenants) Act 1964. Alternatively, to give added reassurance to the purchaser, he could appoint a friend as co-

trustee, and the two of them convey The Retreat to the purchaser. Either way a sale would overreach the equitable interests of Tracey and any other beneficiary.

The practical reality is, however, that no purchaser, even a very keen one, is going to buy with Tracey in permanent occupation. Undoubtedly Tracey has the right to occupy the property until it is sold (see *Williams and Glyn's Bank Ltd v Boland*). On the sale taking place her rights will be overreached (*City of London Building Society v Flegg*) and she will become a trespasser vis-à-vis the purchaser. But the purchaser will 'acquire' the problem of taking proceedings to evict Tracey. No purchaser (particularly one keen to move in quickly) is going to buy in these circumstances.

Thus Mark will be forced to take proceedings under s. 14 Trusts of Land and Appointment of Trustees Act 1996. (See below.)

The equitable ownership of the Retreat

The initial position

There appears to be nothing to rebut the initial presumption of joint tenancy. Note in particular that the four contributed equally to the cost. However, there might be a tenancy in common (in equal shares) if the court found there was a business element to the arrangements, e.g. if they envisaged holiday lettings of The Retreat when none of them wanted to use it themselves.

Current position if parties initially tenants in common

An equitable interest as tenants in common can be left by will. Therefore after the car crash Violet and Karen would become tenants in common in equity alongside Mark and Tracey.

Current position if parties initially equitable joint tenants

The effect of Julia's mortgage

This clearly severs her equitable interest, converting it into a one quarter share as tenant in common (for a discussion on this point see p.253). On her death this equitable interest will pass by her will (subject to the mortgage) to Karen.

The effect of Steven's frequent arguments

It is possible to sever by informal agreement, or by conduct which indicates that the parties are treating the joint tenancy as at an end (*Burgess v Rawnsley*). As the outbursts were ignored by the other three it seems that there has been no informal severance by conduct/agreement. However, Lord Denning was of the view in *Burgess* that an oral unilateral statement would effect a severance. This rather impractical view is unsupported by authority, and it is unlikely that such an outburst would result in severance.

If (as is probably the case) Steven has not severed, then Violet does not inherit any interest in The Retreat. The 'survivorship' rule operates between joint tenants; the law of succession has no application to a joint tenancy interest. The current equitable ownership would be Julia one quarter with the other three-quarters belonging to Mark and Tracey as joint tenants.

Mark's prospects of getting an order of sale

Violet's support is probably irrelevant, as she only has an interest if either the parties were initially tenants in common or if Steven has severed. If Violet has no interest and Karen comes out against a sale then a majority by value would be against sale.

But it is submitted that Mark has the trump card. The purpose for which the property was acquired has clearly failed, and that normally means that the court in its discretion will order a sale under s. 14 TOLATA 1996 (see *Jones v Challenger*, contrast *Re Buchanan-Wollaston* and see s. 15 TOLATA 1996).

A refusal of sale would be very unfair on Mark, as he would be left with his money locked up in an asset he no longer has any use for. In *Dennis v McDonald* the Court of Appeal adopted a compromise whereby a sale was refused but the co-owner in occupation had to pay a rent. However, that was a case of a broken-down cohabitation, very different from this one!

A much more sensible compromise, *and one which can be reached without the expense of litigation*, is for Tracey to buy out the interests of the other parties involved. Mark should propose this in 'Calderbank' letters sent to Tracey and Karen. (A 'Calderbank' letter is a letter sent 'without prejudice' to legal action that might be taken by the person sending the letter.)