30.6.2000

Legal Dept.

Alastair please file in relevant bundle. Thx Steve 19/9.

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO: 296/1995

BETWEEN : MARYBETH TARDIFF PEARSON — PLAINTIFF

AND:
(1) CAYMAN NATIONAL BANK LTD
(2) COCONUT GROVE BANK as Personal Representative of the Estate of Jeffrey G. Tardiff, deceased
(3) MICHAEL SUBKLEW
(4) SARAH NIMS

DEFENDANTS

Appearances:

Mr. Steven. Barrie, for the Plaintiff
Mr. Guy Locke for Defendants

June 12th, 2000

BEFORE MR. JUSTICE SANDERSON

REASONS FOR JUDGEMENT

This is an application by the Plaintiff pursuant to Order 14, for summary judgment. The third and fourth Defendants' have also filed an application for summary judgment in their favour. Both counsel have agreed that the matters before the court can be decided on a summary basis.

GRAND COURT - CAYMAN ISLANDS

The Plaintiff was the sister of Dr. Jeffrey Tardiff, a medical doctor who practiced in Miami, Florida. On October 29th 1990 Dr. Tardiff opened a savings account with the Cayman National Bank Ltd. (account # 205349) and he signed the usual documents required for conducting business with the Bank. Dr. Tardiff opened two more accounts at the Bank; a certificate of deposit account (#347647) on July 8, 1991 and a second savings account (#206828) on March 23, 1993. He did not sign any new account opening forms in respect of the latter two accounts.

In 1993 Dr. Tardiff was terminally ill. From September to December 16th, 1993, when he died, he changed his will, changed his beneficiaries under an insurance policy and made arrangements to dispose of, transfer and give away a significant amount of his assets to his family, companion, and friends. These assets were substantial in value.

These proceedings involve Dr. Tardiff dealings with the three accounts at the Bank and entitlement to the approximate amount of $250,000.000 US which was deposited in them.

Sometime in November 1993 Dr. Tardiff spoke with an employee of the Bank indicating that he wanted to add the Plaintiff as a second signatory to the three accounts. He also told the Plaintiff that he wanted to add her name to his three accounts at the Bank, which were to be held in joint ownership and that she was to turn the accounts over to their mother, upon his death. At this time Dr. Tardiff was making arrangements to transfer

other bank accounts and other assets directly to his mother as well to other individuals. It was unexplained why Dr. Tardiff would chose this indirect method to transfer the accounts at the Cayman National Bank to his mother but the evidence was uncontradicted.

The Bank sent a General Amendment Form to Dr. Tardiff and it was completed by him and the Plaintiff on November 13th, 1993 and received by the Bank on approximately November 16th, 1993.

It provided in part:

> "Account # 205349/347647/206828
>
> I/We request you to make the following changes in respect of the above numbered account(s) with immediate effect and until further notice (unless indicated to the contrary):-
>
> (F) TO ADD NAME TO EXISTING A/C
>
> Marybeth Tardiff Pearson (sister of Jeffrey Tardiff)
>
> The account will be an either/or account."

It was signed by both Dr. Tardiff and the Plaintiff.

On November 16th, 1993 Dr. Tardif was admitted to the hospital in critical condition. On November 17th, 1993 the Bank dispatched to Dr. Tardiff 's address, a form called a joint account mandate which outlined the terms of a joint account and was to be completed and returned. The Plaintiff says this document was never received by her and alleges that it was likely intercepted

and kept by the third or fourth Defendants. The fourth Defendant denies this. No affidavit was filed by the third Defendant.

On November 17th, 1993 the Bank added the Plaintiff's name to the accounts even though it did not have the completed joint mandate form, and thereafter issued statements which showed her as a joint account holder with Dr. Tardiff.

Sometime in November the fourth Defendant, Sarah Nims, says she arrived in Miami to assist Dr. Tardiff to handle his business affairs and help put them in order as he believed he was about to die. She says that Dr. Tardiff asked her to assist him because she was a lawyer, a close friend and he trusted her.

On December 6th, 1993 Dr. Tardiff sent a letter to the Bank. It provided:

> "Dear Judy Watler;
>
> Please find enclosed copies of my three current accounts with your bank. For fixed deposit account number 347647, a Certificate of Deposit, I would like to add the name Sarah Nims as a second name to this account and delete any other names that have been placed on this account.
>
> For the two other Savings accounts, numbers 206828 and 205349 respectively, please close the latter account and place the proceeds into account number 206828. In addition, please place Michael Subklew's name second on the account, and delete any other names that may appear on either of these two savings accounts.

Please find the necessary signature cards along with these instructions.

Thank you for your kind attention to this matter, as I am ill and all haste would be appreciated.

Sincerely,

Jeffrey Tardiff, MD
December 6, 1993"

On December 10, 1993 the Bank wrote to Dr. Tardiff as follows;

"10 December 1993

Mr. Jeffery G. Tardiff
1775 Nocatee Drive
Miami, Florida 33133
U.S.A.

Dear Mr. Tardiff,
We ackniowledge receipt of your letter dated December 6, 1993 and would advise that we require Bank references for Sarah Nims and Michael Subklew confirming they are suitable people for whom Bank accounts may be maintained, to enable us to add their names to the account.

We also need to know what the signing authorities are and enclose a joint account mandate for completion.

As your signature differs from the specimen held on file we should be grateful if you would arrange to have your signature notarized on the above mentioned document.

We look forward to hearing from you soon.

Yours sincerely,

Mrs. Pauline Eaton
Vice President
Customer Services Department."

After this letter was sent, Ms Nims telephoned the Bank to follow up. She then arranged to get Bank references and Dr. Tardiff dictated another letter which she typed for him and dispatched by overnight courier on December 14th, 1993. That letter provided ;

"December 14, 1993
Cayman National Bank Ltd .
West Wind Building
P.O. Box 1097
Grand Cayman,
Cayman Islands BWI

Attn: Judy Watler
RE: Signatories for Accounts

Dear Judy;
Please find enclosed the additional information that your bank requested in order to add the names Michael Subklew and Sarah Nims to my accounts. I have enclosed original bank references from the Coconut Grove Bank for both individuals and a faxed copy for Sarah Nims from the United Bank with that original to be sent directly to you from that bank in order to expedite this matter. So that you have no doubt that these are my instructions, I am having my signature on this letter notarized as well as the joint account mandate. Also, be advised that my sister Marybeth Pearson does not have my authority to change the instructions I have requested for my accounts # 347647, 206828, and 205349.

Thank you for your kind attention to this matter.

Sincerely,

Jeffrey Tardiff
1775 Nocatee Drive
Miami, Florida 33133"

Dr. Tardiff died on December 16th 1993 and Miss Nims telephoned the Bank the next day to inform it of his death. The Bank received the December 14th letter on December 20th 1993.

The Plaintiff asserts that she has an interest in the Bank accounts as a joint tenant and is entitled to the full amounts therein . The third and fourth Defendants say that the Plaintiff has no legal or equalitable interest in the funds and that they are entitled to them either as joint account holders pursuant to the letters of December 6th and December 14th together with the other documents executed by them, or alternatively as beneficiaries with the Plaintiff holding the legal title to the money in trust for their benefit. Both counsel agree that the key issue in this case is to determine the intention of Dr. Tardiff at the relevant times, then determine if that intention can be given legal effect. If possible it is the courts duty to try to carry out the intention of Dr. Tardiff.

To determine his intention I first examined the documents in question and if they were unclear then to the surrounding circumstances (see, Marshall v Crutwell 1875 LR Eq. 328).

From the evidence contained in the affidavits before me it seems fairly obvious that Dr. Tardiff was attempting to give away many of his assets in anticipation of his eminent death. In that regard he decided that he wanted to transfer to his sister, the accounts at the Cayman National Bank and he instructed the Bank to add her as a second signatory. He also told his sister that the account would be held in joint ownership to be turned over to his mother on his death. He signed a General Amendment Form and in his own language said it was to be an either/or account. I take this to mean that either he or his sister would have the right to take money out of the account. I cannot think of another more logical interpretation and none was suggested. In short, his sister was to be given the right to take out and keep all of the monies on deposit, if she chose to do so. He of course, also had that right.

Dr. Tardiff also knew that these accounts were savings or term deposit accounts. They could not be used for writing cheques or making payments for day to day expenses. Clearly, they were not to be used by the Plaintiff to assist her brother in managing his day to day affairs.

Sometime after November 13th, 1993 Dr. Tardiff changed his mind. He decided that he wanted the accounts to be in the joint names of himself and the third and fourth Defendants as directed in his subsequent instructions to the Bank. I think it is clear on the evidence that he intended to replace the Plaintiff as his joint tenant with the third and fourth Defendants as his joint tenants. The Plaintiff has asserted this was a result of undue influence but it is not necessary or possible to decide that issue on this application. The issue is whether Dr. Tardiff was able to carry out his final intentions or in effect change his mind.

The first question to be answered is what was the nature of the Plaintiff's interest in the accounts. In my judgment Dr. Tardiff intended that the Plaintiff would be a joint tenant both at law and equity with the right of survivorship in these accounts. This conclusion is based upon the evidence referred to; namely the documentation, the oral instructions to the Bank, the desire of Dr. Tardiff to give away his assets before his death, the nature of the accounts and his stated intention to the Plaintiff. I conclude that Dr. Tardiff created a joint tenancy with the Plaintiff in respect of his accounts at the Bank.

The Defendant then submitted that if a joint tenancy was created at law, that Dr. Tardiff's intention was not to grant any beneficial interest to the Plaintiff but rather that the Plaintiff would

hold any beneficial interest in trust for the third and fourth Defendants. He relied upon the principle that when one person conveys property to a stranger without consideration there is a presumption of resulting trust. In the further alternative, he argued that equity presumes that property which is jointly held, will be held as tenants in common unless a contrary intention appears. He submitted that the onus was on the Plaintiff to rebut both of these presumptions. In my opinion the Plaintiff has and accordingly I do accept these submissions on behalf of the third and fourth Defendants.

I have already referred to the evidence upon which I conclude that Dr. Tardiff's initial intention was to create a joint tenancy with a right of survivorship in favor of his sister. I also rely on and follow the following authorities.

In *Young* v *Sealy* [1949] Ch. 278. The headnote reads:

> "Money belonging to the deceased intestate was paid by her into joint banking accounts in the names of herself and her nephew, the defendant, but during her lifetime she alone made payments and withdrawals. The evidence was that she intended the beneficial, as well as the legal interest to pass on her death to the defendant, whom she had always regarded with affection. On her death intestate :- *Held,* notwithstanding that the beneficial interest in the dispositions made by the deceased passed only on her death, they were not invalid by reason of failure to comply with the requirements of the Wills Act. 1837."

In *Russell* v. *Scott* 55 C.L.R. 440 the headnote states:

> "An elderly lady and her nephew opened a joint account in the Commonwealth Savings Bank by the transfer of a large sum from an account in the lady's name. The nephew, who assisted his aunt in all her matters of business, did not contribute to the account, which was kept in funds by payments from the aunt's investments. The account was used solely for the

purpose of supplying the aunt's needs. Moneys for this purpose were withdrawn by the nephew as required, the withdrawal slips being signed by both the aunt and the nephew. When the account was opened the aunt told the nephew and others that any balance remaining in the account at her death would belong to the nephew, and it was found as a fact that the aunt intended her nephew to take beneficially whatever balance stood to the credit of the account at her death. Upon his aunt's death the nephew claimed the balance of the account. *Held,* that the presumption of a resulting trust in favour of the aunt and her estate was rebutted; the nephew's legal right by survivorship to the balance of the account prevailed and was not the subject of any resulting trust."

In that case Starke J. said at page 148:

"A person who deposits money in a bank on a joint account vests the right to the debt or the chose in action in the persons in whose names it is deposited, and it carries with it the legal right to title by survivorship... The vesting of the right and title to the debt or chose in action takes effect immediately, and is not dependent upon the death of either of the persons in whose names the money has been deposited. In short it is not a testamentary disposition."

Finally in Hanbury v Maudsley, Modern Equity 12th Edition at p.250- 251, the author states;

"The classic case is *Fowkes* v. *Pascoe.*

Mrs B. purchased stock in the names of herself and the son of her widowed daughter-in-law. The son was technically a stranger, hence he would prima facie be presumed to hold on resulting trust for Mrs. B. But the Court of Appeal in Chancery held that the strength of the presumption varied according to the circumstances and that, once there is some evidence to rebut it, the court must look at the facts from a common-sense point of view. In the present case, the only rational inference was that Mrs. B. intended the purchase as a gift, so that the presumption of resulting trust was rebuttted, though the effect of the gift would not be apparent until Mrs. B's death, for the court also held that any income declared on the stock during Mrs. B's lifetime would belong beneficially to her."

Finally, the Defendants submitted, in a further alternative, that if I were to find that a joint tenancy had been created, it was nevertheless severed by Dr. Tardiff. Once a joint tenancy has

been severed it becomes a tenancy in common and the Defendants assert that since Dr. Tardiff contributed all of the money to the accounts it would, as a matter of equity be held by the Plaintiff for the benefit of his estate. The Defendant relied upon Megarry and Wade, The Law of Property, page 403-406 where it states in part;

> "The common law mitigated the uncertainty of the *jus accrescendi* by enabling a joint tenant to destroy the joint tenancy by severance, which had the result of turning it into a tenancy in common. The duration of all lives being uncertain, if either party has an ill opinion of his own life, he may sever the jointenancy by a deed granting over a moiety [*i.e*, conveying one-half] in trust for himself; so that survivorship can be no hardship, where either side may at pleasure prevent it." "Severance" strictly includes partition, but the word is normally used to describe the process whereby a joint tenancy is converted into a tenancy in common, and it is used in this sense here. Although no joint tenant owned any distinct share in the land, yet each had a potential share equal in size to that of his companions, and so depending upon the number of joint tenants at the time in question. Thus, if there were five joint tenants, each had the right to sever his joint tenancy and become tenant in common of one undivided fifth share; if one joint tenant died before the severance, each of the survivors had a potential quarter share and so on.
>
> Before 1926 a joint tenancy could be severed both at law and in equity, though after 1925, as will be seen later, no severance at law is possible. Severance was effected by destroying one of the unities. Unity of time could not be severed, and severance of the unity of possession meant partition, but severance of the unity either of title or of interest converted a joint tenancy into a tenancy in common. A joint tenancy could be severed in the following ways.
>
> **1. By alienation**
>
> (a) Total *alienation.* If a joint tenant alienated his interest inter *vivos,* his joint tenancy was severed and the person to whom the interest was conveyed took it as a tenant in common with the other joint tenants, for he had no unity of title with them: *alienatio rei praefertur juri accrescendi.* Such a severance did not affect the other joint tenants, who remained joint tenants *inter se*. Thus if A,B and C were joint tenants, and A sold his interest to X, X became tenant in common as to one-third with B and C as to two-thirds, but B and C remained joint tenants of those two-thirds as between themselves. If B then died, C alone profited by the *jus accrescendi,* X and C being left as tenants in common as to one-third and two-thirds respectively. Involuntary alienation would also effect severance, as where a joint tenant went bankrupt and under the bankruptcy law his property became vested in his trustee in bankruptcy. But although before 1883 a husband acquired important rights of control over his wife's property, marriage did not sever and joint tenancy of the wife's, for the property did not *vest* in her husband.

(b) *Partial alienation.* Severance also resulted from a partial alienation by one joint tenant, e.g., if he created a mortgage or life interest out of his individual share, but not from the creation of a mere incumbrance, such as a rentcharge.

(c) *Alienation in equity.* In equity, as we have seen, a specifically enforceable contract to alienate creates an equitable interest in the property even though the legal act of alienation has not taken place. If, therefore, one joint tenant contracted to sell his interest to X, this worked a severance in equity so that the original joint tenants held the legal estate subject to X's equitable right to one share as tenant in common. Severance was therefore brought about by a covenant in marriage articles or a marriage settlement to the effect that property held in joint tenancy would be settled, or by a contract between joint tenants that they would thenceforward hold as tenants in common, and such a contract might be inferred from conduct, even if the tenants were unaware of their joint tenancy. Recent decisions have gone still further, and it seems that the court will accept a unilateral declaration or course of conduct as a severance in equity, if it indicates an intention to terminate the joint tenancy."

In the case at Bar, however, Dr. Tardiff was not attempting to deal with a complete, partial or equitable alienation of his own interest. He was attempting to take away the interest of the Plaintiff and this is not something that he is entitle as a matter of law to do.

Also in order to sever a joint tenancy, notice must be given in these circumstances. As Lord Denning, MR said in Burgess v Rawnsley; [1975] Ch. 429.

"Nowadays everyone starts with the judgment of Sir William Page Wood V-C. in Williams v. Hensman (1861) 1 John & Hem.546, 557, where he said:

"A joint tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share... Secondly, a joint may be severed to mutual agreement and in the 3rd place, there may be a severance by any course of dealing sufficient to intimate that the interest of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share,

> declared only behind the backs of the other persons interested. You must find in this class of case course of dealing by which the shares of all the parties to the contest have been effected, as happened in the cases of *Wilson* v. *Bell* (1843) 5 Ir. Eq.R. 501 and *Jackson* v. *Jackson* (1804) 9 Ves.Jun 591."

In that passage Page Wood V-C. distinguished between severance "by mutual agreement" and severance by a "course of dealing." That shows that a "course of dealing" need not amount to an agreement, expressed or implied, for severance. It is sufficient if there is a course of dealing in which one party makes clear to the other that he desires that their shares should no longer be held jointly but be held in common. I emphasise that it must be made clear to the other party. That is implicit in the sentence in which Page Wood V-C. says:

> "it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested."

Similarly it is sufficient if both parties enter on a course of dealing which evinces an intention by both of them that their shares shall henceforth be held in common and not jointly. As appears from the two cases to which Page Wood V.C. referred of *Wilson* v. *Bell,* 5 Ir. Eq.R. 501 and *Jackson* v. *Jackson*, 9 Ves. Jun. 591.

I come now to the question of notice. Suppose that one party gives a notice in writing to the other saying that he desires to sever the joint tenancy. Is that sufficient to effect a severance? I think it is. It was certainly the view of Sir Benjamin Cherry when he drafted section 36 (2) of the Law of Property Act 1925. It says in relation to real estates:

> "...where a legal estate (not being settled land) is vested in joint tenants beneficially, and any tenant desires to sever the joint tenancy in equity, he shall give to the other joint tenants a notice in writing of such desire or do such other acts or things as would, in the case of personal estate, have been effectual to sever the tenancy in equity, and thereupon under the trust for sale affecting the land the net proceeds of sale, and the net rents and profits until sale, shall be held upon trusts which would have been requisite for giving effect to the beneficial interests if there had been an actual severance."

I have underlined the important words. The word "other" is most illuminating . It shows quite plainly that, in the case of personal estate one of the things which is effective in equity to sever a joint tenancy is "a notice in writing" of a desire to sever. So also in regard to real estate."

I follow the reasoning of Lord Denning in the present case.

I conclude that the joint tenancy with the Plaintiff was not severed because Dr. Tardiff did not alienate or attempt to alienate his own interest nor did he give notice of severance to the Plaintiff.

I conclude that the Plaintiff is entitled to summary judgment upon her motion and for the same reasons, the Defendant's motion is dismissed.

Having found that the Plaintiff is successful it is not necessary to determine whether the questions of the alleged duress or undue influence of the Defendants, which were raised by the Plaintiffs in response to the Defendant's counterclaim, are res judicata.

The Plaintiff is awarded costs of both applications, payable by the third and fourth Defendants.

Dated this 30th day of June, 2000.

Dale Sanderson
Judge of the Grand Court