

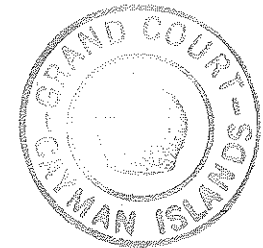
1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 FAMILY DIVISION

CAUSE NO. FAM 2 of 2012
L/A 0242 of 2012

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4
5 BETWEEN JOSSLYN HERNANDEZ SAINZ-EBANKS PETITIONER
6
7 AND JAMES CALBRITH EBANKS RESPONDENT
8
9 AND DOROTHY CRUZ INTERVENOR

10
11
12
13 In Chambers on 18 August 2014
14 Before the Honourable Chief Justice

15
16 APPEARANCES: Mr. David Holland of Samson & McGrath for the Petitioner
17 Ms. Stacy Thompson, Attorney-at-law for the Respondent
18 Ms. Sheridan Brooks of Brooks & Brooks for the Third Party
19
20



21 RULING

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

27
28 (a) Does the respondent husband's mother (the Intervenor) hold a beneficial
29 interest in the property registered in the joint names of the respondent and
30 the petitioner and located at 13 Luna Lane, Central George Town Block 14BG
31 Parcel 39? If so, what is the nature and extent of her interest in that
32 property? ("13 Luna Lane").
33

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

1 (c) How should the court address/divide the Credit Union loan secured against
2 the former matrimonial home at West Bay, North West Block 1D Parcel 588?
3 ("the matrimonial home").
4

5 2. When the matter came on for hearing on the 18th August 2014, the time available
6 allowed only for the arguments on the first issue. This is the Ruling on that issue.
7 Following its delivery, the parties will obtain a hearing before any judge of the Family
8 Division for the resolution of the other issues and so for the final determination of the
9 ancillaries in this matter.
10

11 3. 13 Luna Lane was purchased by the intervenor in September in 1991 by way of a deposit
12 from her own life savings and by means of a loan obtained from First Home Bank (as it
13 was then called – now Fidelity Bank). Her savings she had managed to accumulate from
14 her modest income working for many years as a room attendant at local hotels.
15

16 4. According to her evidence, during 1994 to 1995 the outstanding balance of the loan was
17 repaid. The balance was then a significant amount of around \$3,000.00 and she was
18 assisted in repaying it, by her son Clinton, the respondent's brother.
19

20 5. When the respondent married the petitioner in 1995, they had no home of their own.
21 The petitioner who hails from Cuba, had re-located to Grand Cayman following the
22 wedding and the intervenor testified that she allowed them to move in with her at her
23 modest two bedroom bungalow at 13 Luna Lane.
24

25 6. Shortly after in 1995, the respondent and the petitioner built an addition to the
26 bungalow for their own occupation. This they did by adding two bedrooms, a
27 bathroom, living/dining room, kitchen and porch to the pre-existing structure.
28 According to the petitioner, this was at a cost of some CI\$10,000.00, money which she
29 claims to have borrowed from the Credit Union for the purpose.
30

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

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

7
8 9. When required to substantiate this assertion by supporting evidence from the Credit
9 Union, the petitioner was unable to do so. Instead, she produced records which show
10 that at some time in 2010, she had obtained a loan in the amount of CI\$2,000.00 which
11 appears to have been related to the purchase of a car. She was, at all events, unable to
12 establish by independent evidence that that or any other sum was in any way
13 connected to the repayment of the intervenor's loan as she asserted took place in 1997
14 or in any way related to the cost of the building of additions to the bungalow at 13 Luna
15 Lane. In short, the petitioner was unable to establish that she made any personal
16 financial contribution to the acquisition or development of 13 Luna Lane.

17
18 10. The respondent for his part asserts in his affidavit evidence that for the 5 years or so
19 from 1995 until 2000 that he and the petitioner lived at 13 Luna Lane, she was in no
20 position to make a financial contribution because she was not working and had no
21 income of her own. He denies that the intervenor's loan secured against 13 Luna Lane
22 was repaid by himself and/or the petitioner. He supports the intervenor's account, that
23 the loan was repaid by the intervenor herself with the assistance his brother Clinton.

24
25 11. As events had transpired, the respondent and petitioner moved away from 13 Luna
26 Lane in 2000 to live in a house provided by a friend of the respondent's, rent free. They
27 remained there until 2010 when the friend gave notice that he wished to receive an
28 economic rent for his house and so asked them to demit occupation.

29
30 12. They then returned to 13 Luna Lane into occupation of the addition they had built but
31 soon thereafter, the petitioner made her wish for a home of her own known and the
32 quest to find a suitable place began. This was to have been anticipated because the
33 family had by then grown to include the two children, Selena and James Jr.

1 13. It is common ground between the parties that it was then and in those circumstances,
2 that the intervenor was approached and agreed to allow 13 Luna Lane to be used to
3 collateralize a loan for the purchase of land on which to build a home.
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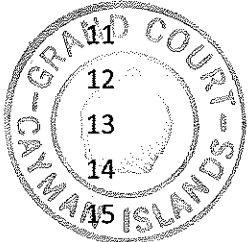
5 14. At first the intention was to purchase land and build but this soon became a plan to buy
6 an existing home. The petitioner had become increasingly impatient with having to live
7 in what had by then become cramped accommodations at 13 Luna Lane.
8

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

16
17 16. In order to allow the registration of the collateral charge, legal title in 13 Luna Lane was
18 registered in the names of the petitioner and respondent and that was effected by way
19 of a transfer of title to them, executed by the intervenor on the 6th October 2010.
20

21 17. The circumstances under which that transfer was done and the real reasons for it, lay at
22 the heart of the present dispute.
23

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



1 19. The intervenor rejects this contention and in her account is fully supported by that of
2 the respondent. She explains that the transfer of legal title to 13 Luna Lane to the
3 petitioner and respondent was done only for the purpose of facilitating the financing of
4 the matrimonial home as she was told that the Credit Union would not have accepted
5 13 Luna Lane as security without title being in their names as the borrowers.
6

7 20. Immediately prior to the transfer, title had been in the joint names of herself and her
8 son, the respondent. This was following a transfer from being held in her name jointly
9 with Clinton – all transfers having been for natural love and affection and done solely
10 she says, for the purpose of assisting with the raising of family finances for one purpose
11 or another. Two such specific purposes were referenced in her evidence: the raising of
12 funds by Clinton to cover medical expenses for her now deceased husband and the
13 father of her children, in the amount of CI\$50,000.00; and, the securing of a loan in the
14 amount of CI\$10,000.00 to allow the respondent to acquire an engine for one of his
15 boats used for his tourist boating business.
16

17 21. On each occasion the loans were fully repaid she explains and the title to 13 Luna Lane
18 cleared off and reverted to her. The title had however, remained in the joint names of
19 herself and the respondent following the latter transaction and so it was that she came
20 to execute the transfer into the joint names of the respondent and petitioner, for the
21 purposes of securing the Credit Union loan in respect of the acquisition of the
22 matrimonial home.
23

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

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

3
4 23. She insists that as 13 Luna Lane is the only significant asset she has ever owned, she
5 had no intention simply to give it away to respondent and the petitioner. She had the
6 interests of her other children to consider as well. The property was valued at
7 CI\$266,000.00 in October 2010 and was then entirely unencumbered.

8
9 24. I find the intervenor to be a forthright and compelling witness. I accept her evidence as
10 to her own intention and as to the common intention of the parties when she executed
11 the transfer of title to 13 Luna Lane into the joint names of the petitioner and
12 respondent.

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

18
19 26. It being my conclusion that the parties entered into the transfer with the common
20 intention that the intervenor would retain the beneficial interest in 13 Luna Lane, the
21 question then becomes; what are the legal consequences?

22
23 27. The intervenor invites the court to find that 13 Luna Lane remains 100 per cent
24 beneficially vested in her. In the absence of any written declaration to that effect by her
25 or written agreement between the parties, she invites the court to find that there is
26 what the law now recognizes as a "common intention constructive or resulting trust" of
27 the property, in her favour. Mr. Holland on behalf of the petitioner submits to the
28 contrary, that the court should look no further than to the legal position as evidenced by
29 the extract of the Register of Title in respect of the property. The starting point he
30 submits, is that in cases where legal title is vested in others, the presumption will be
31 that "*equity follows the law*" – citing *Stack v Dowden [2007] AC 432*; per Lord Walker at
32 page 447 F.

33
34 28. Beneficial interest would therefore mirror the extract of title, unless there is clear
35 evidence to the contrary.

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

5
6 30. It was held by the House of Lords (as taken from the headnote of the reported
7 judgment) that where property was conveyed into the joint names of parties, there was
8 a prima facie case that both the legal and the beneficial interest in the property were
9 joint and equal. The onus of proof would lay upon the party seeking to establish that
10 equity should not follow the law; that such a party had to prove that the parties had
11 held a common intention that their beneficial interests be different from their legal
12 interests, and in what way; that in order to discern the parties' common intention the
13 court should look to the parties' whole course of conduct in relation to the property;
14 that the law had moved on from the presumption of a resulting trust and many more
15 factors other than the parties' respective financial contributions might be relevant to
16 divining their true intentions; and that when all relevant factors had been taken into
17 account, cases in which the joint legal owners were to be taken to have intended that
18 their beneficial interests should be different from their legal interests, would be very
19 unusual.

20
21 31. The present is not a case of divining the intentions only of the joint legal owners and
22 parties to the marital relationship as between themselves. Here the issue is whether a
23 third party - the intervenor, may assert a beneficial entitlement to property legal title to
24 which is held in the joint names of the now estranged parties to a marriage.

25
26 32. But the principles are of course, not confined to any particular factual matrix, and as the
27 case law reveals, circumstances quite varied from those considered in *Stack v Dowden*
28 have been found as giving rise to common intention trusts. By way of example
29 considered before in this court, Henderson J, upon application of the dicta from *Stack v*
30 *Dowden* found¹ that a common intention trust existed in favour of a wife based upon a
31 pre-nuptial agreement with her husband such as to afford her an overriding interest
32 which partially defeated a charge subsequently secured against their matrimonial home
33 by the plaintiff bank.

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

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

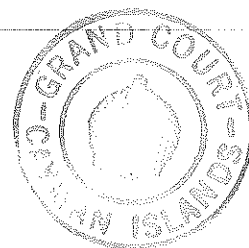
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11 34. As there stated: “a trust² arises in connection with the acquisition by one (or more)
12 party of a legal title to property whenever that party has so conducted himself (or
13 themselves) that it would be inequitable to allow him (or them) to deny to another
14 party a beneficial interest in the property acquired. This will be so where (i) there was a
15 common intention that both (or all) parties should have a beneficial interest and (ii) the
16 claimant has acted to his detriment in the belief that by so acting he was acquiring a
17 beneficial interest. The requisite intention may be shown by virtue of an express
18 agreement between the parties, or such an agreement may, in certain circumstances,
19 be imputed to them. Some element of bargain, promise or tacit common intention
20 must be shown in order to establish such a trust. The trust comes into effect at the time
21 of the conduct relied upon, not when the court declares its existence [a point that could
22 become very material in the subsequent bankruptcy of one of the interested parties]”
23

24 35. These principles apply equally whether the property is held or registered in the name of
25 one or more of the parties, and take into account the usual starting point that the
26 beneficial ownership of property will follow the legal ownership, and that the onus is on
27 the party alleging that the beneficial ownership is different to show why³.

28
29 36. Here I am not invited by the intervenor to deduce or infer a common intention only
30 from the conduct of the parties. She relies also upon their discussions and agreement
31 and invites me to find that it was expressly agreed between them that the beneficial
32 ownership of 13 Luna Lane would remain hers and would be held in trust for her by the
33 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.



1 37. It is in this sense that I am invited to conclude in her favour, that a common intention
2 constructive or resulting trust was created.
3

4 38. Although the burden rests upon her, the evidence as I have concluded, weighs heavily in
5 favour of her discharge of the burden and she is supported in all material particulars by
6 the respondent's evidence. His evidence - far from asserting a presumption of
7 advancement in his favour (as the intervenor's son) or in favour of the petitioner as his
8 estranged wife (and the daughter-in-law of the intervenor) - expressly supports the
9 intervenor's account of an agreement that legal title to 13 Luna Lane would revert to
10 her once the Credit Union loan was cleared off and that the beneficial entitlement
11 would remain in her until then. I accept that in agreeing to these arrangements the
12 intervenor acted to her detriment and significantly altered her position as the legal
13 owner by the transfer of title into the names of the petitioner and respondent.
14

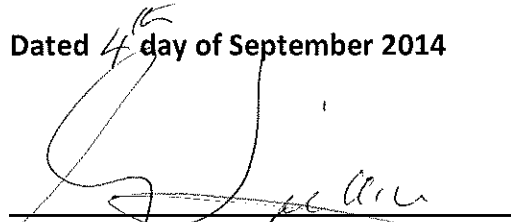
15 39. In assessing all the circumstances, I also regard as relevant the fact that the intervenor
16 had been in the practice of allowing 13 Luna Lane to be used as security for her family's
17 loans. The fact that this was the first time that she allowed her own name to be entirely
18 removed from the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

26 40. But for an intention to retain a beneficial interest in the property, her hopes in these
27 regards would have been entirely defeated.
28

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

1 42. Accordingly, this judgment will take effect in keeping with section 23 (the second
2 proviso); section 140(1) and section 121(1) of the Registered Land Law, on the basis that
3 the legal proprietors, upon registration of the transfer, should have been described as
4 holding the title as trustees, and; in keeping with Section 140(2), without prejudice to
5 the interests of the Credit Union as proprietor of the existing collateral charge.⁴
6

7 Dated 4th day of September 2014
8
9

10
11 
12 The Hon Mr. Justice Anthony Smellie
13 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.