IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2010 HCV 05208

IN THE MATTER of an Application under the Partition Act:

and

IN THE MATTER of an Application concerning premises situated at 49 Selbourne Gardens, Ocho Rios in the parish of Saint Andrew registered at Volume 1319 Folio 953 of the Register Book of Titles.

BETWEEN	**NORMA MURRAY**	**CLAIMANT**
AND	**HAROLD MURRAY**	**DEFENDANT**

Heard: **31st March, 2014; 1st, 3rd, 4th April, 28th April, 2014; 11th July 2014 & 31st October, 2014.**

Marjorie Shaw-Currie, Terry-Joy Stevenson instructed by Brown & Shaw for Claimant.

Veronica Morris instructed by Holyn & Morris for Defendant.

Property Rights of spouses Act – Partition Act- Whether Fraudulent Transfer of a 1/3 interest – Whether each spouse only entitled to a 1/3 interest.

BATTS J

[1] At the commencement of this matter it was brought to my attention that one of the experts to be called was Miss Beverley East. I advised the parties of my earlier decision in ***Montaque v Willie [2012] JMSC Civ. 179*** in which I had to consider her expert testimony. Neither party objected to my continuing to hear the matter on that basis. I felt no inhibition about so doing.

[2] The parties also helpfully agreed that the Judges Bundle of Documents with the exception of pages 14 – 25 be admitted as Exhibit I. It was also agreed that the preliminary issue (which by Order of the Court dated 4th April 2013 was to be determined) would be dealt with as part of the closing submissions.

[3] The Claimant's Counsel opened her case in great detail. The court is being asked to declare the parties respective interest in premises located at Selbourne Gardens. The Claimant asserts that they both purchased the property in their joint names. However at all material times it was understood that the Claimant's son, who is not the biological child of the Defendant contributed financially and was entitled to a 1/3 interest. This understanding, asserts the Claimant was given effect to by the Defendant signing a transfer off a 1/3 interest to the Claimant's son. The Defendant denies ever signing such a transfer and alleges that the premises are jointly owned legally and beneficially by himself and the Claimant. The Claimant left the matrimonial home and returned to live in England in 2009. The Defendant remains in possession of the premises. The Claimant seeks severance and sale of the premises.

[4] It was agreed between the parties that the Order made on the 31st October 2011 for Affidavits to stand as the evidence in Chief meant affidavits without the attachments.

[5] The Claimant Norma Murray then gave evidence. Pursuant to the Order dated 31st October, 2011 her affidavits dated 29th October 2010 and 12th May 2011 stood as her evidence as chief. She described herself as a retired social worker. She is the mother of 3 children all of whom are adults and none of whom was fathered by the Defendant. She asserts that in 1979 with the financial assistance of her son Paul, she purchased property in the United Kingdom. This I will describe as the Kennedy Close premises. Although registered solely in her

name, the Claimant says that Paul who resided with her and paid the monthly mortgage was regarded as a joint owner.

[6] Paul left Kennedy Close in 1992 to set up home with his fiancée. The Defendant says she met the Claimant in 1995 and they were married. He moved into Kennedy Close to live with her. She says the Defendant stopped working in October 1996 however she continued her employment. Paul continued to assist her financially.

[7] The Claimant states that herself and the Defendant decided to return to live in Jamaica. They therefore went in search of property to buy. At paragraphs 15 and 16 of her affidavit filed on the 29th October 2010 she stated:

> "15. That the Defendant exerted pressure upon me to sell and relocate to Jamaica. I explained to the Defendant about my son's property at 2 Kennedy Close Cowley Oxford OX42UH England. He stated that my son's name could be added to the property that would be purchased in Jamaica so as to reflect his interest as we would need more than just my one half interest in the property in England.

[8] The Claimant sold the Kennedy Close property. She states that the Defendant and herself decided to purchase premises in Jamaica at 49 Selbourne Gardens Ocho Rios in the parish of St. Ann. The price was J$5,800,000 which was then the equivalent of £96,000. She asserts that the total contribution of herself and Paul to the purchase of Selbourne Gardens was £140,600.00 whereas the total contribution of the Defendant was £12,250.00.

[9] The Claimant asserts that it was subsequently agreed that Paul's name would be added to the Selbourne Gardens property. This was done voluntarily by the Defendant because at all material times he knew of Paul's beneficial interest.

[10] In her affidavit filed on the 12th May 2011 the Claimant is responding to an Affidavit of the Defendant filed on the 4th February 2011. She denies the allegation that the Transfer to Paul was fraudulent.

[11] When cross examined the Claimant explained that Kennedy Close was purchased by way of a mortgage. She said Paul did car maintenance, carpentry and electrical work. He worked with Rover and later BMW. He now is self employed. All 3 of her sons lived with her at Kennedy Close. Her marriage to Mr. Murray occurred in Jamaica. She stated in addition to her work as a social worker, she did private work as a caregiver. She also boarded students from time to time. The Defendant worked with Rover when the Claimant first met him. He took voluntary redundancy at age 55. She admitted that the Defendant gave her a cheque for £18,000 towards the purchase of Selbourne Gardens. She denied that herself and the Defendant threw a partner to purchase Selbourne Gardens. She said her contribution to the purchase of Selbourne Gardens came from savings and 2 loans. She stated that Kennedy Close was sold in 2000 or 2001. Kennedy Close was sold to her son Ray Williams. The house at Selbourne Gardens was completed in 1998. The house was rented after that. In April 2002 herself and the Defendant came to live in Jamaica. They stayed with friends for about a year until they moved into Selbourne Gardens.

[12] She said she removed from Selbourne Gardens and returned to England in 2009. She returned with her sister twice per year after that. The following exchange occurred,

> "Q. When marriage started going bad
>
> A. The year after we come out to live
>
> Q: That was about 2003
>
> A. Yes early 2003
>
> Q. When did it become apparent that it was in Paul's best interest to get his name on the title?
>
> A. From the start, in 1998."

[13] She said also that her marriage to the Defendant was dissolved in 2010. She said that the first time she discussed the transfer to Paul with Marsha Francis was in late 2006. She says the Defendant was present. They returned in April 2007 and the documents were prepared. She stated that she was present when the Defendant signed the transfer.

[14] When reexamined the Claimant was asked to explain paragraph 22 of her Affidavit given the fact as she was now saying, that Kennedy Close was sold after Selbourne Gardens was purchased. Her response was rather inadequate, she said,

> "From the £80,000, £32,100 was taken out for extended mortgage and the rest was used to put an extension to Selbourne Gardens."

In answer to the Court she said that the transfer of Selbourne Gardens to Paul was because it was apparent the marriage was deteriorating,

> "Q. What behaviour
>
> A. Being aggressive, heavy drinking, smoking and gambling."

In questions arising from the Judges question, the Claimant explained that she noticed the behaviour while they were in England but she was trying to make the marriage work. The Claimant was also asked why was Paul's name not put on at the time Selbourne Gardens was purchased, she said,

> 'We could not get that done on time. Because we were preparing to come out and because we would need to get a Notary Public and lawyers in England so we decided to do it when we got settled in Jamaica."

[15] The Claimant's next witness was Marsha Francis an attorney at law. Her affidavits dated 7th June 2011 and 26th October 2011 stood as her evidence in chief. Her evidence is that she is the Claimant's cousin. In and around February 2007 the Claimant contacted her and asked her assistance to have 1/3

share of the property at Selbourne Gardens transferred to Paul. In March 2007 the Claimant and the Defendant visited her at home. The instructions were repeated in the presence of the Defendant. She says she prepared the instrument of transfer and explained to both parties the consequences of the document. She stated that she read the document to both of them and explained the right to survivorship. Thereafter both parties executed the instrument of transfer.

[16] The witness explained also that in March 2007 the Claimant also instructed her to see to the correction of the spelling of her middle name on the Title to Selbourne Gardens. She prepared Voluntary Declarations with regard to that application. The Declarations were eventually returned to her witnessed by Dr. Osmond A. Tomlinson a Justice of the Peace.

[17] This witness was extensively cross examined. She stated that she was first contacted by the Claimant and this was by telephone. She could not recall conversation on the subject prior to January 2007. In March 2007 she had no offices and was not working. She admitted that she had not advised them about the possibility of becoming tenants in common. She said the title was already in joint tenancy and she had not been asked to change that. She was asked whether she had suggested that the parties' obtain separate legal advice and said she had not done so. She deponed that in March 2007 she had known the Defendant for several years. He and the Claimant had visited her family home on many occasions and had even stayed there for a while on one occasion. When tested she admitted that the Declarations for signature may not have been given to the parties in March 2007. She could not recall if both Declarations were done at the same time. She insisted that the Transfer had been signed in her presence.

"Q: Suggest that Mr. Murray never signed any Transfer

A: Mr. Murray signed the Transfer

J: Did you see him sign it.

A: Yes, because I witnessed the document I would have seen."

[18] There were no questions in re-examination. In answer to the court she said that she was in Canada prior to January 2007 and therefore the conversation with the Claimant was not likely to have been in November or December of 2006. She was shown the documents at pages 43 and 57 of Exhibit 1 and asked whether the signatures appeared to be the same. She responded:

> "A. They don't look the same. One is joined up the other is scripted. I witnessed transfer not Declaration."

[19] In answer to questions arising from the Judge's questions the witness stated she was of the view that the Defendant was literate. She said that at the time she received the documents she would not have been comparing signatures. She therefore never noticed a difference between the signatures at the time.

[20] The case was adjourned to the 3rd April 2014 as the Claimant's expert witness was not available until then. On that date Andrea Marie Thomas who described herself as a forensic Document examiner, gave evidence. Pursuant to Orders of this court dated 31 October and 27 July 2012 an expert report dated 5 February 2013 was admitted into evidence as Exhibit 2. (See also page 111 Exhibit 1). Both parties were allowed to cross examine this expert pursuant to Rule 32.1 (8) of the Civil Procedure Rules. her report concluded:

> "Based on the examination done, it is my professional opinion that the documents labeled Q1 – Q2, K1 – K7 and S1 is identified as written by one and the same person. Based on the evidence contained in the handwriting, the writer of the known material actually wrote the writing in question. There are several consistencies found in the document and the master patterns are unique."

[21] I will return to the evidence given by this expert witness, suffice it to say at this stage, that I was not impressed. I will discuss her evidence in more detail when comparing and contrasting the evidence of both experts.

[22] Upon completion of Miss Thomas' evidence the matter was adjourned to the 28th April 2014. On that date the Claimant closed her case and the Defendant gave evidence in chief.

[23] The Defendants evidence in chief was supplemented by further questions in chief I allowed over the objections of Claimant's counsel. In a nutshell the Defendant denied many of the Claimant's factual assertions. He stated that he lived with the Claimant at Kennedy Close prior to their marriage and continued to do so thereafter. He did not stop working but was made redundant after Rover was acquired by the BMW Group.

[24] He stated that Paul was unemployed and received unemployment benefits. The Defendant said he used his redundancy of £20,000 as well as cash settlements for his pension scheme towards the purchase of Selbourne Gardens. He denied applying any pressure on the Claimant to return to Jamaica and believed it was their joint desire.

[25] He says at no time was Paul's interest in Kennedy Close or Selbourne Gardens discussed. No discussion about Paul having a 1/3 share or any share he says, ever occurred. He asserts that a will was made jointly with the Claimant. However Selbourne Gardens was not left solely to Paul but to the survivor of the Claimant and the Defendants or their progeny. He did not have a copy of that will but he alleged it was made by Brown and Shaw.

[26] He asserts that he contributed £34,500.00 (being redundancy and pension funds) towards the purchase of Selbourne Gardens. He gave the money to the Claimant but never got a receipt. He asserted that the properly was rented for 3

years after purchase and the rental went towards the additions and improvements made to it.

[27] The Defendant denied having any knowledge of a Transfer to Paul of a 1/3 or any interest in Selbourne Gardens. He denied executing any such transfer. The signature purporting to be his is not his. He alleges that the Registration of Paul was obtained by fraud. He describes the Claimant as having deserted him and says she still has keys for the house and has returned since to stay there with friends. He denied showing any hostility towards her.

[28] He denied all allegations in Marsha Francis' affidavit pertaining to conversations with and advice to him about the transfer of an interest to Paul. He denied being present when Declarations were prepared and denied signing any such declarations before Dr. Osmond Tomlinson. He denied that Marsha Francis ever explained the significance of any transfer to him. He alleged fraud. It is to be noted that he admitted knowing Dr. Tomlinson who "is my Doctor."

[29] He too was extensively cross-examined. He admitted to a previous marriage. Admitted that he had never owned a house but his previous wife owned a counsel house. He owned no other property in Jamaica. Before marrying the Claimant he lived with his sister. He said he had 3 bank accounts in 1997. He was probed about the source of funds and said £10,000 was received from Rover as back payments. He admitted not having requested from the bank a copy of the cheque for £18,000 he allegedly gave to the Claimant; nor did he request a copy of a statement to show £18,000 was lodged.

[30] The Defendant stated that although he helped with shopping, cleaning and running of the house he made no contribution to Kennedy Close; nor did he pay any utility bills or mortgage there. the following exchange occurred:

> "Q: Suggest you never enquired because she told you how her sons helped pay bills.

A. If she wasn't she should but she never did

Q. Suggest you never asked because she told you about her sons and how helpful financially they were

A. (Pause) yes that could be the reason"

[31] He admitted that Kennedy Close was sold before they came to Jamaica and that they lived in rented premises for about 2 years before coming to Jamaica. He paid the rent of £400 per month. He said the Claimant never told him what she would use the proceeds of sale of Kennedy to do. He admitted that the keys for Selbourne Gardens was collected in 1998 by the Claimant and her son Paul, and that at that time it had been fully paid for. He said that they lived with the Halls for approximately 2 months prior to moving into Selbourne Gardens. This was because some painting and cleaning had to be done. When challenged he said he could not recall if they had been with the Halls from April to December of 2002. The following exchange followed,

"Q: Did you not live April to December 2002

A: I don't remember exactly could be. Can't recall

Q: Wasn't it because more than just decorating. There was a substantial expansion.

A: That was done when we in England.

Q: You did not move in because substantial improvement to the house.

A: Yes, yes, ok yes"

[32] He admitted he did not report the fraud to the police. He however did write specimen signatures at a police station in the presence of a police officer. He admitted that he had been to Dr. Tomlinson on many occasions since September 2011. He was shown page 83 of Exhibit 1 (a letter to the Claimant) and admitted, it was his handwriting. He admitted being well acquainted with the Claimants relatives and in particular Marsha Francis and her mother. He admitted visiting often and on one occasion staying 3 – 4 days with them. He admitted picking mangoes there.

[33] Such was his evidence in cross examination. Re examination was unremarkable. The Defendant's next witness was Beverley East who described herself as a Forensic Document Examiner. Her report is to be found at page 130 – 159 of exhibit 1. I was impressed by the professionalism and presentation of the report. Her evidence also impressed in terms of the knowledge and expertise demonstrated. I will return to this later in the judgment. Miss East's evidence in chief was oral and she was extensively cross examined. When her evidence ended the defence closed its case. Written submissions were directed to be filed and exchanged on or before the 13th June 2014. The hearing resumed on the 11th July 2014 when each party was allowed to respond orally to the written submission of the other.

[34] I do not intend to repeat in this judgment the submissions made. The parties are to rest assured that I have reread the written and oral submissions. I am indebted to counsel for the points made. The conclusions to follow were informed in part if not in whole by the points advanced.

[35] Let me say that having seen and heard the witnesses as to fact, I have no hesitation saying I accepted the Claimant and her witness Marsha Francis as witnesses of truth. It was not only their demeanour that impressed. The Claimant's evidence had generally an internal consistency. She was also well informed and clear. Miss Francis similarly impressed. It is true that the Claimant initially said Kennedy Close was sold to purchase Selbourne Gardens. She however admitted the inconsistency and explained that although it was sold after the purchase of Selbourne Gardens, the proceeds of sale after the mortgages were discharged was applied to do additions.

[36] In contrast, the Defendants' evidence did not impress. He struck me as someone determined to deny his signature in order to frustrate the result. He was often uncertain. When pressed on collateral matters he on more than one

occasion reversed himself. Most significantly and although given ample opportunity to do so, he could not explain how it was that Dr. Tomlinson witnessed his signature on the Declaration. Interestingly he had never asked Dr. Tomlinson why he did so. This I find incredible. The doctor continues even now to be the Defendant's medical doctor.

[37] On the evidence therefore I find as a fact that the Defendant did execute the relevant Transfer to place Paul's name on the title to Selbourne Gardens. This was done because he recognized Paul's interest. This had to do with Paul's financial contribution to Kennedy Close and later to the purchase of Selbourne Gardens. The Defendant is however a "wiley old man." It is apparent from the letter written to the Claimant, that he is not "well lettered." I find however that he deliberately scripted the signature placed on the Transfer. He deliberately signs in different styles depending on the occasion. So that the signature to the Declaration even to the layman looks different to the one on the Transfer and to those on his Affidavits before this Court.

[38] I am fortified in these findings because I ask myself, what foolish fraudsters must be the Claimant and Marsha Francis. They, the Defendant would have us believe, forged the Defendant's signature without any attempt whatsoever to make it appear to be his. One need only examine the transfer to see that the "signature" placed there does not even appear to be a signature. It is what in common parlance we call "scripted," that is, not in joined up. It would be a foolish fraudster indeed that would seek to pass that off as anyone's signature. I find and this on a balance of probabilities that the only reason Marsha Francis signed and accepted that as the Defendants signature was because she saw him put it there. He "scripted" it to create, to use an Americanism, plausible deniability on some future occasion, such as this.

[39] I need now to say something about the Expert reports. I have already indicated that Miss East impressed me as an expert, the Claimant's expert did not. Why

then have I come to a conclusion contrary to the expressed opinion of Miss Beverley East?

[40] I, as said earlier, accept the Claimant and her witness as truthful. I regard the Defendants contention as improbable. I did not believe him. Miss East in the course of giving evidence was honest and professional enough to state the following:

i. she did not examine any original document
ii. a person who deliberately prints [i.e. what is commonly called scripted) can affect the expert's conclusions. This is called "disguised writing."
iii. Examination of both originals can get around disguised writing by observation of pressure patterns.
iv. Pressure points cannot be seen on copy documents.
v. There is a margin of error where a copy signature is compared with other type of documents (such as the letter). Miss East said that her peer review accepted her findings.

[41] I was impressed by the professionalism of Miss East. Her report, unlike that of the Claimant's expert, was clear and very well presented. It is however not surprising that she found all the differences she did. Indeed one need only, as a layman, glance at the "signature" on the transfer (page 56 Exhibit I) and any of the known signatures page 79, 93, 94- 97, and 102 – 103 of Exhibit I to see if they are different. The one is printed (popularly called scripted but which Miss East informed us is a misused terminology) and most of the others are cursive (popularly called 'joined up') writing. Unfortunately, when preparing her report Miss East did not consider the possibility that the individual had disguised his own handwriting. It is not mentioned at all in the report. When asked about that while giving evidence she responded that, this can be detected by observing "pressure patterns." But to do so one needed to have originals and she had examined no originals. I should add that it does not appear that Miss East was

briefed on the full facts of the case and the fact that the Claimant was contending that the document was executed in her presence.

[42] Interestingly in the only known sample in which the Defendant prints (or scripts) the word Murray (the envelope) Miss East finds only 6 distinguishing features. In the conclusions in her report she groups the known Samples (K1 to Kg) when stating the several reasons why they all differed from the Transfer (Questioned document Q1). However with my layman's eye, the envelope (K2) bore some similarities to the Transfer (Q1). See the formation of the 'R's and the 'V' and the upper Section of the 'y'. When writing the envelope the Defendant would have been doing it in a fluid perhaps hurried context. When "signing" the transfer as I have found he did, he would have been deliberate as he scripted (printed) his own name. It is not surprising therefore that differences emerge. Unfortunately, Miss East saw no originals and hence was unable to detect pressure patterns. Unfortunately, also, when giving his sample signatures, the Defendant was not asked to print (script) his name. (See page 119 Exhibit 1). The only other scripted document was the envelope. "Pen lifts "are a useful comparison where one is comparing signatures. Miss East correctly pointed out this when challenging Miss Thomas' statement that one "cannot have consistent signatures",

> "There are patterns and characteristics within a signature that make it unique to a specific writer."

[43] Where however an individual does not sign but in effect prints or scripts so as to deliberately deceive, then it is not sufficient to rely on such patterns or pen lifts. As Miss East herself said, an examination of originals to detect pressure patterns is advisable.

[44] In giving evidence Miss East was asked:

> Q: Can you explain difference between script and cursive
>
> A: Cursive is joined up writing when connected. Script is also regarded as cursive.
> Print is block capital"

The following exchange followed:

Q: For best results compare a signature made in script with another signature made in script or signature made in print with another signature made in print.

A. That is correct."

[45] Miss East it should be noted was clear that the questioned document was written in caps. The following exchange occurred:

Q: did you advise them of difficulty because difficulty in patterning between script and print.

A: I did also between signature and regular writing. I did so orally advise them.

Q: Not noted in report

A: No"

[46] I should on the matter of experts mention that evidence was lead as to differences of a personal nature between Miss East and Miss Thomas. It is relevant only to the extent that it impacts Miss Thomas credentials. I accept as truthful Miss East's statement of the circumstances of the matter. Indeed it does appear that Ms. Thomas was unsuccessful in her examinations. She parted company with the police force consequent on information provided by Miss East. I will quote a part of Miss East's evidence.

"Q: You had any personal problem with Miss Thomas

A: Not as far as I know. I tried to mentor her. She pulled back. I tried to get her to do homework. I was advised to give her harder work as she was more experienced. I did that but she never produced the home work. She was sending her resume to lawyers and lawyers sent it back to me asking if she is a student. I suggested that she should not be doing that while under training and two using the form of internet to send out resume. She had no control where it would end up, which could be on her bosses' desk. She had been in a

> *matter where her opinion was different from mine. I suggested as her training not completed, she had not done examination and she had not seen the original document which would give a different opinion. She told me she did not need my advice and she had another opinion from someone else. I did not report Miss Thomas to her superiors. Kinghorn & Kinghorn reported her. I did not deliberately fail Miss Thomas. She did poorly in the exam."*

[47] In the final analysis the expert evidence tendered was not of great assistance to the court. Miss East never saw originals and hence was at a disadvantage. She would be unable to rule out intentional deception by the use of print. Miss Thomas on the other hand, did not impress me as an expert. Her conclusions on similarity flew in the face of my own observations and indeed the observations of Miss East.

[48] I am satisfied on a balance of probabilities and having seen and heard the witnesses that the Defendant did affix his name to the Transfer. He knew the nature and content of the document he was signing. He intended to give effect to what was at all material times the common intent of the parties. That is he intended to convey 1/3 interest in Selbourne Gardens to Paul. His purpose in printing rather than signing his name was to allow for deniability. Himself and the Claimant had been having difficulties. The Claimant says these had started even while in England. At the time of the Transfer there was no certainty that there would be separation; there certainly would have been had the Defendant refused to execute the Transfer. The Defendant therefore purported to do so, and in the way of "Anansi" decided to print rather than "sign" his name.

[49] I need to say a short word about the jurisdictional issue. The Defendant argued that since the coming into force of the Property Rights of Spouses Act, the Claim can no longer be litigated under the Partition Act. In this way the Defendant hopes to apply the Statutory imperative and hence that the property be divided equally. The fact, as I have found, that there is a third party interest, weakens

the submission considerably. I hold that the Partition Act is applicable and is indeed the primary basis of the claim.

[50] I therefore for the reasons stated in this judgment, decide in favour of the Claimant and intend to grant Declarations and Orders accordingly. Let me invite the parties to prepare an appropriate Minute of the Order which should have the appropriate Declarations, an Order for Sale and for division of the proceeds. The parties can attend before me in 14 days to finalize the order. If an appropriate form cannot be arrived at I will decide on its final Structure and Content.

David Batts
Puisne Judge