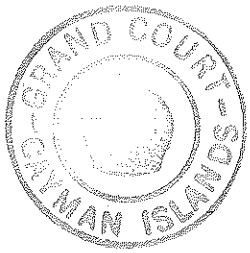
IN THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION **CAUSE NO. FAM 2 of 2012**
L/A 0242 of 2012

BETWEEN	**JOSSLYN HERNANDEZ SAINZ-EBANKS**	**PETITIONER**
AND	**JAMES CALBRITH EBANKS**	**RESPONDENT**
AND	**DOROTHY CRUZ**	**INTERVENOR**



In Chambers on 18 August 2014
Before the Hononourable Chief Justice

APPEARANCES: Mr. David Holland of Samson & McGrath for the Petitioner
Ms. Stacy Thompson, Attorney-at-law for the Respondent
Ms. Sheridan Brooks of Brooks & Brooks for the Third Party

RULING

1. This is the hearing for the resolution of the final ancillary matters in the divorce of the petitioner and respondent. The main question arising (custody, care and control of the two children of the marriage having been settled by agreement) is what is the extent of the marital estate and how should the marital property be divided. In determining these matters the court is required to address the following issues in particular:

   (a) Does the respondent husband's mother (the Intervenor) hold a beneficial interest in the property registered in the joint names of the respondent and the petitioner and located at 13 Luna Lane, Central George Town Block 14BG Parcel 39? If so, what is the nature and extent of her interest in that property? ("13 Luna Lane").

   (b) Is the petitioner entitled to a share in the respondent's tourist boating business and its assets and if so, should adverse inferences be drawn regarding the respondent's lack of disclosure in relation to that business?;

(c) How should the court address/divide the Credit Union loan secured against the former matrimonial home at West Bay, North West Block 1D Parcel 588? ("the matrimonial home").

2. When the matter came on for hearing on the 18th August 2014, the time available allowed only for the arguments on the first issue. This is the Ruling on that issue. Following its delivery, the parties will obtain a hearing before any judge of the Family Division for the resolution of the other issues and so for the final determination of the ancillaries in this matter.

3. 13 Luna Lane was purchased by the intervenor in September in 1991 by way of a deposit from her own life savings and by means of a loan obtained from First Home Bank (as it was then called – now Fidelity Bank). Her savings she had managed to accumulate from her modest income working for many years as a room attendant at local hotels.

GRAND COURT - CAYMAN ISLANDS

4. According to her evidence, during 1994 to 1995 the outstanding balance of the loan was repaid. The balance was then a significant amount of around $3,000.00 and she was assisted in repaying it, by her son Clinton, the respondent's brother.

5. When the respondent married the petitioner in 1995, they had no home of their own. The petitioner who hails from Cuba, had re-located to Grand Cayman following the wedding and the intervenor testified that she allowed them to move in with her at her modest two bedroom bungalow at 13 Luna Lane.

6. Shortly after in 1995, the respondent and the petitioner built an addition to the bungalow for their own occupation. This they did by adding two bedrooms, a bathroom, living/dining room, kitchen and porch to the pre-existing structure. According to the petitioner, this was at a cost of some CI$10,000.00, money which she claims to have borrowed from the Credit Union for the purpose.

7. It is acknowledged by the intervenor that the addition was erected by the petitioner and respondent with her permission and has enhanced somewhat the value of 13 Luna Lane but, she asserts, whatever value may be ascribed must be discounted to reflect the fact that the structure had been extensively damaged by hurricane Ivan in 2004 and had to be restored by her. For this restoration, she used her own funds and some which she had been granted from the Government's National Recovery Fund.

8. The intervenor strongly denies a main premise of the petitioner's asserted claim to an interest in 13 Luna Lane. This is the petitioner's assertion that there was still a significant outstanding balance to the intervenor's loan secured against 13 Luna Lane after the petitioner and respondent went to live there and that the petitioner helped to re-pay it either by way of further borrowings from the Credit Union or from her own income.

9. When required to substantiate this assertion by supporting evidence from the Credit Union, the petitioner was unable to do so. Instead, she produced records which show that at some time in 2010, she had obtained a loan in the amount of CI$2,000.00 which appears to have been related to the purchase of a car. She was, at all events, unable to establish by independent evidence that that or any other sum was in any way connected to the repayment of the intervenor's loan as she asserted took place in 1997 or in any way related to the cost of the building of additions to the bungalow at 13 Luna Lane. In short, the petitioner was unable to establish that she made any personal financial contribution to the acquisition or development of 13 Luna Lane.

GRAND COURT CAYMAN ISLANDS

10. The respondent for his part asserts in his affidavit evidence that for the 5 years or so from 1995 until 2000 that he and the petitioner lived at 13 Luna Lane, she was in no position to make a financial contribution because she was not working and had no income of her own. He denies that the intervenor's loan secured against 13 Luna Lane was repaid by himself and/or the petitioner. He supports the intervenor's account, that the loan was repaid by the intervenor herself with the assistance his brother Clinton.

11. As events had transpired, the respondent and petitioner moved away from 13 Luna Lane in 2000 to live in a house provided by a friend of the respondent's, rent free. They remained there until 2010 when the friend gave notice that he wished to receive an economic rent for his house and so asked them to demit occupation.

12. They then returned to 13 Luna Lane into occupation of the addition they had built but soon thereafter, the petitioner made her wish for a home of her own known and the quest to find a suitable place began. This was to have been anticipated because the family had by then grown to include the two children, Selena and James Jr.

13. It is common ground between the parties that it was then and in those circumstances, that the intervenor was approached and agreed to allow 13 Luna Lane to be used to collateralize a loan for the purchase of land on which to build a home.

14. At first the intention was to purchase land and build but this soon became a plan to buy an existing home. The petitioner had become increasingly impatient with having to live in what had by then become cramped accommodations at 13 Luna Lane.

15. It is common ground that the intervenor then further agreed to the change of plans and allowed 13 Luna Lane to be used by way of collateral charge to the Credit Union in order to secure financing and that was the means by which the matrimonial home was acquired. The amount borrowed was CI$251,085.46. There is a primary charge secured against the matrimonial home in favour of the Credit Union for that amount, as well as the collateral charge secured against 13 Luna Lane for a like amount, in effect, giving the Credit Union double security for the same debt.

GRAND COURT - CAYMAN ISLANDS -

16. In order to allow the registration of the collateral charge, legal title in 13 Luna Lane was registered in the names of the petitioner and respondent and that was effected by way of a transfer of title to them, executed by the intervenor on the 6th October 2010.

17. The circumstances under which that transfer was done and the real reasons for it, lay at the heart of the present dispute.

18. The petitioner's contention is that the intervenor transferred 13 Luna Lane into the joint names of herself and the respondent as an outright gift. This was done she says in recognition of their earlier repayment of the intervenor's loan (according to her and as discussed above, circa 1997) and the fact that herself and the respondent had invested significant sums - the asserted CI$10,000.00 - for the erection of the additions which significantly enhanced the overall value of 13 Luna Lane. Further, that the intervenor had expressly stated her wish that they should have the property outright, subject only to the right of the intervenor to reside there for the rest of her life and to the understanding that if needs be, others of her children who may need to reside there would be allowed to do so. In this regard, the petitioner points to the fact that another of the intervenor's adult children (her daughter Lisa) was allowed to build a separate apartment at 13 Luna Lane, where she lived for a while.

19. The intervenor rejects this contention and in her account is fully supported by that of the respondent. She explains that the transfer of legal title to 13 Luna Lane to the petitioner and respondent was done only for the purpose of facilitating the financing of the matrimonial home as she was told that the Credit Union would not have accepted 13 Luna Lane as security without title being in their names as the borrowers.

20. Immediately prior to the transfer, title had been in the joint names of herself and her son, the respondent. This was following a transfer from being held in her name jointly with Clinton – all transfers having been for natural love and affection and done solely she says, for the purpose of assisting with the raising of family finances for one purpose or another. Two such specific purposes were referenced in her evidence: the raising of funds by Clinton to cover medical expenses for her now deceased husband and the father of her children, in the amount of CI$50,000.00; and, the securing of a loan in the amount of CI$10,000.00 to allow the respondent to acquire an engine for one of his boats used for his tourist boating business.

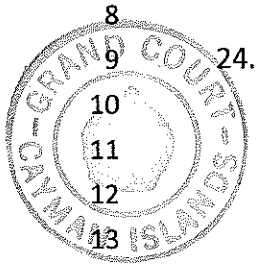
GRAND COURT - CAYMAN ISLANDS

21. On each occasion the loans were fully repaid she explains and the title to 13 Luna Lane cleared off and reverted to her. The title had however, remained in the joint names of herself and the respondent following the latter transaction and so it was that she came to execute the transfer into the joint names of the respondent and petitioner, for the purposes of securing the Credit Union loan in respect of the acquisition of the matrimonial home.

22. This transfer took place as already noted, on the 6th October 2010. This was at around the time she was readying herself to move to Trinidad and Tobago for an indeterminate stay with Clinton and his family, following their relocation to that country. As her absence from the Cayman Islands was to be indeterminate, it was proposed to her by the respondent and the petitioner and she agreed that she should execute the transfer before she left. This she did simply to facilitate the acquisition of the matrimonial home and with the common understanding that she would always retain the beneficial interest in 13 Luna Lane. Although her time away would be indeterminate, it was fully understood by the three of them that she intended to return to reside at 13 Luna Lane. There was nowhere else for her to reside as she owns no other property. And while the collateral charge to the Credit Union would be expected to remain for some 25 years before the large debt of CI$251,000.00 was cleared off, *"who was to say"* she asked rhetorically, *"that I would not still be around to see the title come back to me after it was*

cleared off"? Being 61 and in good health at the time of the transfer in October 2010, this could hardly be described as an unrealistic expectation on her part, she explained.

23. She insists that as 13 Luna Lane is the only significant asset she has ever owned, she had no intention simply to give it away to respondent and the petitioner. She had the interests of her other children to consider as well. The property was valued at CI$266,000.00 in October 2010 and was then entirely unencumbered.



24. I find the intervenor to be a forthright and compelling witness. I accept her evidence as to her own intention and as to the common intention of the parties when she executed the transfer of title to 13 Luna Lane into the joint names of the petitioner and respondent.

25. In this not only is she fully supported by her son, the respondent; the petitioner's contention as to her own expenditure upon 13 Luna Lane being an important reason for the purported outright transfer by way of gift is, as already discussed, not supported by any independent evidence.

26. It being my conclusion that the parties entered into the transfer with the common intention that the intervenor would retain the beneficial interest in 13 Luna Lane, the question then becomes; what are the legal consequences?

27. The intervenor invites the court to find that 13 Luna Lane remains 100 per cent beneficially vested in her. In the absence of any written declaration to that effect by her or written agreement between the parties, she invites the court to find that there is what the law now recognizes as a "common intention constructive or resulting trust" of the property, in her favour. Mr. Holland on behalf of the petitioner submits to the contrary, that the court should look no further than to the legal position as evidenced by the extract of the Register of Title in respect of the property. The starting point he submits, is that in cases where legal title is vested in others, the presumption will be that *"equity follows the law"* – citing *Stack v Dowden [2007] AC 432;* per Lord Walker at page 447 F.

28. Beneficial interest would therefore mirror the extract of title, unless there is clear evidence to the contrary.

29. The cited observations were made by Lord Walker in *Stack v Dowden*, in the context of a judgment dealing with a claim to beneficial entitlements to property acquired during the course of a co-habitation relationship, through the joint contributions and efforts of the parties.

30. It was held by the House of Lords (as taken from the headnote of the reported judgment) that where property was conveyed into the joint names of parties, there was a prima facie case that both the legal and the beneficial interest in the property were joint and equal. The onus of proof would lay upon the party seeking to establish that equity should not follow the law; that such a party had to prove that the parties had held a common intention that their beneficial interests be different from their legal interests, and in what way; that in order to discern the parties' common intention the court should look to the parties' whole course of conduct in relation to the property; that the law had moved on from the presumption of a resulting trust and many more factors other than the parties' respective financial contributions might be relevant to divining their true intentions; and that when all relevant factors had been taken into account, cases in which the joint legal owners were to be taken to have intended that their beneficial interests should be different from their legal interests, would be very unusual.

31. The present is not a case of divining the intentions only of the joint legal owners and parties to the marital relationship as between themselves. Here the issue is whether a third party - the intervenor, may assert a beneficial entitlement to property legal title to which is held in the joint names of the now estranged parties to a marriage.

32. But the principles are of course, not confined to any particular factual matrix, and as the case law reveals, circumstances quite varied from those considered in *Stack v Dowden* have been found as giving rise to common intention trusts. By way of example considered before in this court, Henderson J, upon application of the dicta from *Stack v Dowden* found[1] that a common intention trust existed in favour of a wife based upon a pre-nuptial agreement with her husband such as to afford her an overriding interest which partially defeated a charge subsequently secured against their matrimonial home by the plaintiff bank.

[1] *CIBC Cayman Limited v Christiansen and Christiansen* Cause 352 of 2005, judgment delivered on 16th April 2008.

33. While the present factual circumstances also differ way from those considered in *Stack v Dowden* (and from many of the authoritative cases dealing with marriage or co-habitation relationship entitlements discussed therein by their Lordships); it is clear that the present circumstances could indeed give rise to what has come to be described as a common intention constructive or resulting trust by the subsequent case law. And the question whether such a trust is established, will be answered by the application of the same principles as those identified above from *Stack v Dowden.* See, for a clear exposition of the principles "Trusts founded on a common intention", Lewin on Trusts, 18th Ed. Chapter 9 – 66 to 9 – 80; pps 321 to 330.

34. As there stated: "a trust[2] arises in connection with the acquisition by one (or more) party of a legal title to property whenever that party has so conducted himself (or themselves) that it would be inequitable to allow him (or them) to deny to another party a beneficial interest in the property acquired. This will be so where (i) there was a common intention that both (or all) parties should have a beneficial interest and (ii) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The requisite intention may be shown by virtue of an express agreement between the parties, or such an agreement may, in certain circumstances, be imputed to them. Some element of bargain, promise or tacit common intention must be shown in order to establish such a trust. The trust comes into effect at the time of the conduct relied upon, not when the court declares its existence [a point that could become very material in the subsequent bankruptcy of one of the interested parties]"

35. These principles apply equally whether the property is held or registered in the name of one or more of the parties, and take into account the usual starting point that the beneficial ownership of property will follow the legal ownership, and that the onus is on the party alleging that the beneficial ownership is different to show why[3].

36. Here I am not invited by the intervenor to deduce or infer a common intention only from the conduct of the parties. She relies also upon their discussions and agreement and invites me to find that it was expressly agreed between them that the beneficial ownership of 13 Luna Lane would remain hers and would be held in trust for her by the respondent and petitioner once she transferred the legal title to them.

---

[2] Whether a resulting or constructive trust or merely an implied trust does not greatly matter: citing *Burns v Burns [1984]* CH 317 at 326 CA, per Fox LJ.

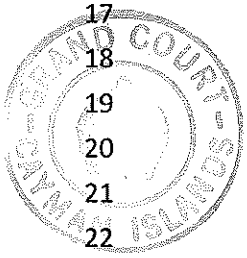
[3] Citing *Stack v Dowden [2007]* UK HL 17 at [56] per Lady Hale.

GRAND COURT CAYMAN ISLANDS

37. It is in this sense that I am invited to conclude in her favour, that a common intention constructive or resulting trust was created.

38. Although the burden rests upon her, the evidence as I have concluded, weighs heavily in favour of her discharge of the burden and she is supported in all material particulars by the respondent's evidence. His evidence - far from asserting a presumption of advancement in his favour (as the intervenor's son) or in favour of the petitioner as his estranged wife (and the daughter-in-law of the intervenor) - expressly supports the intervenor's account of an agreement that legal title to 13 Luna Lane would revert to her once the Credit Union loan was cleared off and that the beneficial entitlement would remain in her until then. I accept that in agreeing to these arrangements the intervenor acted to her detriment and significantly altered her position as the legal owner by the transfer of title into the names of the petitioner and respondent.

39. In assessing all the circumstances, I also regard as relevant the fact that the intervenor had been in the practice of allowing 13 Luna Lane to be used as security for her family's loans. The fact that this was the first time that she allowed her own name to be entirely removed from the title does not detract from this and is readily explained by the concern acknowledged both by herself and the respondent, that otherwise, the Credit Union would not have accepted the property as security. And while the loan is to be secured against it for 25 years, that factor alone does not make the claimed agreement unlikely or unfeasible: not only might the intervenor still be around to see the title revert to her at age 86, she also as she explained, would wish her estate to benefit not only her son, the respondent, but her other children as well.



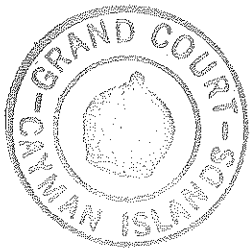
40. But for an intention to retain a beneficial interest in the property, her hopes in these regards would have been entirely defeated.

41. I am satisfied that the common intention and agreement between the parties at the time of the transfer of title to 13 Luna Lane was that the respondent and the petitioner would hold the beneficial interests in it for the benefit of the intervenor. The property is therefore declared to have been impressed with a trust in her favour as of the moment of transfer of title on 6th October 2010 and the Register of Title must be rectified to show its existence.

42. Accordingly, this judgment will take effect in keeping with section 23 (the second proviso); section 140(1) and section 121(1) of the Registered Land Law, on the basis that the legal proprietors, upon registration of the transfer, should have been described as holding the title as trustees, and; in keeping with Section 140(2), without prejudice to the interests of the Credit Union as proprietor of the existing collateral charge.[4]

Dated 4th day of September 2014

The Hon Mr. Justice Anthony Smellie
CHIEF JUSTICE



[4] In this last respect the outcome here is distinguishable from that in *CIBC Cayman Limited v Christiansen and Christiansen* Cause 352 of 2005 where the subsequent charge of the bank was held to have been partially defeated by an overriding interest of the wife created by the common intention trust which was found to have arisen from a pre-nuptial agreement with the husband.