Neutral Citation No: [2024] NICh 4	*Ref:* **HUD12500**
	ICOS No: **21/25652**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **07/05/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

CHANCERY DIVISION

_____

MARGARET GRAHAM

Plaintiff;

and

ROBERT GRAHAM AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN KEVIN GRAHAM (DECEASED)

First-Named Defendant;

and

JULIE-ANN BOWIE (NEE GRAHAM)

Second-Named Defendant.

_____

Michael Lavery (instructed by Conor Agnew, Solicitors) for the Plaintiff
Craig Dunford KC with Eoghan McCarthy (instructed by Wilson Nesbitt, Solicitors) for the First-Named Defendant
The Second-Named Defendant appeared as a Litigant in Person

_____

HUDDLESTON J

Introduction

[1] The plaintiff seeks the following relief:

(i) An order setting aside a charge deed over premises known as 152 Cloughwater Road, Ballymena (as comprised in Folio AN99903 Co Antrim) (the property) which was entered into on 4 July 2016 and registered against that folio on 20 September 2017;

(ii) An order that at the date of the death of John Kevin Graham (the deceased) the plaintiff and the deceased were joint tenants of the property by virtue of the doctrine of survivorship and that therefore the plaintiff is the sole beneficial owner of the property;

(iii) The return of £7,000 that was removed by the deceased from an account held in the joint names of the deceased and the plaintiff on 10 July 2019;

(iv) Damages for loss and damage sustained by the plaintiff by reason of the negligence in breach of fiduciary duty of the defendants and each of them and their servants and agents in or about the steps taken to sever the joint tenancy.

Background

[2] The deceased and the plaintiff were married in June 1973. They cohabited in various addresses until the marriage broke down finally in 2016. The plaintiff at the date of hearing was approximately 67 years of age. It is suggested that she is a vulnerable individual and suffers from a degree of physical incapacity. In an affidavit filed in the related matrimonial proceedings she avers to being medically retired from work in 2011 and having suffered from fibromyalgia and osteoporosis since 2009.

[3] The parties separated in 2016 when the deceased left the matrimonial home but from the evidence of the plaintiff, they had occupied separate rooms and, for all intents and purposes, led separate lives for approximately 20 years before that.

[4] The plaintiff gave evidence that she was the main breadwinner earning approximately £6,000 per month when she worked for a building society after which she worked for Lindsay Ford Motors as a Business Manager where she increased her earnings and had the benefit of generous bonuses.

[5] The plaintiff gave evidence that the deceased's income as a joiner was somewhat more sporadic and that he earned approximately £18,000 per annum.

[6] The first and second-named defendants are the surviving children of the marriage and the beneficiaries of the deceased's estate under a will he entered into in June 2016 – i.e. after he left the former matrimonial home.

[7] When the deceased and the plaintiff separated in and around April 2016 the plaintiff prepared a handwritten note (dated 24 April 2016) which is in the following terms:

> "I Margaret Graham agree to give John Graham 50% of the monies left after the sale of 152 Cloughwater Road. He has agreed in front of two witnesses that he will not touch or claim any of my savings.
>
> Furthermore I want it known that I have not put him out of the house he wants to go so that is the way it has to be. He is not to harass or enter the house without my permission at any time after he has left until the house has been sold.

Dated this 24th April 2016."

[8] Both the deceased and the plaintiff signed that document. It was witnessed by the plaintiff's sister Phylis McDowell (who also gave evidence in the case) and her brother-in-law Sam McDowell both of whom had been called to the house as the final acts of the relationship played out on that day. The defendants' case is that this demonstrates a mutual agreement and a course of dealing between the plaintiff and the defendant that severed the pre-existing joint tenancy in the property in equity.

[9] Shortly after the split, and after taking legal advice the deceased entered into a charge in favour of the second-named defendant on 4 July 2016 which was registered against the folio in which the property is held on 20 September 2017. Under the terms of that charge the deceased's interest in the property was charged with payment to the second defendant of the sum of £1. The later explanation provided in correspondence between the parties is that the clear intention behind the charge was the severance of the joint tenancy in order to protect his interest in the property following the breakdown of the relationship with the plaintiff.

[10] The Land Registry, when they were completing the registration and to give effect to the charge and the severance of the joint tenancy, served notice on the registered owners pursuant to the Land Registry Rules. The notice which they served, however, was to the address which appeared on the register which was 33 Berryfields Park, Ballymoney which was, in fact, the house in which the parties lived before they acquired the property. The plaintiff took issue with the manner in which the notice had been served and at an earlier stage had joined the Land Registry and James Ballentine & Sons solicitors to the proceedings. She subsequently discontinued those proceedings against the Land Registry and that firm. Aside from that, the defendants take the position that the plaintiff and her solicitors were on notice of the changes to title through severance by 18 December 2017 at the latest through inter partes correspondence but did not take any action after becoming aware of the circumstances and/or that change notwithstanding the later matrimonial proceedings.

[11] Divorce proceedings were commenced following which ancillary relief proceedings between the plaintiff and the defendant were commenced in 2019. A decree nisi was granted on 19 September 2019 on foot of the deceased's divorce proceedings. During the course of and as part of an agreement between the plaintiff and the defendant in the ancillary relief proceedings the property was jointly marketed for sale by the plaintiff and the deceased. The case is made by the defendants that the plaintiff frustrated that sale. In her affidavit, as filed in those proceedings, the plaintiff avers as follows:

> "[3] On 24th April 2016 myself and [the deceased] entered into a written signed and witnessed agreement in relation to our finances on which we have both placed reliance and performed prior to the issue of proceedings,

> his solicitor then sought from me in October 2017 an additional £27,000…."

[12] The deceased died on 10 November 2020 before a sale could be achieved and following his death the ancillary relief proceedings were dismissed in January 2021.

[13] It is suggested that the plaintiff attempted to sell the property in January 2021 at an agreed price of £299,950. It is also alleged that she was less than co-operative in advancing the sale at that time. A grant of probate to the deceased's estate was issued to the first-named defendant alone on 18 March 2021. The first-named defendant, in his role as executor, agreed that the property should be sold but only on the basis that the deceased's estate received 50% of the sale proceeds to which the plaintiff did not agree. These proceedings were subsequently commenced.

[14] Under the plaintiff's amended (and current) statement of claim she claims entitlement to the property in equity. She alleges that the deceased failed to update the Land Registry records with their current and correct postal address and that accordingly the Land Registry failed to serve notice of the deed of charge on the plaintiff. She also alleges that the deceased owed a fiduciary duty to notify her of the charge and claims not to have received the notice which was posted by Land Registry. Setting that aside for the moment, I accept that at the latest she would have become aware of the charge on 18 December 2017. This is evidenced by a letter from her current solicitors Conor Agnew & Co to James Ballentine & Son on that date which highlights the issue.

[15] James Ballentine, in response to the letter from Conor Agnew & Co wrote in the following terms:

> "The purpose of lodging the said charge was in order to protect our client's 50% interest in the former matrimonial home, in the event our client should die before matrimonial settlement had been reached and the sale of the said property."

[16] The plaintiff also alleges that the deceased and the second-named defendant removed £7,000 in July 2019 from a joint account with Nationwide Building Society placing it in a sole account in the name of the deceased. There is no issue that the transfer happened. The defendants say that the joint account was operated on a joint mandate basis and that the deceased was therefore entitled to make the withdrawal – citing the authority of *Fielding v Royal Bank of Scotland* [2004] EWCA Civ 64 in support. As against that the plaintiff makes allegations of fraud, makes allegations of negligence and breach of fiduciary duty. It is fair to say that these are not particularised with any degree of specificity in any of the pleadings.

[17] A previous application before the master to strike out the proceedings was rejected as the master felt that there were triable issues which in due course led to the matter coming on before this court.

Consideration

[18] The background circumstances surrounding this case are unfortunate. It is self-evident that the deceased and the plaintiff had, certainly in its later stages, an unhappy marriage. In the affidavit filed in the matrimonial action she avers to physical and psychological abuse. One of their children, a son, predeceased the husband. It is very clear from the evidence in court that there is no continuing relationship between the plaintiff and her remaining children, the first and second defendants. The plaintiff is described in the position paper lodged on her behalf as someone who has "suffered from a significant physical disability and is a vulnerable individual." She gave evidence as to those vulnerabilities and the fact that she drives a specially adapted vehicle and/or has made adaptations to the property to render it more suitable for her. She also gave evidence that she was the principal breadwinner for the family contributing more to the mortgage payments then the deceased and that she had spent approximately £40,000 on renovations and improvements to the property and had been the person solely responsible for its upkeep since 2016. There was no challenge on the evidence to the fact that she had been the principal breadwinner and/or that she had spent the monies she suggested on improvements. As I have indicated, I had the benefit of sight of the affidavit filed in the ancillary relief proceedings (before they were discontinued) which corroborates certain aspects of this information.

[19] The parties formally separated on 19 April 2016 when the deceased moved into a rented NIHE property, but it is also clear from the plaintiff's evidence that they lived separately for almost 20 years before that. Mrs Graham gave evidence which demonstrated an unhappy marriage – certainly in later years and one, which I perceive, deteriorated further after their son's death and the deceased's own ill health. Matters came to a head in or around April 2016 when the deceased decided to leave. When he came to collect some of his possessions the plaintiff prepared and the parties signed the minute of agreement in relation to the property (referred to above) which was witnessed by the plaintiff's sister, Mrs McDowell (who also gave evidence) and her husband. At the instigation of the first-named defendant the deceased sought separate legal representation. In seems that on the back of that advice he created the Will under which the first and second defendant were appointed executors and the deceased's estate was left to his children on a 50/50 basis. The charge deed purporting to sever the joint tenancy was also undertaken around that time. As I have indicated matrimonial proceedings were then commenced but did not reach culmination because of the deceased's prior death.

[19] The position paper lodged for the plaintiff says:

(a) At para 10 "that the defendants had a legal and fiduciary duty to notify the plaintiff [of the charge and severance]";

(b) Also at 10 that this is "at the very least a dubious transaction designed to deprive her of her legal entitlement";

(c) At 11 that her case is "straightforward" in that she asserts "the equitable ownership of the property was held as a joint tenancy after separation of the deceased and the entry into of the charge'';

(d) At para 12 that the legal ownership ought to have passed to the plaintiff on the death of the deceased by operation of survivorship; and

(e) At 17 that the charge deed was registered without the plaintiff being put on notice and was procedurally incorrect.

[20] As regards the transfer of the £7,000 in July 2019 the plaintiff argues that the deceased was dissipating matrimonial assets which the defendants deny.

Severance of the joint tenancy

[21] Although historically there was some debate about the effect of a charge (as opposed to a mortgage), in a case where property is held as joint tenants any such debate was removed by Article 50 of the Property (Northern Ireland) Order 1997 which is in the following terms:

> "The creation of a charge on the estate or estates of one or more joint tenants (but not all of them) causes (and always has caused) a severance of the joint tenancy."

[22] It is quite clear, therefore, that the deceased was perfectly entitled to sever the joint tenancy if he wished and by entering into the charge deed with his daughter sought to do so. The fact that that charge had no other purpose is largely irrelevant. It is clear by reason of the fact of its existence and the correspondence which passed between the solicitors on the point that it was the husband's intention to sever the joint tenancy. The allegation of breach of fiduciary duty and/or negligence was not pleaded out and at law there was nothing in my view to prevent the deceased taking the action which he took. He was simply preserving, for his estate, the legal entitlement he then enjoyed.

[23] I accept that, procedurally, there is a requirement for the Land Registry to serve notice upon the registered owners. Christine Farrell, Registrar of the Land Registry, has indicated in her affidavit (filed before the proceedings against the Land Registry had been discontinued) that that was done but, unfortunately, was sent to the Berryfields address which was the earlier address for Mr and Mrs Graham before they acquired the property. Neither party had updated it – although it was always open to either to do so. I do not find any fraudulent intent on any party to these proceedings as regards the failure to do so. I asked counsel for the plaintiff to advance any

authority they might have to suggest that notice of the severance had to be served on the co-owner to perfect a severance, but none was provided. In my view as between the co-owners none was needed. The service of notice then becomes a matter for the Land Registry under the Rules.

[24] In any event, aside from that, it was clear on foot of the minute of agreement of 24 April 2016 that it was **the joint intention** of the parties to sever the joint tenancy in equity. Indeed, thereafter, the property had been marketed for sale on that basis, but the sale did not come to fruition for a variety of reasons after which the death of the deceased brought that matter to a conclusion and led, directly, to the present dispute. The affidavit filed in the matrimonial proceedings confirmed that was, by then, the common intention and indeed the basis of **reliance** for **both** parties.

[25] The plaintiff is clearly aggrieved at the course events have taken but there is nothing legally incorrect about those steps. The deceased was entitled to take the course that he adopted and by discontinuing proceedings against the Land Registry and James Ballentine the plaintiff has, in effect, conceded that any procedural irregularity amounts to nothing. The case of *Quigley v Masterson* [2011] 3 EGLR 81 to which I was taken is directly in point. In that case too the joint tenancy (albeit under the Law of Property Act 1925 in England and Wales) was deemed, on appeal, to have been properly effected on analogous facts.

[26] As regards any procedural irregularity I do accept that the point made by the defendants that the plaintiff was on notice of events certainly by December 2017. Had she wished she could have objected at any point between then and these proceedings. Section 6 and section 69 of the Land Registration Act (Northern Ireland) 1970 provided a route to court. In lieu of taking that course the plaintiff seemed to rely on the ancillary relief proceedings which were commenced in the Family Division and, as I have recorded, were discontinued after the death of the deceased. Throughout all of that course of conduct, however, there was an acceptance on her part that the property would have to be sold and the proceeds equally divided.

The joint deposit account

[27] It is common case that £7,000 was removed in July 2019 from a joint account in the name of the plaintiff and the deceased with the Nationwide Building Society and placed into an account in the sole name of the deceased. I heard evidence from the daughter, Julie-Ann Bowie, the second-named defendant, surrounding the circumstances of how that occurred. I am satisfied that the transfer was done by or with the approval of the deceased.

[28] In her pleadings and her oral evidence the second-named defendant denies any involvement or fraudulent intent.

[29] The plaintiff makes allegations of negligence and breach of fiduciary duty, but the issue is that she has not particularised those. The law on this point is clear. This

was **a joint account**, operated under a joint mandate where **either party** had access to it and as Paget's Law of Banking (16th ed) para 5.2 and the case of *Fielding v Royal Bank of Scotland* [2004] EWCA Civ 64 makes clear there is nothing wrong in a co-signatory withdrawing funds providing it is in accordance with that mandate. That I find is exactly what happened on the present facts.

[30] Nothing was advanced either by way of fact or legal argument to suggest other than the fact that the deceased was exercising in respect of the account his legal entitlement. The contrary argument of negligence and/or breach of fiduciary duty has not been particularised nor is it, in my view, of merit on the facts.

Equity

[31] The writ seeks in aid of the plaintiff "such further or other relief as the Court may deem just and equitable." This is not particularised either. The position paper filed on behalf of the plaintiff says (at [5]) that the charge was effected 'before this matrimonial asset was correctly dealt with by way of matrimonial ancillary relief.' It is also asserted that in equity she should be entitled as if the rules of survivorship still applied – notwithstanding the creation of the charge.

[32] This plea, although it is far from particularised in the pleadings themselves, attracts the court's attention on the facts of the case. In essence, based on what I accept was the unequal financial contribution of husband and wife, there has arisen a classic *Stack v Dowden* [2007] 2 AC 432 scenario. The property was held in joint names. That being the case one starts from the presumption that the beneficial interests follow the legal – unless there is evidence to the contrary. Whilst I accept on the facts that the parties may have contributed unequally to both the acquisition, improvement and maintenance of the property nonetheless until the deceased's death the plaintiff had acknowledged and confirmed in both writing and by her actions that a 50/50 split was the common intention of the parties. I see no reason why that should be departed from now.

[33] In terms of the 'equity' which she has raised, in my view, what the court in effect has been invited to do is to determine what is required to satisfy that equity. In the first part, and on the facts before me I do not consider that the equity requires any adjustment in the 50/50 ownership of the property as between the plaintiff and the deceased's estate. In coming to that conclusion I have had regard to what the plaintiff herself asserted in the matrimonial proceedings and their course of conduct which had led them to the initial marketing of the property in the first instance. I feel the equity which I find on the facts arising on the unequal contributions – based solely I may say on the oral evidence I heard and having regard to the affidavit filed in the matrimonial proceedings because nothing else was advanced by way of evidence - would be sufficiently satisfied if the plaintiff is allowed to continue residing in the property for a two (2) year period from the date of delivery of this judgment. That period should be more than sufficient to allow her to find a suitable alternative property – and if necessary, adapt it for her needs. Her continued occupation, while free of rent, will

be subject to the condition that she is required to maintain (and where necessary repair and/or renew) the property and keep it insured in its full replacement value. She will also be required to pay all rates and other outgoings in respect of the property. This I feel acknowledges the fact that she was, on balance, the party who paid more for the acquisition, renovation and continued maintenance of the property from the date of its acquisition to the date of the deceased's departure and, indeed, continues to maintain it. It also acknowledges the pre-death agreement to sell the property and divide the net proceeds. When it comes to the sale the parties are to agree a single selling agent and adhere to that person's professional recommendations as to the marketing and sales process. Likewise a single solicitor is to be tasked to undertake the conveyancing aspects. Whilst I sincerely hope that it will not be necessary but because of the previous difficulties between the parties either party may be at liberty to apply to this court for further direction as to the conduct of the sale if it is necessary.

Costs

[34] If required I am happy to hear the parties as to the matter of costs.