

DIVISION OF ST. THOMAS AND ST. JOHN

Plaintiff)

ACTION FOR: EXPUNGEMENT

VS

Defendant

TO: LEMUEL F. CALLWOOD, ESQUIRE
SUPERIOR COURT IT DIVISION

Dated: October 01, 2014

Estrella H. George
Acting Clerk of the Court

Acting Clerk of the Court
Rachel Clayton

PAULA CLAXTON
COURT CLERK II

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

ORINE CHRISTOPHER,

Plaintiff,

vs.

TARANA SKINNER,

Defendant.

Case No. ST-13-CV-575

**ACTION FOR PARTITION
OF REAL PROPERTY**

ORDER

Having reviewed Plaintiff's July 31, 2014, motion for default judgment, and being satisfied that this Court has jurisdiction over this matter, it is

ORDERED that Plaintiff **MAY PROCEED** with her action for partition; and it is

ORDERED that copies of this Order shall be directed to counsel of record and the Superior Court IT Division.

Dated: September 26, 2014

ATTEST: Estrella George
Acting Clerk of Court

by Lori Boynes-Tyson
Court Clerk Supervisor


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

10/1/2014

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

ORINE CHRISTOPHER,	)	
	)	Case No. ST-13-CV-575
Plaintiff,	)	
	)	
vs.	)	ACTION FOR PARTITION
	)	OF REAL PROPERTY
TARANA SKINNER,	)	
	)	
Defendant.	)	
_____	)	

MEMORANDUM OPINION

Before the Court is Plaintiff Orine Christopher's July 31, 2014, Motion for Default Judgment seeking an Order permitting partition of property shared with Defendant. Defendant Tarano Skinner has failed to comply with the Court's March 12, 2014, and May 20, 2014, Orders to actively defend the case, and has, to date, failed to move, answer or otherwise meaningfully respond to the Complaint or Plaintiff's motion. Because the Court may consider the question of its jurisdiction at any time,¹ and because the Court concludes that denying the right to seek partition to tenants that hold estates jointly or in the entirety creates unjust results, the Court concludes that it has jurisdiction to consider Plaintiff's motion for default judgment.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

Plaintiff filed a Petition for Partition on November 4, 2013, seeking partition of property she shares with Defendant. The parties hold the property "as joint tenants with the right of survivorship and not as tenants in common".² Plaintiff states that she has and continues to pay the property taxes and insurance, and Plaintiff requests that the property be sold because physical division of the property is not practical since there is a house on the land.

¹ *Martinez v. Colombian Emeralds, Inc.*, 51 V.I. 174, at *5 (V.I. 2009) ("[T]he court treated the issues as affecting subject matter jurisdiction[,] which can be raised and addressed by the court at any time") (citation omitted).

² October 26, 1998, Warranty Deed over Estate Anna's Retreat Heights (VQ001032).

Plaintiff moved for entry of default judgment on July 31, 2014, and a hearing was scheduled for September 11, 2014. However, upon further review and consideration of Plaintiff's motion, the Court determined that it had to undertake additional research concerning whether the Virgin Island Partition Act imposed a jurisdictional limit on the Superior Court's authority³ over an action seeking partition of a joint tenancy. The default judgment hearing was then continued to a future date.

STANDARD OF REVIEW – MOTION FOR DEFAULT JUDGMENT

Pursuant to Rule 48 of the Rules of the Superior Court, after entry of default and upon motion, the Court may enter a default judgment against a party who has failed to plead or otherwise defend.

DISCUSSION

Plaintiff states that he "is entitled to partition of the parties['] joint tenancy pursuant to 28 V.I.C. § 451, et. seq., (the 'Partition Act')." ⁴ 28 V.I.C. § 451 states that:

When several persons hold and are in possession of real property *as tenants in common*, in which one or more of them have an estate of inheritance, or for life or years, or when several persons hold *as tenants in common* a vested remainder or reversion in any real property, any one or more of them may maintain an action of an equitable nature for the partition of such real property according to the respective rights of the persons interested therein, and for a sale of such property, or a part of it, if it appears that a partition cannot be had without great prejudice to the owners.

(emphasis added). Similarly, Section 454 of the Partition Act also specifically references tenancies in common without discussing joint tenancies:

The summons shall be directed by name to all *the tenants in common* who are known, and in the same manner to all lien creditors who are made parties to the action, and

³ See *Bunn v. Dowdye*, 59 V.I. 899, n. 6 (V.I. 2013) (In the context of the Virgin Islands Torts Claims Act, the Court stated that "whether the scope of employment provision found in section 3408(a) of title 33 constitutes a jurisdictional limit on the Superior Court's authority remains an unresolved question").

⁴ November 3, 2013, Complaint.

generally to all persons unknown, having or claiming an interest or estate in the property.

(emphasis added). Thus, the issue before the Court is whether in the Virgin Islands only tenants in common may maintain an action for partition of real property or if that right also extends to joint tenants and tenants in the entirety.⁵

A. Binding Precedent.

“[A]bsent a different interpretation by this Court, the Superior Court is required to follow [prior interpretations of local law issued by]” the Third Circuit Court of Appeals and the Appellate Division of the District Court.⁶ The Virgin Islands Supreme Court held in *Walters v. Parrott* that “28 V.I.C. § 451 is unambiguous that actions for partition may be initiated by those having legal interest in property as tenants in common.”⁷ But *Walters* does not then go on to state whether Section 451, and thus the Partition Act, excludes joint tenants from seeking partition.

While a 1979 Third Circuit case held that “[t]he legislature has authorized judicial division of real property only in divorce actions and in partitions of tenancies in common,”⁸ more recently the availability of partition appears to have been extended to joint tenants via the Appellate Division’s 2003 holding in *Armstrong v. Armstrong*. In *Armstrong*, the District Court stated that

⁵ “[T]he estate by the entirety was not known in the Virgin Islands until September 1, 1957 when it was introduced by title 28, § 7, of the Virgin Islands Code.” *Masonry Products, Inc. v. Tees*, 280 F. Supp. 654, 657 (D.V.I. 1968). Because a tenancy by the entirety is essentially a special joint tenancy held by a married couple, references to joint tenancies, unless otherwise noted explicitly or by context, also encompass estates by the entirety.

⁶ *Berrios-Rodriguez v. Berrios*, 58 V.I. 477, at *2 (V.I. 2013) (citing *Najawicz v. People*, S.Ct.Crim. No.2012-0109, 2013 WL 1095416, at *5-6 (V.I. Mar. 15, 2013)).

⁷ 58 V.I. 391, at *7 (V.I. 2013); see also *Tranberg v. Tranberg*, 456 F.2d 173, 175 (3d Cir. 1972) (on appeal from D.V.I.) (“[I]n the Virgin Islands, an action in partition is not a privilege, but a right possessed by tenants in common”) (citing to 28 V.I.C. § 451); *Kean v. Dench*, 413 F.2d 1, 4 (3d Cir. 1969) (on appeal from D.V.I.) (“[P]artition is a matter of right and this right is afforded to tenants in common in the Virgin Islands by [28 V.I.C. § 451]”); *Dyndul v. Dyndul*, 541 F.2d 132, 134 (3d Cir. 1976) (“[E]ither party may institute a separate action in the proper jurisdiction for partition of property held as tenants in common”) (citing to 28 V.I.C. § 451); and *Williams v. Mackay*, 54 V.I. 713 (D.V.I., App. Div. 2009) (held that the tenants in common can seek partition under Section 451).

⁸ *Francois v. Francois*, 599 F.2d 1286, 1294 (3d Cir. 1979) (on appeal from D.V.I.).

“any distribution of [the property held in joint tenancy] must be done in a separate civil action for partition,”⁹ citing Section 451 in support. However, *Armstrong* did not analyze or explain why the right is extended to joint tenants despite the specific language of the statute, and instead the finding appears to depend upon severance of the joint tenancy by conveyance to a third party,¹⁰ which converts the joint tenancy into a tenancy in common.

This Court is not bound by an otherwise precedential decision grounded solely on an erroneous reliance on the common law or the Restatements of the Law of the American Law Institute. In *Govt. v. Connor*, the Virgin Islands Supreme Court directed that this Court, when considering a question not foreclosed by prior precedent, “must perform a three-part analysis as set forth in *Banks*.”¹¹ The Court will now consider whether broader allowance of partition is permissible under the statute.

B. APPLYING PLAIN MEANING STATUTORY INTERPRETATION HIGHLIGHTS THAT, IN A JURISDICTION THAT RECOGNIZES JOINT TENANCIES AND TENANCIES BY THE ENTIRETY, AN EXCLUSION UNDER SECTION 451 IS ABSURD.

The Legislature referenced tenancy in common not once, but twice, within the text of Section 451. “If the language [of a statute] is clear and unambiguous, there is no need to resort to any other rule or statutory construction.”¹² And, unless the disposition required by the text is absurd, the Court must enforce the statute according to its terms.¹³

⁹ 266 F.Supp.2d 385, 394 (D.V.I., App. Div. 2003).

¹⁰ 266 F.Supp.2d at 393-394 (citing *United States v. Craft*, 535 U.S. 274 (2002), which discussed property interests under the common law).

¹¹ S. Ct. Civ. No. 2013-0095, 2014 WL 702639, at *3 (V.I. 2014).

¹² *Shoy v. V.I.*, 55 V.I. 919, at *5 (V.I. 2011) (citing *Dodd v. United States*, 545 U.S. 353, 359 (2005)) (further citation omitted).

¹³ *Id.*

A disposition is absurd when it would produce an odd or unjust result.¹⁴ Pursuant to 7 V.I.C. § 7(d), tenancies by the entirety automatically become tenancies in common upon divorce or annulment. Short of an outright conveyance to a third party by mutual agreement, and with the exception of equitable division of the marital homestead by the Family Division during a divorce or annulment¹⁵ or via a probate action,¹⁶ the Virgin Islands Partition Act is the only means by which parties holding concurrent estates can voluntarily seek equitable division of their interests through the courts. This includes married couples who, for religious or other personal reasons, choose not to seek a divorce or annulment. In a jurisdiction that recognizes joint tenancies and tenancies in the entirety in addition to tenancies in common, denying the ability to seek partition to tenants holding interests other than in common is both odd and unjust. The Court concludes, therefore, that such a limitation is absurd.

C. IT IS UNCERTAIN WHETHER THE LEGISLATURE INTENDED TO EXPLICITLY EXCLUDE JOINT TENANTS FROM THE PARTITION ACT.

Before applying a common law concept to the existing statute, the Court must first decide whether there was a clear expression of Legislative intent to exclude joint tenants from seeking partition. 28 V.I.C. § 451 is derived from and is an exact replication of Title III, ch. 42, § 1 of the

¹⁴ *In Matter of Application of Shores*, 59 V.I. 994, n. 5 (V.I. 2009) (citations omitted).

¹⁵ It should be noted that property acquired by a husband and wife jointly is held as tenants by the entirety, and “[u]pon the divorce or annulment of the marriage, they... become tenants in common as to any real property then held by them as tenants by the entirety.” 28 V.I.C. § 7(d). But this automatic statutory severance of a tenancy by the entirety under Section 7 should not be confused with the equitable division of the marital homestead by the Family Division, because not all marital homesteads are held by the entirety. *Harvey v. Christopher*, 55 V.I. 565, at *3 (“[A] ‘marital homestead’ is any ‘homestead’ in which a husband and wife both reside during the marriage and that is owned by one or both of the spouses”) (citations omitted). “[T]he Superior Court, in a divorce case, lacks subject matter jurisdiction to issue a judgment affecting rights to real property if the property does not qualify as a marital homestead.” *Garcia v. Garcia*, 59 V.I. 758, at *4 (V.I. 2013) (citations omitted). The Legislature is currently considering expansion of the Family Division’s jurisdiction to include “all ... real property, whether such property was held individually, jointly or by the entireties, which shall include the marital homestead, and all other real property, wherever situated, in accordance with the principles of equitable distribution,” (Bill No. 30-0392), but presently, divorced parties seeking a division of any real property that does not qualify as a marital homestead need the ability to do so via the Partition Act.

¹⁶ This Opinion does not address partition in relation to probate matters, bankruptcy, or personal property.

Code of Laws of St. Thomas and St. John, approved March 17, 1921, title IV, chap. 13, sec. 6 (the “1921 Codes”).

According to the revision notes of 28 V.I.C. § 7, Property, Title II, ch. 13, § 6 of the 1921 Codes provided for the abolition of joint tenancies and stated that “all persons having an undivided interest in real property are deemed and considered tenants in common.” But, this section conflicted with Title II, ch. 15, § 9 of the 1921 Codes, which allowed for a more lenient presumption against joint tenancies. Therefore, on the advice of the Code Advisory Committee, 28 V.I.C. § 7(b) and (c) provide that “unless it is expressly declared in the conveyance or devise” “[e]very conveyance... of lands... made to two or more persons [except as to husband and wife jointly,] ... shall create a tenancy in common in such estate”. It is notable, however, that although “joint tenancies were the predominant form of concurrent ownership at common law,”¹⁷ our earliest common law based code¹⁸ made an incomplete attempt to do away with joint tenancies altogether. Not all jurisdictions recognize joint tenancies, and our governing bodies may have, early on, been attempting to extinguish this form of ownership.¹⁹

“[W]here a statute is unambiguous ‘it is not the function of this Court to substitute its judgment for that of the Legislature.’”²⁰ However, our case law and statutory law currently allow

¹⁷ *Craft*, 535 U.S. at 280 (citing 4 G. Thompson, Real Property § 31.05 (D. Thomas ed. 1994)).

¹⁸ *Smith v. Defreitas*, 329 F.2d 629, 633 and n. 2 (3d Cir. 1964) (on appeal from D.V.I.) (“The Danish law... was in force in St. Thomas prior to 1921” and “[o]n July 1, 1921 the rules of the common law as understood in the United States came into force”) (citing Title IV, ch. 13, sec. 6 of the 1921 Codes).

¹⁹ See, for example, *Edwin Smith, L.L.C. v. Synergy Operating, L.L.C.*, 285 P.3d 656, 662 (N.M. 2012) (“For at least the past several centuries courts have observed that ‘[f]ormerly joint tenancy was much favored, but for more than a century past the courts have laid hold of every available expression to construe estates given to a plurality of tenants as tenancies in common’”) (quoting *Lockhart v. Vandyke*, 97 Va. 356, 33 S.E. 613, 613 (1899)). *Edwin* goes on to explain that while “[f]ew courts have examined why joint tenancies are disfavored... the animating reason seems to be a historical solicitude for a property owner’s heirs, because by operation of the right of survivorship the property would pass to the owner’s cotenants instead of those heirs.” *Id.* at 662.

²⁰ *Kelley v. Gov’t of the V.I.*, 59 V.I. 742, 747 (V.I. 2013) (quoting *Brady v. Gov’t of the V.I.*, 57 V.I. 433, 443-444 (V.I. 2012)).

for and recognize joint tenancies.²¹ Thus it appears that, rather than expressing a specific legislative intent to limit partition actions to those between tenants in common, the language of 28 V.I.C. §§ 451 and 454 more likely is just a continuation of the concepts expressed in, but not fully implemented by, the 1921 Codes. Statutory provisions limiting partition to tenants in common make perfect sense if the tenancies in common are the only recognized form of property ownership. But, where other forms of ownership are routinely permitted and utilized, mere reiteration of anachronistic language should not be blindly afforded the weight of a clear expression of legislative intent. Even if the Legislature intended to explicitly exclude joint tenants from the Partition Act, that intention has long been abrogated in practice. As discussed above, because an exclusion creates absurd results, the Court will now analyze the propriety of permitting partition of joint tenancies and tenancies by the entirety.

D. Banks Analysis

Pursuant to the Virgin Islands Supreme Court's holding in *Banks v. International Rental & Leasing Corp.*, parties – and indeed, this Court – can no longer automatically and uncritically rely on non-binding authority when discussing the best common law for the Virgin Islands.²² The only decisions binding upon this Court are those rendered by the Virgin Islands Supreme Court;²³ the Third Circuit Court of Appeals, when serving as the de facto court of last resort in the Virgin Islands; and the Appellate Division of the District Court of the Virgin Islands.²⁴ All other

²¹ See, for example, 28 V.I.C. § 7, Remedies of tenant in common; joint tenancies; tenants by the entirety.

²² 55 V.I. 967, 979 (V.I. 2011); *Connor*, 2014 WL 702639, at *1.

²³ The Virgin Islands Supreme Court was established by the Legislature of the Virgin Islands by Act No. 6687, and “[t]he Supreme Court officially assumed appellate jurisdiction over appeals from the Superior Court on January 29, 2007.” 4 V.I.C. § 32; *Hypolite v. People*, 51 V.I. 97, 101 (V.I. 2009). Before January 29, 2007, the Appellate Division of the District Court of the Virgin Islands had appellate jurisdiction over final judgments, decrees or orders from this Court.

²⁴ *Najawicz*, 58 V.I. 315; *Connor*, 2014 WL 702639; *Simon v. Joseph*, 59 V.I. 611 (2013).

holdings,²⁵ as well the Restatements, law review commentaries, and pre-*Banks* common law decisions of the Virgin Islands Supreme Court, Third Circuit and Appellate Division, are merely persuasive.^{26,27} As a result, “the Superior Court, when considering a question not foreclosed by prior precedent... must perform a three-part analysis as set forth in *Banks*.”²⁸ A *Banks* analysis involves:

- (1) assertion of “whether any... local courts have considered the issue and rendered any decisions upon which litigants may have grown to rely;”
- (2) determination of the “position taken by a majority of courts from other jurisdictions;” and
- (3) identification of “the best rule for the Virgin Islands”.²⁹

This Court “possesses, in the absence of binding precedent... concurrent authority with [the Virgin Islands Supreme Court] to shape Virgin Islands common law,” and it need not even follow otherwise binding precedent that was predicated solely on 1 V.I.C. § 4.³⁰ As discussed above, binding authority by the Supreme Court addressing the scope of the Partition Act is limited

²⁵ This includes decisions rendered by courts outside of the Virgin Islands. *Connor*, 2014 WL 702639.

²⁶ *Connor*, 2014 WL 702639; *Simon*, 59 V.I. 611.

²⁷ *Connor*, 2014 WL 702639, n. 1 (“[W]hile all decisions of [the Virgin Islands Supreme] Court, the Third Circuit, and the Appellate Division should be considered with respect to the first *Banks* factor, the Superior Court need not consider itself foreclosed from adopting a different common law rule if those decisions were wholly based on a belief that application of the Restatements or the majority rule was mandatory pursuant to 1 V.I.C. § 4 as in effect prior to this Court's ruling in *Banks*”).

²⁸ *Connor*, S.Ct. Civ. No. 2013-0095, at *3.

²⁹ *Connor*, S.Ct. Civ. No. 2013-0095, at *3 (citations omitted). Although only the Superior Court is required to conduct *Banks* analyses, litigants are reminded of the requirements of LRCi 11.1. By signing a motion or supporting memoranda, an attorney certifies that the applicable law in this jurisdiction has been cited, including authority for or against the position being advocated by counsel. LRCi 11.1(a). Therefore, parties are singularly reminded that, in the absence of discussion addressing: (1) whether cited authority is binding upon this Court or presented as persuasive authority; and (2) why the Court should adopt this view as the “appropriate... rule based on the unique characteristics and needs of the Virgin Islands” and the parties, the Court may strike motions and responses as fatally deficient. *Connor*, S.Ct. Civ. No. 2013-0095, at *3 and LRCi 11.1; see also VIRGIN ISLANDS RULES OF PROFESSIONAL CONDUCT RULE 211.3.1, Meritorious Claims and Contentions (“A lawyer shall not... assert or controvert an issue... unless there is a basis in law and fact for doing so... which includes a good faith argument for an extension, modification or reversal of existing law”) and *Cacciamani and Rover Corp. v. Banco Popular De Puerto Rico*, S. Ct. Civ. No. 2013-0063, 2014 WL 4262098, n. 2 (V.I. Aug. 29, 2014) (citing *Benjamin v. Coral World V.I., Inc.*, Super. Ct. Civ. No. 294/2013 (STT), 2014 WL 2922306, n. 38 (V.I. Super. Ct. June 12, 2014)) (warning litigants that simply citing the Restatements and other non-binding authorities without any discussion of *Banks* may result in sanctions).

³⁰ *Connor*, S.Ct. Civ. No. 2013-0095, at *3 (citation omitted) and n. 1 (citations omitted).

to instances involving litigants who may seek partition, without clarity as to who may not. And although the Appellate Division appears to reject the Third Circuit decisions that restricted partition, the Appellate Division mechanistically relied on the common law in apparent reliance on 1 V.I.C. § 4. Because this Court lacks binding authority clearly addressing the issue of whether joint tenants and tenants by the entirety may seek partition, the Court will conduct an analysis of the issue consistent with *Banks*.

i. LOCAL COURTS THAT HAVE CONSIDERED THE ISSUE HAVE NOT RENDERED ANY DECISIONS UPON WHICH LITIGANTS HAVE GROWN TO RELY.

The Court will first review whether any local courts have considered the issue of partition by joint tenants.³¹ Although the following are non-binding, the Court also considers whether litigants have grown to rely on the holdings.

1. The Court of Appeals for the Third U.S. Circuit

Three (3) Third Circuit decisions confirm the right of tenants in common to seek partition while not addressing whether this right extends to joint tenants.³² Even though other Third Circuit cases discuss partitions of property in general or in relation to tenants in common, none either allow or reject partition by joint tenants. Therefore, the Court cannot rely upon the Third Circuit cases addressing partition within the Virgin Islands.

2. The District Court of the Virgin Islands

In the non-binding case of *George v. George*, the District Court of the Virgin Islands recently and specifically extended the right to seek partition to joint tenants.³³ However, the District Court's holding relied on 1 V.I.C. § 4, which is misplaced for two reasons. First, the

³¹ *Connor*, S.Ct. Civ. No. 2013-0095, at *3 (citations omitted).

³² *Tranberg*, 456 F.2d at 175; *Kean*, 413 F.2d at 4; and *Dyndul*, 541 F.2d at 134.

³³ 59 V.I. 1092, at *4-5 (D.V.I. 2013).

Supreme Court held in *Connor* that, as of December 15, 2011, Section 4 was impliedly repealed through its holding in *Banks*. Thus, 1 V.I.C. § 4 was not good law when *George* was filed on August 8, 2013. Second, even if 1 V.I.C. § 4 applied, the Virgin Islands would only turn to the Restatements “in the absence of local laws to the contrary,” while 28 V.I.C. § 451 has been around in some form since 1921. Additionally, the District Court held that “nothing in [the Virgin Islands Code] is ‘contrary’ to the Restatement provision granting joint tenants the right to seek partition.”³⁴ However, 28 V.I.C. §§ 291,³⁵ 451 and 454 all fail to address the rights of a joint tenant while specifically discussing those of a tenant in common. Lastly, although the District Court recognized that a conveyance by any joint tenant destroys the joint tenancy while a conveyance by a tenant in common would not disturb the status of the parties, the court went on to state that the right of survivorship is the only additional difference between a joint tenancy and a tenancy in common. However, in the Virgin Islands, “the unities of time, title, interest and possession must all be present in order to create a joint tenancy,”³⁶ “[w]hile the characteristic attribute of a tenancy in common is a unity of possession”.³⁷

Moreover, while the District Court points out that it has “previously construed Section 451 to apply to joint tenancies,” it cites to *Armstrong*, which, because it relied on the common law

³⁴ *Id.* at *5.

³⁵ 28 V.I.C. § 291 addresses an “action by tenant in common against a cotenant”. Like Section 451, this section was derived from the 1921 Codes and specifically addresses the rights of tenants in common. There is not a similar statutory “right” for joint tenants within the Virgin Islands Code, aside from the rights granted to tenants in the entirety during divorce or annulment proceedings.

³⁶ *Williams*, 54 V.I. 713, n. 12 (“To remain joint tenants, the parties must have one and the same interest accruing by one and the same conveyance commencing at the same time and held by one and the same undivided possession”) (citations omitted).

³⁷ *Bishop v. Bishop*, 257 F.2d 495, n. 2 (3d Cir. 1958) (on appeal from D.V.I.).

without doing any particular analysis of its reliance thereon, is likewise not binding upon this Court.

In conflict with *George*, an earlier non-binding District Court case, *Jacobs v. Jacobs*, appears to restrict partition to tenants in common.³⁸ Therefore, the Court finds these conflicting holdings are not particularly persuasive.

3. The Supreme Court of the Virgin Islands

As discussed previously, the Supreme Court's decision in *Walters v. Parrot* does not discuss whether Section 451, and thus the Partition Act, excludes joint tenants from seeking partition.

4. The Superior Court

Finally, it does not appear that the Superior Court has come to rely on any particular application of the Partition Act.^{39,40} Reviewing all of these sources, the Court concludes that local reliance is not a persuasive consideration in the Court's analysis of the application of the Partition Act.

³⁸ 408 F.Supp. 846, 850 (D.V.I. 1976) ("Any action for partition is necessarily a bitter one. It arises when several persons, holding title to real property as tenants in common, hav[e] a falling out").

³⁹ For example, some cases discuss partition only in relation to tenants in common: *Phaire v. Galiber-Babb*, 26 V.I. 144 (Terr. Ct. 1991); *Creque v. Creque*, 19 V.I. 408 (Terr. Ct. 1983).

⁴⁰ Other cases discuss partition in relation to joint tenants or tenants by the entirety without specifically reaching the issue presented here: *Corneiro v. Simmonds-Corneiro*, Fam. No. ST-09-DI-125, 2014 WL 2109311 (Directed joint tenants to seek division through a separate civil action for partition. But this case relies on *Armstrong*, which, as discussed in the body of this memorandum, is not binding); *Quiros v. Birch*, 19 V.I. 418 (Terr. Ct. 1983) (The partition action referenced in *Quiros* determined the rights of the parties, whose interests included a tenancy in common and a tenancy by the entirety, but the tenancy by the entirety remained unified); *Laurent v. Laurent*, 15 V.I. 409 (Terr. Ct. 1978) (The Court determined during a marriage dissolution that there was insufficient evidence to evaluate the equities of the properties, one of which was held by the entirety, but the Court stated that the parties "may pursue their rights to partition in a separate action"); *Zivic v. Zivic*, 21 V.I. 290, at *3 (Terr. Ct. 1985) ("The principle still holds that... neither spouse may compel partition") (citing non-binding authority and *Masonry Products*, 6 V.I. 108 (D.V.I., App. Div. 1968)).

ii. COURTS THAT RECOGNIZE JOINT TENANCIES AND TENANCIES BY THE ENTIRETY EXTEND THE RIGHT TO SEEK PARTITION TO JOINT TENANTS WHILE FORECLOSING TENANTS BY THE ENTIRETY FROM SEEKING IT UNILATERALLY.

Next, the Court considers “all potential sides of an issue by viewing the... different ways that other states and territories have resolved a particular question.”⁴¹

1. Joint Tenancies

While not all jurisdictions recognize joint tenancies, those that do extend the right of partition to joint tenants.⁴²

2. Tenancies By the Entirety

While not every jurisdiction recognizes tenancies by the entirety,⁴³ those jurisdictions that do hold that the interests of tenants by the entirety cannot be unilaterally divided by one spouse.⁴⁴

3. The Restatement’s Position

“Although only representing non-binding persuasive authority in light of [the Virgin Islands Supreme Court’s] decision in *Banks*, the Restatements of the Law promulgated by the American Law Institute remain a helpful guide to determining how other jurisdictions approach

⁴¹ *Connor*, S.Ct. Civ. No. 2013-0095, at *3 (citation omitted).

⁴² *Canepari v. Pascale*, 944 N.E.2d 172 (Mass. App. Ct. 2011) (1st Cir.); *Tsoukas v. Tsoukas*, 968 N.Y.S.2d 109, 110 (2013) (2d Cir.); *Fuhrman v. Doll*, 305 Pa. Super. 277, 451 A.2d 530 (Pa. Super. 1982) (3d Cir.); N.C.G.S.A. § 46-7 (North Carolina) (4th Cir.); *Wilde v. Murchie*, 949 S.W.2d 331, 332 (Tex. 1997) (5th Cir.); MCL 600.3304 (Michigan) (6th Cir.); 735 ILCS 5/17-101 (Illinois) (7th Cir.); *Anania v. Anania*, 576 N.W.2d 830, 838 (Neb. Ct. App. 1998) (8th Cir.); *Spiegel v. Adams*, No. D053939, 2009 WL 4048086 (Cal. Ct. App. Nov. 24, 2009) (9th Cir.); *Duston v. Duston*, 31 Colo. App. 147, 148 (Colo. Ct. App. 1972) (10th Cir.); Ala. Code 1975 § 35-6-20 (11th Cir.); D.C.Code § 16-2901 (D.C. Cir.).

⁴³ For example: South Dakota (*Schimke v. Karlstad*, 208 N.W.2d 710, 713 (1973) (“[T]he doctrine of estates by entirety [is] repugnant... to the American system of justice to the heirs and therefore not the common law of that state”) (citation omitted)); Minnesota (M.S.A. § 500.19).

⁴⁴ General Laws c. 241, § 1 (Mass.) (1st Cir.); *V.R.W., Inc. v. Klein*, 68 N.Y. 2d 560 (N.Y. 1986) (2nd Cir.); *Sadowski Estate v. Sadowski*, 37 Pa. D. & C.3d 267, 268 (Pa. Com. Pl. 1982) (vacated on other grounds) (3d Cir.); VA Code Ann. § 8.01-81 (4th Cir.); Miss. Code Ann. § 11-21-3 (5th Cir.); *Tkachik v. Mandeville*, 487 Mich. 38, 75 (Mich. 2010) (6th Cir.); *Humberd v. Collings*, 20 Ind. App. 93, 50 N.E. 314, 316 (Ind. App. 1898) (7th Cir.); *Johansen v. Pelton*, 8 Cal. App. 3d 625, 632, 87 Cal. Rptr. 784, n. 8 (Cal. Ct. App. 1970) (9th Cir.); *Stewart v. Hampton*, 506 So. 2d 70, 71 (Fla. Dist. Ct. App. 1987) (11th Cir.); *Robinson v. Evans*, 554 A.2d 332, 337 (D.C. 1989) (D.C. Cir.).

the question of⁴⁵ a joint tenant's right to seek partition. Because the Restatements are "regarded both as the product of expert opinion and as the expression of the law by the legal profession,"⁴⁶ the Court is persuaded by the approach of the Restatement (First) of Property, which, in 1936, recognized the right of tenants in common, joint tenants and tenants by the entirety to seek partition.⁴⁷

4. Severance of the Tenancy

Severance involves "[t]he termination of a joint tenancy, usually by converting it into a tenancy in common."⁴⁸ While our jurisdiction only recognizes severance of a tenancy in the entirety upon divorce or annulment,⁴⁹ other jurisdictions "facilitate alienation... by allowing severance to automatically accompany a conveyance of that interest or any other overt act indicating an intent to sever."⁵⁰ Jurisdictions that recognize tenancies in the entirety generally hold that these tenancies cannot be severed unilaterally.⁵¹

iii. THE BEST RULE FOR THE VIRGIN ISLANDS IS TO EXTEND THE RIGHT TO SEEK PARTITION TO ALL FORMS OF CONCURRENT OWNERSHIP.

The third and most important part of a *Banks* analysis involves "identifying the best rule for the Virgin Islands... based on the unique characteristics and needs of the Virgin Islands."⁵²

⁴⁵ *Simon v. Joseph*, 59 V.I. 611, at *7 (V.I. 2013).

⁴⁶ *Gallimore v. Washington*, 666 A.2d 1200, 1214 (D.C. 1995) (further citation omitted).

⁴⁷ RESTATEMENT (FIRST) OF PROPERTY § 51 (1936). The Court need not perform a separate *Banks* analysis of Section 51 because it is merely reviewing the section as persuasive authority.

⁴⁸ SEVERANCE, BLACK'S LAW DICTIONARY.

⁴⁹ 28 V.I.C. § 7(d).

⁵⁰ *Craft*, 535 U.S. at 280 (citation omitted). See also *In re Abernathy*, 259 B.R. 330, 336 (B.A.P. 8th Cir. 2001) aff'd, 19 F. App'x 460 (8th Cir. 2001) (discussing Missouri law).

⁵¹ *Craft*, 535 U.S. at 298.

⁵² *Connor*, S.Ct. Civ. No. 2013-0095, at *3 (citation omitted).

1. Joint Tenancy

The right of tenants in common to seek partition in our jurisdiction is absolute.⁵³ Because our jurisdiction also recognizes joint tenancies, denying joint tenants the equitable right of partition would have absurd and unreasonable results.

2. Tenancies Held In the Entirety

Although the Court is cognizant that “a tenancy by the entireties creates a unilaterally indestructible right of survivorship,”⁵⁴ this Court finds that “dissolution of estates by the entirety should be permitted to avoid injustices.”⁵⁵ Even New York’s concern that “involuntary partition is not available to either cotenant as a means of severing the tenancy by the entirety, since a contrary rule would permit a vindictive or irresponsible spouse to deprive the other of the comforts of the marital home,”⁵⁶ is inapplicable in our jurisdiction because a Virgin Islands marital homestead does not have to be held in the entirety.⁵⁷ A spouse is already statutorily extended the right to seek involuntary partition of a marital homestead held as a tenancy in common. The “vindictiveness” of a cotenant, as well as the loss of the marital home, would be subject to the equity considerations⁵⁸ applied by this Court pursuant to Section 451 and the rest of the Partition Act.

⁵³ 28 V.I.C. § 451 (“... any one or more of them may maintain an action of an equitable nature for the partition of such real property ...”).

⁵⁴ *Estate of Gullledge*, 673 A.2d 1278, 1280 (D.C. 1996) (citation omitted).

⁵⁵ *Rodgers v. Rodgers*, 611 S.W.2d 175, 176 (Ark. 1981).

⁵⁶ *V.R.W.*, 68 N.Y. 2d at 564.

⁵⁷ See n. 14, above.

⁵⁸ EQUITY, BLACK’S LAW DICTIONARY (9th ed. 2009) (“The recourse to principles of justice to correct or supplement the law as applied to particular circumstances”).

“Because a tenancy by the entireties is grounded in the unity of the marital relationship, it can be severed [by partition] only in certain limited circumstances.”⁵⁹ The Court finds that including tenancies in the entirety within the scope of Section 451 is the best rule for the people of the Virgin Islands because it balances the right to seek partition when to do so furthers the interests of justice⁶⁰ with the recognition of the special rights and responsibilities of marriage.⁶¹ An exclusion of tenancies in the entirety from partition creates unjust results when certain limited circumstances may justify severance. Of course, this right should be extended only in very narrow situations and as equity permits.⁶²

3. Alienation

Alienation involves the “[c]onveyance or transfer of property to another,”⁶³ and “the almost universal policy of our laws[is] to allow, if not to favor, the right to free alienation of property”.⁶⁴ Excluding joint tenants from seeking partition unreasonably restrains the right to convey or transfer one’s own property.

⁵⁹ *Clingerman v. Sadowski*, 519 A.2d 378, 381 (Pa. 1986).

⁶⁰ For example: Where “one spouse has misappropriated the tenancy by the entireties property to the detriment of the other spouse” (*Sadowski Estate*, 37 Pa. D. & C.3d at 268-269); after “adjudication of incompetency of the spouse” (Miss. Code Ann. § 89-1-29).

⁶¹ And it remains that “[a] tenancy by the entireties may be terminated upon the following: death of one of the spouses, divorce, by voluntary agreement between the husband and wife to partition the tenancy or by a joint conveyance.” *Louis E. Jones v. Alan Alper*, 22 Phila. Co. Rptr. at 604 (Pa. Com. Pl. 1991). Though *Jones* is only persuasive upon this Court, it reflects the existing law of the jurisdiction, discussed throughout this Opinion.

⁶² It should also be noted that both tenants by the entirety may seek partition – an action for partition need not be unilateral or even contentious.

⁶³ ALIENATION, BLACK’S LAW DICTIONARY.

⁶⁴ *Maxwell v. Moore*, 63 U.S. 185, 188 (1859).

4. Due Process Concerns

“Each co-tenant has an absolute statutory right to partition,”⁶⁵ and a defendant must “set forth in his answer the nature and extent of his interest in the property”.⁶⁶ However, there are situations where a party was served via publication,⁶⁷ has failed to defend and is then potentially subject to default judgment. Because a judgment of partition is “effectual forever,”⁶⁸ the Court must address any due process concerns when considering what is best for the people of the Virgin Islands, especially when partition would sever a right of survivorship. “[D]ue process requires that all litigants be given notice and an opportunity to be heard,”⁶⁹ and, after a respondent has been “afford[ed] a reasonable time...to make their appearance”⁷⁰ but “fails to answer[,]. . . the title shall be ascertained by proof to the satisfaction of the court before the judgment for partition... is given.”⁷¹ Absent this proof, the Court may choose to: deny the partition;⁷² “designate the portion to remain undivided for the owners whose interests remain unknown or not ascertained;”⁷³ or distribute, deposit⁷⁴ or invest⁷⁵ the nonresponsive party’s share of the purchase money.⁷⁶ This

⁶⁵ *Fankhanel Farms Ltd. P'ship v. Holden-Conner Realty Co.*, 1:13-CV-57-DPM, 2013 WL 5934651, at *1 (E.D. Ark. Oct. 31, 2013) (citing ARK.CODE ANN. § 18–60–401); 28 V.I.C. § 451, Right to maintain action for partition (“... any one or more of them may maintain an action... for the partition of such real property...”).

⁶⁶ 28 V.I.C. § 456, Answer.

⁶⁷ 28 V.I.C. § 455, Service of summons by publication.

⁶⁸ 28 V.I.C. § 460, Court action on report; conclusiveness of judgment.

⁶⁹ *Henry v. Dennery*, 55 V.I. 986, at *5 (V.I. 2011) (“Accordingly, when a defendant receives actual notice of an action in time to give him an opportunity to present his objections, that notice, however provided, meets the requirements of due process”) (citations omitted).

⁷⁰ *Id.*, at *5 (quoting *Gore v. Tilden*, 50 V.I. 233, 239 (V.I.2008)).

⁷¹ 28 V.I.C. § 457, Determination of rights and title.

⁷² Because the right to seek partition is absolute, complete denial of the request should be a last resort resolution. See short discussion on alienation, above.

⁷³ 28 V.I.C. § 458, Order of sale or partition; appointment of referees.

⁷⁴ 28 V.I.C. § 474, Distribution of proceeds or payment into court.

⁷⁵ 28 V.I.C. § 490, Investment of proceeds of sale.

⁷⁶ *Shell Oil Co. v. Seeligson*, 231 F.2d 14, 17 (10th Cir. 1955) (“The purpose of partition is to terminate the relationship of co-tenancy between the parties. Its objective is to bring to an end the undivided interests of the parties in order that each owner may enjoy his estate without supervision or hindrance from the other or others. And in the exertion of its equitable jurisdiction, the court has a measure of discretion in adapting its judgment to the particular circumstances

approach preserves a party's absolute right to seek partition and a non-responsive or unknown party's right to have his or her interests in the property determined⁷⁷ and preserved.⁷⁸

Lastly, whether the tenancy is adjudicated to be severed into a tenancy in common by the overt act of seeking partition⁷⁹ or whether the Court allows joint tenants and tenants by the entirety to seek partition directly through Section 451, is simply a matter of semantics. The end result of either method is the same, as both approaches require equitable considerations and a determination of the interests of the parties under the Partition Act.

E. DEFENDANT HAS BEEN AFFORDED ACTUAL NOTICE AND AN OPPORTUNITY TO DEFEND.

Defendant accepted service in Florida via certified mail on November 29, 2013, and the Clerk of the Superior Court entered default on February 12, 2014, when Defendant failed to appear, answer, respond or otherwise defend. Defendant filed a belated *pro se* Objection to Motion for Entry of Default on February 25, 2014, asserting, "If given the opportunity, I have viable defenses and claims I would like to present to the Court." Treating her Objection as a motion to set aside the default, the Court took the motion under advisement and directed Defendant to, by April 25, 2014, either have counsel enter an appearance on her behalf or submit a written notice that she intends to proceed *pro se* and to file an amended motion to set aside default demonstrating good cause why the Court should set aside the default. Defendant submitted another unsworn letter, filed on April 28, 2014, indicating that, "I would like to have my attorney, Mr. Warren Williams,

presented. The court may grant or deny partition in toto. It may partition the whole of the property in kind. It may sell all of the property and distribute the proceeds. It may partition part in kind and sell part. It may prescribe different terms and conditions for the sale of different parts. And it may impose burdens upon one cotenant for the benefit of another. In short, the court may take any action not incompatible with the statutory law of the state which is reasonably appropriate in the circumstances to effectuate a just and equitable partition between the parties") (citations omitted).

⁷⁷ 28 V.I.C. § 457.

⁷⁸ 28 V.I.C. § 474, Distribution of proceeds or payment into court.

⁷⁹ Once the tenancy is severed, the parties may proceed as tenants in common. And again, special considerations apply if the tenancy is one of the entirety.

represent me”. Despite stating that a copy of the letter was to be forward to Attorney Williams, he did not enter an appearance on her behalf.

On May 20, 2014, the Court ordered Defendant to direct her attorney or another attorney to enter an appearance on her behalf or to indicate in writing her intention to proceed *pro se* and to file an amended motion to set aside default, supported by affidavit and demonstrating good cause to set aside default, by June 13, 2014. Defendant filed another letter with the Court on June 19, 2014, without clarifying how she intended to proceed or including an amended motion to set aside default. On June 30, 2014, the Court ordered Plaintiff to take appropriate steps to move the case forward by July 31, 2014. Plaintiff filed a motion for entry of default judgment on July 31, 2014.

On August 11, 2014, and after the Defendant failed to comply with the Court’s orders, the Court scheduled a default judgment hearing to be held on September 11, 2014. The Court then continued the hearing to October 7, 2014, to *sua sponte* address the jurisdictional issue presented by the Partition Act.

Defendant’s due process rights have been recognized throughout this matter. The Court finds that joint tenants are entitled to seek division via the Partition Act, and Plaintiff may proceed with her motion for entry of default judgment.

CONCLUSION

In the absence of extension of the right to seek partition via the Virgin Islands Partition Act, parties would be denied a useful means to equitably divide property in which they hold an interest as joint tenants or by the entirety. Consequently, the Court concludes that it has jurisdiction over the parties' joint tenancy, and the Plaintiff may proceed with her suit for partition. An appropriate Order is issued simultaneously herewith.

Dated: September 26, 2014

ATTEST: Estrella George
Acting Clerk of Court

by:

Donna D. Donovan
Donna D. Donovan
Court Clerk Supervisor


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS