

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. E352 of 1997

BETWEEN	SUSAN EVANKO on her own behalf as executrix of the Estate of STEPHAN JURIK	PLAINTIFF
A N D	DASA YETMAN	1 ST DEFENDANT
A N D	ZUSANNA BRECHOVA- SOUCEK	2 ND DEFENDANT
A N D	LARON JURIK (formerly LARON McEWAN)	3 RD DEFENDANT

R.N.A. Henriques Q.C. and R. Clough instructed by Clough, Long & Company for the Plaintiff.

S. Shelton & Mrs. Michelle Champagnie instructed by Myers, Fletcher & Gordon for 1st & 2nd Defendants.

J. Vernon Ricketts for the 3rd Defendant.

Heard: 23rd, 24th, 25th & 26th September;
9th, 10th, 11th & 12th December,
2002 & 22nd May, 2003

On 9th December 2002, notice of change of Attorney filed by Mr. D.

A. Gittens on behalf of 1st and 2nd Defendants.

G. SMITH, J.

Before this Court is an Originating Summons for the determination of the following questions and consequential Declarations and/or orders:-

1. (A) Whether there was a partnership between the Plaintiff and Stephan Jurik, deceased, in the building and operation of a hotel, known as "Blue Cave Castle," and/or a restaurant, known as "Sweet Bite Café" on premises at Negril aforesaid registered at Volume 1042, Folio 247 of the Register Book of Titles;
- (B) Whether the said premises and/or a 1971 Mercedes Benz motor car formed part of the assets of the said partnership;
- (C) Whether the said partnership has been dissolved by the death of the said Stephan Jurik, deceased;
- (D) Whether the Plaintiff is entitled to a half share in the said premises and said motor car;
- (E) Whether the said Stephan Jurik, deceased was competent to dispose of only his half share of the said premises and motor car in his will;
- (F) Whether the following provisions in the said will are void for uncertainty:

“The main building which is to the East side of the property which I own at Negril, Westmoreland which includes the residence and garage to go to DASA JURIK AND ZUSANNA BRECHOVA as joint tenants. They are to give ten percent (10%) of their profits from the operation of the said property as the case may be to Loren McEwan of Grange Hill, Westmoreland.

The buildings to the West side – Guest house, kitchen and office to go to Susan Evanko and Loren McEwan receiving ten percent (10%) of the profits coming from the operation of the said property as the case may be.

In case of a sale of the entire property by the beneficiaries the surviving beneficiaries are to share the proceeds of sale equally among themselves. Further, that in case of a sale of the entire property first option is to be given to the respective beneficiaries.

There must be no sale of a part of the property unless it is among the beneficiaries or their survivors.

There must be no dividing boundary between the property – West and East.

All contents in each property (West and East) to remain intact to operate the businesses subject to SUSAN EVANKO removing her personal effects from the main building”.

- (G) If the answer to the preceding question is in the affirmative, whether the properties mentioned therein fall into residue under the said will.
- (H) Whether the following provision of the said will is void as there has been an outright bequest of his interest in the said motor vehicles to the 1st and 2nd Defendants:

“Any existing motor vehicles registered in my name is to go to DASA JURIK and ZUSANNA BRECHOVA and in the case of sale of the said motor vehicles LOREN McEWAN to receive one third (1/3) from the proceeds of sale.”

2. Consequential Orders:-

- (a) That the accounts of the said partnerships be taken;
- (b) That the Plaintiff purchases the half share of the said Stephan Jurik, deceased in the said partnership;

3. Such other relief as this Honourable Court may deem just.

FACTS:-

- (i) The Plaintiff SUSAN EVANKO was the common law spouse of the deceased STEPHAN JURIK.
- (ii) The first and second Defendants DASA JURIK YETMAN and ZUSANNA BRECHOVA SOUCEK are the deceased's daughters and the third Defendant LARON JURIK (formerly LOREN McEWAN) his son.
- (iii) The deceased/testator STEPHAN JURIK died on the 19th April 1996, testate, leaving a will dated the 27th day of May 1991.
- (iv) The Plaintiff SUSAN EVANKO is the sole Executrix of that will.
- (v) Probate was granted by the Supreme Court of Jamaica on the 2nd May 1997 to SUSAN EVANKO, the Executrix.

The Plaintiff/Executrix has brought this Originating Summons asking the Court to answer/determine a number of questions as were previously outlined.

The historical background of this case in my view is of some significance and importance, as it will be relevant in assisting the Court to arrive at the answers to the questions posed for its determination. I will therefore encapsulate this information as follows:

1. In July 1976 the deceased Stephan Jurik acquired a parcel of land at Negril for \$15,000.00 US.
2. In December 1976, the Plaintiff Susan Evanko an American citizen on a visit to Jamaica met the deceased, a Canadian artist. They became enamoured with each other and he told her about the property he had acquired in Negril.
3. In June 1977 the deceased visited the Plaintiff at her apartment in New York, where he remained with her for the next five months.
4. They held discussions about returning to Jamaica to live together on the deceased property and to develop and operate this property.
5. In furtherance of these discussions Ms. Evanko gave up her full time job at Penthouse magazine where she says she was the Marketing Director, to live on the property in Negril with Stephan Jurik in an "A" frame wooden house without modern conveniences.
6. In 1978 they built a two-storied house for themselves on the east side of the property where they resided for 6 months out of each year for the next 6 years (up to 1984). The other 6 months of the year the testator Stephan Jurik returned to New York and resided with the Plaintiff in her apartment.

7. Between 1980 – 1983 the restaurant “Sweet Bite Café” was built. Operation of the restaurant commenced in 1983.
8. In 1981 the testator acquired a Mercedes Benz motor car while on a visit to Germany and the Plaintiff contends that she provided the money to ship it to Jamaica and to pay the Customs duties on it. The cost for the upkeep and maintenance of this vehicle was paid for out of the earnings of the business.
9. On 3rd day of February 1984 the Plaintiff and the testator entered into a written partnership agreement for the operation of the “Sweet Bite Café”. This agreement sets out the terms and conditions which both parties agreed would be the basis for the operation of the café.
10. In 1981 the construction of the Castle started and this was completed in 1987. On completion, the Blue Cave Castle Hotel consisted of six rooms.
11. In 1984 the original “A” frame wooden shelter was refurbished into a (4) four bedroom guest house.
12. In 1988 – 1989 this 4 bedroom guest house had to be rebuilt into a permanent stone-structure, due to the damage caused by Hurricane “Gilbert”.

13. In 1992 – 1993 the 2nd floor of the parties' personal residence was rebuilt to match the stone and cement construction of the other buildings on the property.

What is to be observed is that there was a constant upgrading of the property from the time the parties started their relationship and decided to be together. The Plaintiff asserts that in all of this and in the operation of the businesses she played a very active and vital role. She supervised, managed and ran the businesses. She assisted actively in the financing of the construction and rebuilding of the buildings on the premises. All of this with the full knowledge and consent of the deceased.

The partnership agreement dated the 3rd day of February 1984 sets out the terms and conditions that both parties agreed would form the basis for the operation of the "Sweet Bite Café" and the parties are all agreed that there was in fact a partnership as it related to the "Sweet Bite Cafe" as evidenced by the written agreement.

The Plaintiff's attorney-at-law Mr. R.N.A. Henriques Q.C. submitted that the partnership agreement was expanded to include the running of the hotel. At first this was challenged by the 1st and 2nd Defendants who argued that Ms. Evanko was a mere employee as far as the running of the hotel was concerned.

However, on the resumption of the hearing on the 9th day of December 2002, Mr. Gittens (who had then taken over conduct of the case on behalf of the 1st and 2nd defendants) conceded that Ms. Evanko was in fact a partner in the operation of the hotel along with Mr. Stephan Jurik. He however argued that neither the property registered at Volume 1042 Folio 247 nor the 1971 Mercedes Benz became a part of the partnership assets. It is on that aspect of the case that the parties are asking the Court to take a very critical look and make a determination.

Mr. R.N.A. Henriques Q.C. for the Plaintiff submitted that it was clear that the parcel of land on which the buildings were constructed registered at Volume 1042 Folio 247 was an asset of the partnership. He argued that "Clause 4" of the written partnership agreement stipulated the respective contributions for the venture by each party, viz "that the deceased Stephan Jurik was required to put up the building and other chattels and the Plaintiff Susan Evanko would provide equipment. The gains and the profits were to be shared by the partners of the business as to one-half share each and to bear the losses (in the same proportions) equally."

In addition he opined that the provisions of the will of Stephan Jurik deceased clearly showed that the deceased intended the property to remain intact including the contents so as to accommodate the operation of the

businesses. The deceased specifically stated that “there must be no dividing boundary between the property West and East and all contents in each property to remain intact to operate the business”.

Mr. Henriques cited and relied on the cases of *In Re Rhagg (deceased) Eastern v Boyd* 1Ch.828 and *In Re White McGann & Another v Hull* [1958] 1 ALL ER 375 and submitted that as a matter of law, the land was an asset of the business as it was the deceased’s capital injection thereto and he held same in trust as an asset of the partnership and therefore could not dispose of same by his will. He argued that what the deceased was entitled to do was to dispose of his entitlement of a share in the partnership but could not dispose in specie of the assets of real or personal estate of the partnership. He further stated that by parity of reasoning, that the attempt by the deceased to dispose of the real estate to the Defendants and the beneficiaries of his will was ineffective. The beneficiaries under the will he contends are only entitled to have the deceased’s share in the partnership on dissolution, in this case upon his death, that entitlement would be limited to his half share in the premises which would have to be divided between the Plaintiffs and the Defendants to give effect to the deceased’s intention in his will.

Mr. Gittens for the 1st & 2nd Defendants argued that the deceased in making the land and buildings available for the conduct of the partnership business could not be taken as intending to grant the Plaintiff a beneficial interest therein. Such an intention he submitted would be indispensable and crucial for the Court to find that such an interest was created. The input of buildings and land by the deceased did not make them partnership property.

Mr. Gittens asserted that they remained the deceased sole and personal property, and that he could and did competently dispose of them by his will.

The intention of the parties is very critical to the determination of the issues herein. The Court must therefore examine very carefully the conduct of the parties in trying to arrive at their intentions. In cases of this nature it is extremely rare for the parties to specifically state what their intentions are, hence they will have to be inferred from the conduct of the parties over the period of the transactions. The Plaintiff and the deceased lived together as man and wife from 1977 up to the deceased death in April 1996. There is no denying that they both worked together and developed the property at Negril from very humble beginnings to what it is today.

First there was the building and operation of the "Sweet Bite Café" for which there was a written partnership agreement between the parties. Then there was the subsequent completion and operation of the "Blue Cave Castle

Hotel” in respect of which there was no partnership agreement in writing. It was argued by Mr. Gittens that since the construction of this hotel had commenced when the written agreement in respect of “Sweet Bite Café” was drawn up, then if it was intended to be a part of the partnership then it should have been included in the written agreement.

On the evidence put before this Court, it is my considered view that by the time of the completion of the “Blue Cave Castle Hotel” in 1987 the parties had been living together for at least 10 years as “man & wife”. Not only had their personal relationship matured and deepened but their business relationship had blossomed and flourished, and there is not one iota of evidence to suggest that there was a difference in the way the operations of “Sweet Bite Café” & “Blue Cave Castle Hotel” were conducted. From all appearances Ms. Evanko was responsible for most of the transactions related to the running of the hotel with the full knowledge and consent of the deceased Stephan Jurik. There was a joint bank account for the businesses out of which such expenses as property tax, insurance premiums for the buildings were paid and receipts from the operation of both entities were lodged. Based on the conduct of the parties I have concluded that they intended to operate the “Blue Cave Castle Hotel” as a partnership.

Having decided that there was in fact a partnership between the parties for the operation of the hotel, the further question which has to be determined is whether or not the land and buildings thereon became partnership assets.

Here one must go back to the very beginning of the relationship before any development of the property took place. The deceased Stephan Jurik had purchased the land in Negril, then he formed a liaison with Susan Evanko the young New York Marketing executive with the business savvy, they were in love and they decided to develop and operate these businesses. Consequently, Ms. Evanko gave up her New York apartment and her job to join Mr. Jurik in this enterprise in which she not only invested her time and her business know how but equipment and money as well. The fact that her name was not on the title of the property does not preclude her from having a beneficial interest in the land and buildings thereon first as a partner and/or in the alternative as someone who contributed to the development and operation of "Blue Cave Castle Hotel."

In *Azan v Azan* (1988) 25 JLR 301 Forte J.A (as he then was) in approving the decision of the House of Lords in *Gissing v Gissing* [1970] 2 ALL E.R 780 stated that ... "the nature of the relationship between the parties is immaterial. Although in those cases cited they involved the

breakdown of marriages I am fully of the view that the principles would be the same on the dissolution or breakdown of a partnership". Support for this is to be found in *Gissing v Gissing* where Lord Diplock had this to say:

"Any claim to a beneficial interest in land by a person whether spouse or stranger in whom the legal estate in the land is not vested must be based on the proposition that the person in whom the legal estate is vested holds it as a trustee on trust to give effect to the beneficial interest of the claimant as cestui que trust."

In this case I find that Mr. Jurik in whom the legal estate vested held it as trustee on trust for Susan Evanko, based on the conduct of the parties at the time that they would both have a beneficial interest in the property and also that Ms. Evanko acted to her detriment on the basis of that common intention i.e. by giving up her lucrative job with Penthouse Magazine, her New York apartment and by investing her time and money in this venture.

The evidence disclosed that Ms. Evanko made both substantial and indirect contributions to the development of the businesses. The Court finds that she made financial contributions, she brought in her business (marketing) experience and expertise as well as helping with the day to day operations of these businesses.

Mr. Gittens stated that it was improbable that the Plaintiff an experienced business woman would enter and stay so long in a partnership involving the land and buildings, and spend so much money to build a castle without

making any effort to have the original partnership agreement amended or a new one effected, so as to cover expressly the land and building.

It is the Court's view that despite Susan Evanko's business acumen, based on the course of conduct by the deceased Stephan Jurik, she felt extremely secure and confident in both the business partnership and her personal relationship with the deceased. She apparently never imagined that there would have been any dispute as to her position as a full partner with the deceased in the businesses and their assets, nor did she anticipate his early demise.

In concluding I would answer the questions posed in the Originating Summons dated the 3rd day of October 1997 as follows:

1. (A) That there was in fact a partnership between the Plaintiff and Stephan Jurik deceased in the building and operation of the hotel known as "Blue Cave Castle Hotel" and in the restaurant known as "Sweet Bite Café" on premises at Negril registered at Volume 1042 Folio 247 of the Register Book of Titles.
- (B) That the said premises and the 1971 Mercedes Benz car formed part of the assets of the said partnership.

(C) That the said partnership has been dissolved by the death of Stephan Jurik. In Lindley and Banks on Partnership p. 648 paragraph 26-02 it states:

“... Subject to any contrary agreement the death of a partner dissolves the partnership as regards all partners ...”

In addition in the written partnership agreement which related to the operation of the “Sweet Bite Café” “Clause 8” spoke to “termination by death or otherwise”. Stephan Jurik having died then it may reasonably be concluded that his death resulted in the termination of the partnership.

(D) That on the totality of the evidence and the findings previously made I find that the Plaintiff is in fact entitled to a half share of the said premises and motor car being part of the partnership assets.

(E) That Stephan Jurik deceased was competent to dispose of only his half share of the partnership, but could not dispose in specie of the assets of real or personal estate of the partnership.

(F) That based on the previous findings at E, it is my opinion and I therefore find that this question as well as those at G & H in the Originating Summons would not arise for my consideration.

The question was canvassed by Mr. R. Henriques Q.C. that if the deceased could only dispose of his share (which is half-share of the partnership)

having regard to the fact that in his will he purported to give half of his estate to the Plaintiff and half to the 1st and 2nd Defendants, should this half share be divided equally between Susan Evanko and the 1st and 2nd Defendants.

Again the Court is required to look at the intention of the testator. Based on the provisions contained in his will, it would appear that the intention to be gleaned therefrom is that he intended the Plaintiff and the 1st and 2nd Defendants to share whatever he owned equally.

But what of the 3rd Defendant?

The will of Stephan Jurik also indicated that he wanted to make provisions for Laron Jurik (formerly Loren McEwan) his infant child at the time of the making of the will. To this end he provided that 10% of the profits should be paid by the Plaintiff and the 1st and 2nd Defendants to Loren McEwan-Jurik, as well as (1/3) one third the proceeds of sale of the motor car. He went on further to say that "In the case of a sale of the entire property..... the surviving beneficiaries are to share the proceeds of sale equally among themselves.

Having previously found that:

- (i) the land and the buildings thereon as well as the 1971 Mercedes Benz motor car formed part of the partnership assets; and

- (ii) that the deceased was only competent to dispose of his half share of the partnership; and
- (iii) that the deceased could not dispose in specie of the assets of the partnership (real or personal) then it is reasonable to conclude that “the deceased partner’s share will normally be ascertained and paid out by means of a sale of all the partnership assets.”

See *Lindley and Banks on Partnership* at page 648 paragraph 26-03.

Based on the foregoing principle and in trying to give effect to the deceased’s wishes, it is my view that the 3rd Defendant Loren McEwan-Jurik would be entitled to 25% ($\frac{1}{4}$) of the proceeds of sale from the deceased’s $\frac{1}{2}$ interest in the partnership as he is one of the four beneficiaries named in the deceased’s will who should benefit in the event of a sale of the entire property, with Susan Evanko, Dasa Yetman and Zusanna Brechova-Soucek being entitled to 25% each.

2. Consequently, upon the foregoing it is further ordered that:
 - (a) the accounts of the partnership be taken;
 - (b) the partnership property be sold with the first option to purchase being offered to the respective beneficiaries.
 - (c) the proceeds of sale of the partnership property to be divided as previously indicated by the findings of the Court.