

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

Filed May 17, 2007

SUPERIOR COURT

ANN STRAUSS BARTLETT,
Plaintiff

V.

PETER C. FITTS,
Defendant

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C.A. No. PC 00-2002

DECISION

SAVAGE, J. This action concerns a dispute between former spouses over the ownership of stock. Plaintiff Ann Strauss Bartlett¹ claims a one-half interest in certain stock that her former husband, defendant Peter C. Fitts, transferred to the two of them jointly, without her knowledge, during their marriage and that he concealed from her prior to their divorce. She has filed an action for partition, conversion and an accounting, seeking legal and equitable relief to recover one-half of the stock, one-half of the stock dividends issued, and additional damages.

Fitts has asserted a plethora of affirmative defenses by which he seeks to defeat Bartlett's claims, including lack of subject matter jurisdiction, failure to state a claim, collateral estoppel and res judicata, laches, statutes of limitation, statute of frauds and release. Fitts also has filed a counterclaim seeking a declaration that he owns the shares exclusively, arguing that he intended to transfer the shares to his former wife only as a matter of convenience for tax purposes and not as a gift to her of a joint interest with right of survivorship. He further seeks specific

¹ During her marriage to defendant Peter C. Fitts, plaintiff was known as Ann Fitts. She later divorced and remarried and became known as Ann Brescia. She has since divorced and remarried a second time and is now known as Ann Strauss Bartlett.

performance to compel Bartlett to execute the documents necessary to remove her name from the disputed stock certificates so that he is permitted to sell, transfer or convey the shares as their exclusive owner.

For the reasons set forth in this Decision, this Court: (1) declares that Bartlett and Fitts own the disputed stock jointly; (2) orders a partition of the stock and the execution of documents to effectuate the transfer of one-half of the disputed shares to Bartlett and the remaining one-half to Fitts; (3) grants Bartlett a one-half interest in the dividends received by Fitts to date with respect to the disputed stock; and (4) denies her request for additional damages. This Court rejects all of Fitts's affirmative defenses and denies him relief with respect to his counterclaim.

I.

Factual Background and Procedural History

According to the Record of Stock, Fitts's parents gave him 82 shares of stock in the Standard Oil Company, a predecessor-in-interest to Exxon Mobil Corporation on May 1, 1963. (Pl.'s Exh. 1). On July 25, 1964, Fitts and Bartlett were married (Jt. Stip. of Facts ¶3). The Record of Stock further reflects a transfer of an additional 10 shares of Standard Oil Company stock from Fitts's parents to "Peter and Ann Xmas 1964." Id.

A Standard Oil Company stock certificate, dated December 1, 1964, certifies that Bartlett and Fitts are owners of 92 shares of stock and hold those shares as "JOINT TENANTS WITH RIGHT OF SURVIVORSHIP AND NOT AS TENANTS IN COMMON." (Jt. Exh. 2). That stock certificate further provides that the shares are "each transferable on the books of the Company in person or by duly authorized attorney upon the surrender of this certificate properly endorsed." Id.

In the Joint Statement of Facts, Fitts admits that his parents gave him certain shares of Standard Oil Company stock as a gift in 1963, that after he and Bartlett were married he placed some shares in his name and Bartlett's name jointly and that he never told Bartlett that he had placed any of the shares in their names jointly. (Jt. Stip. of Facts ¶¶1-5). This Court finds that Fitts placed, or consented to the placement of, a total of 92 shares of Standard Oil Company stock in the names of he and Bartlett jointly in 1964, during the course of their marriage, and that he did not inform his then-wife of these transfers. (Pl's Exhs. 102; Jt. Stip. of Facts ¶¶ 1-5).²

The marriage between Bartlett and Fitts lasted over ten years before it ended in divorce. On December 20, 1975, the parties entered into a written separation agreement. (Jt. Stip. of Facts, Exh. A). The parties' divorce became final on March 15, 1977 through a judgment rendered by the Supreme Court of the State of New York. Fitts v. Fitts, C.A. No. 20137/76 (N.Y. Sup. Ct. 1977) (Jt. Stip. of Facts, Exh. B). In accordance with the parties' separation agreement, the Court awarded Bartlett custody of the two minor children of the marriage, awarded visitation to Fitts, and ordered support and maintenance to be paid by Fitts to Bartlett. Id. at 3-4. The Court decreed that the parties' separation agreement would survive and not merge into the judgment of divorce. Id. at 5. Hardly forthcoming about his assets, Fitts never disclosed the

² While Fitts objected at trial to the admission into evidence of the Record of Stock showing transfers from his parents to him of 82 shares of Standard Oil Company stock on May 1, 1963 and to he and Bartlett jointly of 10 shares for Christmas 1964, this Court finds that evidence is properly admissible. See R.I. Rules of Evidence 901(a)(b)(4), (6), (8); 803(16), (24). The age of the document, its appearance and substance, the circumstances surrounding it, the fact that the defendant had custody of the document and that its purported author (his mother) is unavailable, the presence of evidence corroborating it and the absence of evidence contradicting it satisfies this Court that it is what it purports to be and that it is sufficiently reliable to be admitted into evidence. Regardless, this Court is satisfied from the Joint Stipulation of Facts and the other evidence at trial that 92 shares of stock were transferred to Fitts and Bartlett jointly during their marriage, that those shares remain jointly held between the two of them and that Bartlett had no knowledge of the jointly held stock until after their divorce.

existence of the disputed shares during the proceedings that resulted in the parties' separation agreement and divorce. See Jt. Stip of Facts ¶ 8.³

In 1978, however, Bartlett became aware that the disputed stock had been issued in the names of both she and Fitts. (Jt. Stip of Facts ¶8). That same year, Fitts had asked Bartlett to execute three stock powers to transfer to him the disputed shares. She declined to do so based on the advice of her counsel, Mary Benson. Id. ¶¶ 9-10, Exh. C. Since that time, Fitts has disputed Bartlett's claim of an ownership interest in the stock.

Also in 1978, Bartlett petitioned the Family Court of the State of New York for a modification of child support. See Brescia v. Fitts, C. A. No. F-1649-78 (N.Y. Fam. Ct. 1980) (Jt. Stip. of Facts, Exh. D). Fitts's child support payments had been set by the parties' separation agreement, but Bartlett complained that the financial needs of the children had outpaced the agreed upon amount. Id. The Family Court so found and increased the child support payments. Id. Fitts successfully appealed to the Appellate Division of the Supreme Court, see Brescia v. Fitts, 82 A.D.2d 803 (N.Y. App. Div. 1981) (Jt. Stip. of Facts, Exh. E), but the New York Court of Appeals reversed and remanded the case to the Appellate Division for further proceedings consistent with its decision. See Brescia v. Fitts, 56 N.Y. 2d. 132, 436 N.E.2d 518 (N.Y. 2d. 1982) (Jt. Stip of Facts, Exh. F). The parties did not litigate the issue of stock ownership or any other issue of property division at that time.

From 1978 through 1983, Bartlett was represented by attorney Douglas Hoyt and, in 1978, discussed with him the disputed shares. (Jt. Stip. of Facts ¶ 11). According to Bartlett, her attorney chose not to address that issue in the proceedings for modification of child support but

³ Indeed, the Family Court judge who later presided over a proceeding for modification of child support commented unfavorably on Fitts's stonewalling of Bartlett's attempts to obtain financial disclosure during those proceedings. See Brescia v. Fitts, C.A. No. F-1649-78 at 6-8 (N.Y. Fam. Ct. 1980) (Jt. Stip. of Facts, Exh. D) (noting that Fitts failed to disclose his earned income, withheld information, and was generally guilty of overreaching in connection with the separation agreement).

intended to seek redress in a separate proceeding. In that time period, however, there is no evidence that her counsel ever pursued her legal remedies regarding the disputed shares.

In 1991, Bartlett attempted to claim her one-half interest in the stock. Id. ¶19. She obtained information from Exxon's transfer agent, First Chicago Trust Company of New York, regarding the number of shares that she and Fitts held jointly. Id.; see Def's Depo. at 9-10; Exh. 1 to Def's Depo. She then sought to have her name on the stock certificate changed to reflect her then-current name and requested that First Chicago divide the shares between she and Fitts, but to no avail.

Fitts advised her that he would not execute the form necessary to transfer to her a one-half interest in the shares, and he returned that form to her or her counsel. (Jt. Stip. of Facts ¶19). In 1991, Bartlett also engaged attorney Edward Kiley for the exclusive purpose of pursuing her stock claim. Id. ¶20. There is no evidence to suggest that she filed suit at that time. Bartlett finally filed suit in this Court on April 20, 2000. Id. ¶ 21.

Since 1963, Fitts has neither sold nor purchased any stock of Exxon Mobil Corporation or its predecessor in interest. Id. ¶ 22. Over time, by virtue of stock splits and other events, the number of the disputed shares held by him that are at issue has increased from 92 to 3136. Id. ¶ 27. These disputed shares have paid and continue to pay quarterly dividends. Id. ¶ 23. The quarterly dividend checks are made payable to "Peter C. Fitts & Ann S. Fitts Jt Ten" and are delivered to Fitts's residence in Smithfield, Rhode Island. Id. Fitts has endorsed these checks typically with his name only and has deposited them into a bank account maintained in his name only; he has never signed Bartlett's name to any of the dividend checks. Id. ¶¶ 24-25. The parties have agreed, in their Joint Stipulation of Facts, to the amounts of the dividends received by Fitts annually, based on the issuance of 92 shares of stock by Standard Oil Company in 1964,

from 1965 through the first quarter of 2004. (Jt. Stip. of Facts (Supp.) ¶ 1).⁴ They agree that those dividends total \$55,985.06. Id. Fitts has paid and continues to pay income taxes on those dividends; Bartlett has never paid taxes on the dividends. (Jt. Stip. of Facts ¶ 26). There is no evidence before this Court as to the amount of any taxes paid.

In the instant proceeding, Bartlett asserts three claims in her second amended complaint. First, she asserts a claim for partition of the disputed shares and petitions this Court for an order directing Fitts to transfer one-half of the disputed shares to her. Second, Bartlett alleges that Fitts has converted her share of the stock dividends and wrongfully withheld those dividends from her; she seeks monetary damages to compensate her for her share of past dividends, along with interest, attorney's fees, and punitive damages. Third, and finally, Bartlett requests an accounting of the dividends, as she alleges that Fitts holds her share of the dividends in constructive trust for her as a fiduciary and that he should be compelled to return to her those dividends that are lawfully hers.

Fitts has answered her complaint, asserting twenty-one defenses. He also has asserted a counterclaim for declaratory relief, to seek to establish his right to total ownership of the disputed shares, and specific performance, to effectuate his alleged status as full owner of the stock.

Previously, the parties filed cross-motions for summary judgment, both of which were denied by a motion justice due to the existence of genuine issues of material fact. A bench trial before this Court followed. Although both parties filed post-trial memoranda, this Court has

⁴ It appears, in fact, that Fitts may have continued to receive and deposit dividend checks with respect to the disputed stock since 2004, as evidenced by Bartlett's post-trial request for admission to establish that fact as well as the amounts of such deposits and Fitts's motion to strike filed in response thereto. This Court has deferred action on the motion to strike pending this Decision.

undertaken independent research on legal issues not addressed by them and has considered intervening case law.

II.

Analysis

A. Defendant's Affirmative Defenses

Fitts seeks to defeat Bartlett's claims for relief based on defenses, inter alia, of lack of subject matter jurisdiction, collateral estoppel, res judicata, laches, statute of frauds and release. This Court will address these defenses seriatim before examining the merits of Bartlett's claims.

Fitts also has raised statutes of limitation defenses with respect to Bartlett's claims for an accounting and conversion of dividends. This Court will address those defenses in the course of addressing the merits of those claims. In addressing the merits of all of Bartlett's claims, this Court implicitly addresses Fitts's defense of failure to state a claim upon which relief may be granted.⁵

1. Lack of Subject Matter Jurisdiction

Fitts first asserts lack of jurisdiction as a defense. This Court construes this defense as one challenging this Court's subject matter jurisdiction over Bartlett's complaint. Bartlett has not addressed this issue.

Bartlett has petitioned this Court to order Fitts to convey to her a one-half interest in the disputed shares. Her claim is essentially one for partition of jointly owned property, an equitable

⁵In addition to the foregoing defenses, Fitts has raised -- but neither briefed nor argued -- the defenses of abandonment of rights, waiver, estoppel, accord and satisfaction, and payment. As such, this Court views Fitts as having waived those defenses. Even absent waiver, it is clear from the facts, as found by this Court, and its analysis of the parties' claims and defenses in this Decision that those defenses would fail as a matter of law.

claim.⁶ See Lucchetti v. Lucchetti, 85 R.I. 112, 115, 127 A.2d 248, 251 (1956) (allowing for partition of personal property in equity). Id. The Rhode Island Superior Court has “exclusive original jurisdiction of suits and proceedings of an equitable character.” R.I. Gen. Laws § 8-2-13. Additionally, “[i]f an action is brought in the superior court which represents an attempt in good faith to invoke the jurisdiction conferred by this section, the superior court shall have jurisdiction of all other actions arising out of the same transaction or occurrence.” Id.

As such, this Court has jurisdiction over Bartlett’s equitable claim for partition of the disputed stock. As Bartlett’s other claims for conversion and an accounting are also equitable or arise from the same transaction underlying her partition claim – the alleged gift of the stock – they, too, are within this Court’s equitable jurisdiction pursuant to R.I. Gen. Laws § 8-2-13. Moreover, to the extent that Bartlett did not expressly invoke this Court’s equity jurisdiction, this Court finds that her complaint reflects a good faith attempt to do so which is sufficient to establish this Court’s equity jurisdiction under that statute. This Court finds, therefore, that it has subject matter jurisdiction over all three counts of Bartlett’s complaint.

This Court likewise has jurisdiction over Fitts’s related claims for equitable relief in his counterclaim by which he seeks a declaratory judgment and specific performance to establish and effectuate his claim to sole ownership of the disputed stock. See R.I. Gen. Laws §9-1-30 (granting Superior Court original and exclusive jurisdiction of actions for declaratory relief); R.I. Gen.Laws §8-2-13 (equitable jurisdiction of Superior Court). Indeed, this Court finds it disingenuous for Fitts to be claiming that this Court lacks subject matter jurisdiction over Bartlett’s equitable claims for partition and an accounting (or her claims for conversion and an

⁶ As Bartlett did not request that the stock be returned to her before trial, she was not required to file a writ pursuant to the replevin statute. See R.I.Gen. Laws § 34-21-1 et seq.; Moseman Construction Co. v. R. I. Dep’t of Trans., 608 A.2d 34, 37 (R.I. 1992). Moreover, it is not at all clear that jointly held stock certificates are the type of “goods or chattel” subject to the replevin statute. Id.

accounting that arise out of the same transaction as her equitable partition claim) when he seeks to invoke this Court's equitable jurisdiction over his counterclaim.

2. Collateral Estoppel

Fitts next argues that collateral estoppel bars Bartlett's claim to one-half of the disputed shares and dividends. Under the doctrine of collateral estoppel, a party is precluded from re-litigating an issue if: (1) there is an identity of issues; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is sought is the same party or in privity with a party in the prior proceeding. Taylor v. Delta Electro Power, 741 A.2d 265, 267 (R.I. 1999).

Fitts submits that "[t]he issue of Fitts's property was fully raised and litigated in the New York Family Court proceedings," where the parties' divorce and battle over child support were litigated. (Def. Opp. Mem. at 3-4.) Fitts has conceded, however, that his ex-wife did not know of her putative ownership interest in the stock during their divorce proceedings or even at the time their divorce became final in 1975. It is undisputed that she did not learn of her potential ownership interest in the stock until 1978. As such, she could not have brought the claims she now asserts for partition, conversion and an accounting in the 1977 divorce proceeding; at that time, Fitts had deliberately concealed from her the fact that he had transferred the stock to the two of them jointly.

The issue of joint ownership of the disputed stock also was not raised in subsequent child support proceedings in the New York Family Court. Brescia v. Fitts, C. A. No. F-1649-78 (N.Y. Fam. Ct. 1980). Bartlett commenced those proceedings by petitioning the New York Family Court to modify the parties' separation agreement to increase the amount of Fitts's child support payments. Id. The issue of division of property was neither raised nor addressed during those

proceedings. Id. The Family Court examined the separation agreement for “fairness” to determine its enforceability, but only to the extent that it addressed child support payments. Id.

It is true, as Fitts suggests, that the Family Court made reference in its decision to the stock dispute between the parties. It stated:

Besides non-disclosure of earned income, other instances of withholding information or overreaching have evidenced themselves. For instance, the wife had been made, apparently unbeknownst to her, the sole or joint owner of certain shares of stock during the marriage which has only recently been discovered by accident; her interest therein had never been disclosed by [Fitts] at the time of “negotiations” and an action to recover them has been commenced.

Brescia v. Fitts, C. A. No. f-1649-78 at 8 (N.Y. Fam. Ct. 1980) (Jt. Stip. of Facts, Exh. D).

Yet a review of this passage and the Family Court’s decision in its entirety makes it is clear that the court considered the stock issue only as an example of nondisclosure or overreaching by Fitts and did not consider it in determining whether to increase Fitts’s child support obligations. The court left the issue of the stock dispute to be resolved in another forum. There is no evidence, however, that Bartlett or Fitts ever brought collateral litigation in the courts of New York, or in any other forum, to resolve the stock dispute. Accordingly, Bartlett’s claims against Fitts concerning the disputed stock and dividends are not barred by collateral estoppel because such issues were not litigated in the New York Family Court proceedings or otherwise.⁷

3. Res Judicata

Apart from collateral estoppel, Fitts also contends that Bartlett’s claims to one-half of the disputed shares and dividends are barred by res judicata because she could have raised her

⁷ Indeed, it again is disingenuous for Fitts to suggest otherwise when he, too, seeks to litigate the issue of stock ownership in this forum through his counterclaim. Ironically, to the extent the Family Court could be viewed as taking any position regarding the stock dispute, which this Court finds it did not other than in dicta, it suggests, contrary to Fitts’s view, that “[Bartlett] had been made...the sole or joint owner of certain shares of stock during the marriage.” Brescia v. Fitts, C. A. No. F-1649-78 at 8 (N.Y. Fam. Ct. 1980) (Jt. Stip. of Facts, Exh. D).

present claims in the Family Court proceedings in New York. Res judicata “functions as an absolute bar to a second cause of action on any matters that were actually raised or that could have been raised in the first proceeding.” Johnston Ambulatory Surgical Assoc. v. Nolan, 755 A.2d 799, 808 (R.I. 2000).

During the divorce proceedings that resulted in a final judgment of the New York Supreme Court, Bartlett had no knowledge that the disputed stock even existed. As a result, she could not have asserted her present claims to a one-half interest in the stock and dividends in those proceedings.

Furthermore, Bartlett could not have brought these claims in Family Court while petitioning for a modification of child support because that court had no jurisdiction to hear such claims. The jurisdiction of the Family Court is limited by § 115 of the New York Family Court Act, which provides, in pertinent part:

(b) The family court has such other jurisdiction as is set forth in this act, including jurisdiction over habeas corpus proceedings and over applications for support, maintenance, a distribution of marital property and custody in matrimonial actions when referred to the family court by the Supreme Court, conciliation proceedings, and proceedings concerning physically handicapped and mentally defective or retarded children.

N.Y. Family Court Act § 411 (emphasis added). “The Family Court, as a court of limited jurisdiction, is confined in its actions to the powers granted to it by the precise language of the statute which creates it.” Graham v. Graham, 249 N.Y.S.2d 899, 900 (N.Y. Sup. Ct. 1964); Matter of Infanto v. Infanto, 66 Misc. 2d 699, 702 321 N.Y. S.2d 928, 932 (N.Y. Fam. Ct. 1971); Matter of Borkowski v. Borkowski, 300 N.Y.S.2d 106, 38 A.D.2d 752 (N.Y. App. Div. 1972). The Family Court would not have had jurisdiction over the stock ownership dispute because it was not one of the issues that could have been

referred to it by the Supreme Court. See Borkowski, 38 A.D.2d at 753. This limitation is strict; in Borkowski, the court held:

[i]nsofar as the Family Court directed appellant to turn over to his wife certain moneys [sic] representing her one-half interest in a joint bank account and further directed him to continue making mortgage payments on the parties' marital premises while awarding him exclusive possession, the court exceeded its jurisdiction. The Family Court is a court of limited jurisdiction and cannot exercise powers beyond those granted to it by statute. It is authorized to grant support to dependents. Since the Family Court had no power to divide property, but had power to order support, it is necessary for that court to reconsider the whole matter.

Id. (internal citations omitted).

Moreover, the New York Supreme Court recognized the limited statutory jurisdiction of the Family Court when it granted the divorce decree, retained jurisdiction and referred certain matters to the Family Court. It granted the Family Court limited concurrent jurisdiction “for the purpose of specifically enforcing such of the provisions of [the Separation] Agreement as are capable of specific enforcement, or to the extent permitted by law, of making such further decree with respect to alimony, support, custody or visitation as it finds appropriate under the circumstances existing at the time of the application for that purpose is made to it, or both.” Fitts v. Fitts, C.A. No. 20137/76 at 5 (N.Y. Sup. Ct. 1977) (Jt. Stip. of Facts, Exh. B). The Supreme Court did not refer issues of property division to the Family Court.

As Bartlett’s present claims involve the division of property, or at least ownership of it, those claims could not have been raised and litigated in the Family Court support modification proceeding. The jurisdiction of the Family Court was limited by statute and by the order of the Supreme Court to matters other than the division of property or claims to ownership of it. The Family Court implicitly recognized its limited jurisdiction when

it referenced the stock ownership dispute only as an example of Fitts's overreaching in failing to disclose to Bartlett her putative interest in the stock, but did not resolve that dispute as part of determining the appropriate level of Fitts's support obligations, recognizing that such resolution would occur, if at all, in some other forum.

In sum, this Court finds that there has been no final adjudication of the merits of Bartlett's claim to ownership of the disputed stock in any prior proceeding such that her claims here are not barred by res judicata. This Court also finds that Bartlett did not and could not have brought these claims in the divorce proceedings in the New York Supreme Court because she was not aware of her ownership interest in the stock due to Fitts's concealment of assets. See Zaino v. Zaino, 818 A.2d 630 (R.I. 2003). Furthermore, Bartlett could not have brought these claims in the Family Court proceeding to modify child support because that Court did not have jurisdiction over such claims. Bartlett's claims, therefore, are not barred by res judicata.⁸

4. Laches

With regard to Bartlett's claims that she is the owner of one-half of the disputed shares and dividends, and her related equitable claims for partition of the stock and an accounting of the dividends, Fitts asserts that they are barred by the doctrine of laches. He argues that Bartlett sat on her rights for over 20 years before filing suit here to attempt to claim her interest in the stock and dividends at issue. He notes that she failed to press her claim to the stock when she went to court in connection with other matters and that she consulted with different lawyers regarding

⁸ To the extent that Fitts argues that this Court lacks subject matter jurisdiction over this action because exclusive jurisdiction over the parties' stock dispute rests with the Family Court in New York, that argument, too, must be rejected for these same reasons. Indeed, to accept his defenses of lack of jurisdiction, collateral estoppel or res judicata would be tantamount to ruling that Fitts, too, is required to litigate his counterclaim in the New York Family Court – a conclusion with which he undoubtedly would quarrel as it would either force him into a forum previously hostile to his claims or leave the question of stock ownership forever unresolved.

her stock claim, indicating that she was well informed of her rights, if any, with regard to the disputed shares and the legal process available to pursue any claim. Fitts also argues that he is prejudiced by Bartlett's belated action, as he has paid taxes on the dividends and made investment decisions based on his belief that he alone owned the stock. To divest him of one-half of his ownership interest in the stock and dividends now, therefore, would substantially prejudice his retirement plan.

Bartlett responds that the mere passage of time, without more, cannot bar her claims. She argues that absent prejudice to Fitts, laches cannot defeat her causes of action. Bartlett contends that Fitts has not been prejudiced in that there has been no adverse change in his circumstances, no loss of evidence, no witnesses who have become unavailable, and no other intervening equities that should prevent her from now pressing her claims. *Id.*

"Laches is an equitable defense that precludes a lawsuit by a plaintiff who has negligently sat on his or her rights to the detriment of a defendant." *O'Reilly v. Town of Gloucester*, 621 A.2d 697, 702 (R.I. 1993) (citing *Fitzgerald v. O'Connell*, 120 R.I. 240, 245, 386 A.2d 1384, 1387 (1978)). Thus, "[l]aches is not concerned alone with time but with changes that time brings." *Rebello v. Cardoso*, 91 R.I. 153, 163, 161 A. 806, 811 (1960) (citing *Chase v. Chase*, 20 R.I. 202, 203, 37 A. 804, 805 (1897)). "To sustain a defense of laches, first the husband must establish 'negligence on the part of the [wife] that leads to a delay in the prosecution of the case. Second, this delay must prejudice the [husband]." *Andrukiewicz v. Andrukiewicz*, 860 A.2d 235, 241 (R.I. 2004) (citing *O'Reilly*, 621 A.2d at 702).

Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his or her rights, he or she takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he or she cannot be restored to his or her former state, if the right be then enforced,

delay becomes inequitable and operates as an estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities and other causes; but when a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief.

Id. (quoting Chase v. Chase, 20 R.I. at 203-04, 37 A. at 805). The court must decide whether the party asserting the defense of laches has suffered a disadvantage from the delay or changed his or her position in reliance upon it. Cavanagh v. Bostich, Inc., 91 R.I. 239, 253, 162 A.2d 785, 792 (1960). Laches is a question of fact, committed to the sound discretion of the trial court. Fitzgerald, 120 R.I. at 245, 386 A.2d at 1387. The party asserting the defense of laches bears the burden of proving unexplained delay and prejudice. Id.

Fitts has asserted that Bartlett's delay in prosecuting her claim is unexcused and unexplained. In so arguing, however, he ignores the fact that his actions in concealing her interest in the stock delayed resolution of these issues during their marriage and throughout their divorce proceedings. Moreover, credible evidence was adduced at trial that Fitts, in addition to initially concealing the stock, on several occasions threatened to cease paying for the education, wedding, and other expenses of their children if Bartlett pursued claims against him for additional monies. In an acrimonious letter to Bartlett dated November 17, 1992, Fitts wrote, "I mentioned to [our daughter] while we were talking about the finances that I would have a great deal of difficulty dealing with the wedding and the expenses while you continue to press a frivolous legal fight against me." (Jt. Exh. 3). Bartlett testified credibly at trial that she delayed in pursuing her claims out of fear of these potential adverse financial consequences to her and their children.

Our Supreme Court has held that "[a] delay is excusable where it is induced or caused by the adverse party." Fitzgerald, 120 R.I. at 246-47, 386 A.2d, at 1387. Although this rule most

often applies when the adverse party acknowledges the merits of the claim and promises to pay it, this Court finds that it applies with equal force in this case where the party seeking to assert the defense of laches caused the delay by coercion and manipulation of the claimant.

In addition, although this Court recognizes that Bartlett delayed in bringing this suit, Fitts similarly delayed. Fitts always knew that he needed to take some action to secure his sole claim to the stock. Indeed, he testified to having twice attempted to have Bartlett sign over the stock powers to him. He also testified that he knew that he could not sell the stock without Bartlett's signature. Instead, he delayed taking any action to clarify his ownership interest in the stock during their marriage, throughout their divorce and for over two decades thereafter. He obviously preferred to "let sleeping dogs lie."⁹

Yet when Bartlett finally filed this action, Fitts responded by filing a counterclaim, seeking a declaration that he is the sole owner of the stock. He could have filed his declaratory judgment action at any time to avoid delay in resolving the question of stock ownership; he did not have to wait until Bartlett brought suit. "The defendant had an equal right and an obligation to do more to assert his own rights which he failed to do." Lorene v. Burdick, 1994 R.I. Super. LEXIS 80 (R.I. Super. Ct. 1994). As such, although Fitts chides Bartlett for her delay in bringing suit, any delay in resolving the question of stock ownership rests on his own shoulders.

Furthermore, Fitts has not borne his burden of proving that any delay by Bartlett in filing suit caused him prejudice. To do so, Fitts must prove that, as a result of Bartlett's delayed prosecution, it would be "difficult or impossible for the court to ascertain the truth. . . and do justice." Fitzgerald, 120 R.I. at 245, 386 A.2d at 1387. To the contrary, this Court has no difficulty at all in exercising these essential judicial functions in this case. Fitts has not proven or

⁹ See Geoffrey Chaucer, Troilus and Criseyde, 154 (1381-1386); (Barry Windeatt trans., Penguin Books 2003) ("It is nought good a slepying hound to wake."); see also Wade v. Rich, 618 N.E. 2d 1314, 1322 (Ill. App. Ct. 1993) (citing Chaucer).

even attempted to prove that due to the passage of time, he is prejudiced in defending this action because evidence has been lost, key witnesses have become unavailable, or rights of third parties have been adversely affected. See id. (noting examples of prejudice that have been held to support a defense of laches).

Fitts instead claims prejudice as a result of having to pay income taxes on the stock dividends and argues that he will be inconvenienced if he now has to account for them. Fitts further claims that he relied on his belief that he alone owned the stock and dividends when making his retirement plans. This Court is not persuaded, however, that Fitts ever has had a belief that he alone owned the disputed shares. His actions in not disclosing their existence, endorsing the dividend checks knowing that they were made payable to both he and his ex-wife jointly without obtaining her signature, depositing these monies into his own account though not spending the monies, twice soliciting but failing to secure her signature on stock powers to transfer the shares to him, never attempting to sell or otherwise dispose of the stock and not filing his own action for declaratory and equitable relief to clarify his ownership interest in the disputed stock until after Bartlett filed suit, suggest that he knew that Bartlett had a claim to a one-half interest in the shares and dividends. It necessarily follows, therefore, that he knew that he might have to account one day for the dividends he received and any taxes he paid on those dividends. He knew he might have to return to Bartlett her rightful share of the disputed stock and dividends.

In addition, evidence was adduced at trial that Fitts enjoys a substantial retirement income that would not be significantly reduced were this Court to award Bartlett what she claims is hers. His claim that her delay prejudices his retirement plan, therefore, is not credible. In addition, the mere fact that the value of the property contracted for has increased in value “does

not convert delay into laches.” Id. Finally, Fitts argues in his post-trial memorandum that he has not sold the shares because he is holding on to them for a time of unexpected need; he claims that such a time may be close, now that he is living on a fixed income, and that to divest him of one-half of the shares and dividends would prejudice his financial security. (Def.’s Post-Trial Br. at 5.) This Court does not find this claim of prejudice credible.

It is a maxim of equity that “he who comes into equity must come with clean hands.” Stafford, A Handbook of Equity 443 (1934). Fitts cannot defeat Bartlett’s claims by arguing laches when any delay in resolving the question of stock ownership or any prejudice resulting from delay was of his own making. Even were this Court to bar her claims on grounds of laches, it still would have to address her claims implicitly in considering Fitts’s counterclaim. As both parties have a desire, at this juncture, to resolve the issue of their respective ownership interests in the disputed stock and dividends, this Court can conceive of no reason not to “do equity” by settling that issue for both of them.

5. Statute of Frauds

In his second amended answer, Fitts alleges that Bartlett’s claim to the disputed stock is barred by the statute of frauds. Neither party has briefed this issue; nonetheless this Court finds that the defense is without merit. Rhode Island’s statute of frauds does not require that a gift be in writing. See R. I. Gen. Laws § 9-1-4. Instead, Rhode Island law, like that of most other jurisdictions, requires that there must have been delivery for a gift to be given legal effect. In re Atkinson, 16 A. 712, 713 (R.I. 1889) (“a gift, ... requires a delivery of the thing given, actual or symbolical.”) This delivery requirement serves the same evidentiary purpose as a writing in preventing mistake, fraud, and perjury. See Gruen v. Gruen, 496 N.E. 2d 869, 874 (N.Y. 1986).

A gift of corporate stock is made when the donor intends to make a gift and does all that is necessary to transfer ownership of the stock. Talbot v. Talbot, 78 A. 535, 540 (R.I. 1911). Constructive delivery of stock may be made by transferring the stock on the books of the corporation and having new stock certificates issued in the name of the new owner or owners, even if the certificates, as issued, are retained by the donor and not actually delivered to the donee. See Eisenhardt v. Lowell, 98 P.2d 1001 (Colo. 1940); In re Estate of Holmes, 414 Pa. 403, 406 (Pa. 1964); Wilmington Trust Co. v. General Motors Corp., 51 A.2d 584 (Dela. Ch. 1947); Kallop v. McAllister, 678 A.2d 526 (Del. 1996). Here, Fitts made constructive delivery of the stock to Bartlett by having stock certificates issued in his name and hers as joint tenants. This Court thus finds that the statute of frauds has no application to the gift of corporate stock at issue here and does not bar Bartlett's claims.

6. Release

Defendant Fitts also asserts that Bartlett bound herself, by virtue of the Separation Agreement, to release Fitts from all claims against him for the disputed stock and dividends. The Agreement provides, in Paragraph Sixth, as follows:

each party hereto hereby releases and relinquishes to the other party and to his or her heirs, legal representatives and assignees, any and all claims or rights which may exist or hereafter arise by reason of the marriage between the parties, with respect to such property, whether real, personal or mixed, belonging to such other party, and without limiting the foregoing, hereby waives and releases to the other party and to his or her heirs, legal representatives and assignees, all right to share in any of the property or estate of such other party which has arisen or may hereafter arise by operation of law or otherwise.

(Jt. Stip. of Facts, Exh. A). The Agreement further provides, in Paragraph Seventh, that each one "renounces and releases all interest, right or claim of right of dower or otherwise, that he or

she now has or might otherwise have against the other on the property of whatever nature, real or personal, of the other.” Id.

This Court finds that these paragraphs of the Separation Agreement do not operate to invalidate Bartlett’s present claims simply because they refer to claims for property of the other party. These clauses would apply only if it were indisputable that Fitts alone owned the disputed stock. As Bartlett claims to own a one-half share of the stock, however, her claim is for recovery of her own property. In fact, it is arguable that Fitts is in breach of Article Eleventh of the Separation Agreement, which provides that “each party shall own, have and enjoy, independently of any claim of right of the other party, all real and personal property (tangible and intangible) of every kind, nature and description and wheresoever situated.” Id. If Bartlett is the owner of one-half of the stock, she certainly has not been able to “own, have and enjoy” it in the time since the parties separated and divorced. Accordingly, Fitts’s defense of release must fail; it acts in no way to bar Bartlett’s claims in this action.¹⁰

B. Ownership

Having rejected the aforementioned affirmative defenses raised by defendant Fitts, this Court now turns to Bartlett’s contention that she owns one-half of the disputed shares. Fitts argues that he did not intend to transfer to Bartlett actual ownership of any part of the disputed shares; instead, his intent was to add Bartlett’s name to the stock certificates solely for his own convenience to take advantage of a tax exemption on the dividends. Fitts contends that a transfer of non-marital assets from one spouse to both spouses jointly gives rise to a presumption that the donor intended a gift, but that it is a rebuttable presumption, and he has presented sufficient evidence to rebut it. The evidence on which Fitts relies consists primarily of his own testimony

¹⁰As resolution of the question of stock ownership between the parties does not alter the provisions of their separation agreement, that agreement does not deprive this Court of jurisdiction over this dispute nor does it suggest that exclusive jurisdiction of the parties’ claims here rests with the New York courts.

that he did not intend the transfer to be a gift. Fitts also makes much of the fact that he alone has been in possession of the stock certificates since the time of the transfer. He relies on Stephenson v. Stephenson, 811 A.2d 1138 (R.I. 2002), a case involving joint bank accounts, to support his proposition that the presumption of a gift may be rebutted by showing that a transfer was made for mere convenience.

Bartlett counters that Fitts's transfer of the stock to her was a gift made complete upon constructive delivery to her of the shares by having the stock certificates issued in the names of the two of them jointly. She argues that, before their marriage, her ex-husband initially received 82 shares of Standard Oil stock as a gift from his parents in his name only. In 1964, after their marriage, Fitts's parents made a further gift of 10 shares to both of them jointly. Bartlett contends that, around that same time, Fitts placed all of those stock holdings, totaling 92 shares, in both of their names jointly, rather than waiting until later to make such a transfer based on any tax strategy. Moreover, she argues that, because both of their names are on the stock certificates, she was and remains a joint owner, regardless of whether she ever learned of the gift. This conclusion, according to Bartlett, is illustrated by the fact that upon Fitts's death, she would take all of the stock outright through her right of survivorship. Finally, she argues that the decision in Stephenson, relied on by Fitts, is distinguishable from this case because it involved joint bank accounts and not stock. There the court found that the donor did not intend to give an immediate possessory interest to the donee in the several joint bank accounts, whereas here, in contrast, Bartlett contends that Fitts had to grant her an immediate interest in the stock to take advantage of any tax exemption.

The well-settled rule of Rhode Island law is that when non-marital property is transferred from one spouse's ownership to both spouses jointly, a presumption arises that such transfer was

a gift and, “in the absence of clear and convincing evidence to the contrary,” it will be held to be so. Stephenson, 811 A.2d at 1142 (quoting Quinn v. Quinn, 512 A.2d 848, 852 (R.I. 1986)). Clear and convincing evidence is a high standard, under which “the witnesses to a fact must be found to be credible. . . and . . . the testimony [must] be clear, direct, weighty, and convincing, so as to enable [one] to come to a clear conviction without hesitancy of the truth of the precise facts in issue.” Parker v. Parker, 103 R.I. 435, 438 (R.I. 1968). Based on the evidence of record, this Court finds that the 82 original shares of Standard Oil Company stock were Fitts’s non-marital property, but that upon his transfer of his shares to himself and Bartlett jointly, a presumption arose that Fitts made a gift to her of a one-half interest in the stock. Similarly, Fitts’s parents made a gift to the two of them jointly of an additional 10 shares of the stock which Fitts placed or had placed into the names of he and his ex-wife jointly. It must be presumed, therefore, that these transfers constituted a gift to Bartlett of a one-half interest in the stock.

As noted, Fitts has made much of the fact that in the entire time Bartlett purports to have been an owner of the stock, she never had possession of the stock certificates. He thereby suggests that there was never any delivery of the alleged gift and that the gift, therefore, must fail. As previously discussed, however, when a gift of corporate stock is made, the delivery requirement may be satisfied by either actual or constructive delivery. Talbot v. Talbot, 78 A.535, 540 (R.I. 1911). A constructive delivery of stock may occur when the stock is transferred on the books of the corporation and when new stock certificates are issued in the name of the new owner or owners, even if the certificates, as issued, are retained by the donor and not actually delivered to the donee. See Kallop v. McAllister, 678 A.2d 526 (Del. 1996); Dean v. Dean, 379 S.E.2d 742, 744 (1989) (citing Snidow v. First Nat’l Bank, 16 S.E.2d 385, 389 (Va. 1941)); In re Estate of Holmes, 414 Pa. 403, 406 (Pa. 1964); Eisenhardt v. Lowell, 98 P.2d 1001

(Colo. 1940); Wilmington Trust Co. v. General Motors Corp., 51 A.2d 584 (Del. Ch. 1947).

Indeed, the Rhode Island Supreme Court has held that physical possession of stock certificates is “of no particular importance,” in determining the ownership of stock registered in more than one name. Washington Trust Co. v. Thomas, 107 A.203, 205 (R.I. 1919). In addition, the Pennsylvania Supreme Court has held:

Where stock is purchased by a husband and the certificates are made out in the names of both the husband and wife, even though the certificates are delivered to the husband and retained by him, the gift to the wife is complete. The gift is presumed by reason of the nature of the joint tenancy which is peculiar to the husband and wife relationship and delivery to the husband is considered to be delivery to both the husband and the wife. . . . Even where a husband places the property in both names without his wife's knowledge or consent, a valid gift occurs. Likewise, if a husband acquires property with his own funds, and places it in the names of himself and his wife, this constitutes a gift and an estate by the entirety, even though he exclusively receives the income therefrom during his lifetime.

In re Estate of Holmes, 200 A.2d 745, 747 (Pa. 1964) (emphasis added) (citing Sparks v. Hurley, 208 Pa. 166, 57 A. 364 (1904); Loesch's Estate, 322 Pa. 105, 185 A. 191 (1936)).

Contrary to Fitts’s assertions, therefore, his possession of the stock certificates is not dispositive of whether he made a gift to his ex-wife. Indeed, it does not even support his argument that he had “dominion and control” over the shares; dominion and control is predicated on the names in which the stock is registered. See Dean, 379 S.E.2d at 744 (holding that “[b]y registering legal title in their joint names, he gave Mrs. Dean an irrevocable interest in the stock, and, thus, surrendered the power of dominion and control over the stock”) This Court thus finds that Fitts’s transfer of the shares to himself and Bartlett jointly, as reflected on the books of the corporation, constituted constructive delivery and a gift to her of a one-half interest in the disputed shares.

Fitts next argues that he has rebutted the well-established presumption that the transfer of the disputed shares to both spouses jointly was a gift by establishing that he effectuated that transfer for “mere convenience.” He relies on our Supreme Court’s decision in Stephenson which held that joint bank accounts may be established for the convenience of the parties without an accompanying transfer of a present ownership interest in the accounts. Stephenson, 811 A.2d 1138. In Stephenson, our Supreme Court overturned a trial justice’s determination that 12 joint bank accounts were marital property where there was testimony that the husband had added his wife’s name to the accounts “as a matter of convenience in the event he should predecease his spouse.” Id. at 1143. The Court held that he had not given her a present ownership interest in the accounts. Id.

There are significant distinctions, however, between joint bank accounts and joint tenancy of other property. Joint bank accounts simply allow access to the account to the parties named on the account; this may be convenient for individuals sharing a household and expenses. In addition, upon the death of one of the parties to a joint bank account with the right of survivorship, a conclusive – but rebuttable – presumption of ownership in the survivor arises. Robinson v. Delfino, 710 A.2d 154, 156 (R.I. 1998).

In contrast, in the case of jointly owned stock, once shares have been transferred to joint tenants, the shares only may be transferred by the signature of all owners. Washington Trust Co. v. Thomas, 107 A.2d 203 (R.I. 1919). Indeed, Fitts himself has testified that a joint bank account is unlike joint ownership of stock, acknowledging that he must have Bartlett’s signature to transfer the stock – unlike funds in a joint bank account. He further has acknowledged the reality of her joint interest in the stock through his filing of a counterclaim by which he seeks a declaratory judgment that the shares belong exclusively to him. While one might put a bank

account in two names for convenience to allow either party acting alone to access the account, a joint tenancy of stock has the opposite effect – it precludes both parties from acting without the consent of the other. Id. Further, when one co-tenant dies, the other co-tenant takes full title to the joint property by the right of survivorship; no presumption is involved. Robinson v. Delfino, 710 A.2d 154, 157-58 (R.I. 1998); Knibb v. Security Ins. Co. of New Haven, 399 A.2d 1214, 1216 (R.I. 1979). This Court finds that the distinction between shares of stock and joint bank accounts makes Stephenson inapposite to this case.

Moreover, while Rhode Island may sanction the creation of a joint bank account for “convenience” that does not then give a present possessory interest, nominal transfers of property ownership for purposes such as easing one’s tax burden are not sanctioned. Fitts claims, in effect, to have transferred only nominal ownership to Bartlett so that he could avoid paying certain federal taxes. This type of transfer is not permitted; in order to legitimately have taken advantage of tax savings, Fitts necessarily must have passed title in one-half of the shares to Bartlett along with a “complete shift of the economic benefits of ownership, direct and indirect.” Specia v. Commissioner of Internal Revenue, 630 F.2d 554, 560 (7th Cir. 1980) (citing Anderson v. Commissioner of Internal Revenue, 164 F.2d 870, 873 (1947)). Fitts’s right to legally claim a tax exemption on dividends distributed to Bartlett only could exist if she owned the stock. Dean v. Dean, 379 S.E.2d at 744.

Furthermore, Fitts presented as a sophisticated businessman, with a bachelor’s degree from Williams College, and a master’s degree in Business Administration and Finance from Babson College, both of which he had earned by 1965. He testified that his father, an accountant, advised him to transfer the stock for tax purposes. This Court does not think that an individual with such credentials and such a professional advisor would be likely to disregard the

natural and probable consequences of the stock transfer. In addition, Fitts concealed the fact of the stock transfer during the parties' marriage and divorce and then denied doing so in a July 24, 2001 deposition. See Def's Depo. at 17. Later, at trial, he contradicted himself, admitting that he never told Bartlett about the joint ownership of the stock during that time period. He twice attempted, unsuccessfully, to have Bartlett sign over her rights in the stock, and later attempted to dissuade her, by threats of withholding financial support from their children, from pursuing her claim to ownership of a one-half interest in the stock. Knowing that she had a claim to the disputed shares, he never filed a declaratory judgment action until after she filed suit and continued to take full control of the dividend checks, without her consent, in the interim.

It must be presumed, therefore, that Fitts's transfer, or consent to the transfer, of the disputed shares to himself and Bartlett jointly during their marriage and without her knowledge was a gift to her of a one-half interest in the stock. He clearly has failed to present the clear and convincing evidence that is necessary to rebut that presumption.

Indeed, the whole tone of Fitts' conduct, as well as his lack of candor and testamentary inconsistencies, convinces this Court that he intended, during their marriage, to gift a one-half interest in the disputed shares to Bartlett. Notwithstanding Fitts's self-serving and incredible testimony to the contrary, this Court finds that his transfer was intended as a valid inter vivos gift to Bartlett of a joint interest in the stock, by reason of constructive delivery, effectuated by placing or having Bartlett's name placed on the stock certificates. Bartlett is thus declared the legal owner of one-half of the 3136 shares of Exxon Mobil stock at issue.

C. Remedy

Having found that Bartlett holds a one-half ownership interest in the disputed stock, this Court now turns to an examination of Bartlett's further claims for relief. She seeks partition of

the disputed shares to return to her one-half of the stock at issue, damages for Fitts's conversion of the dividends issued with regard to that stock (including punitive damages and attorneys' fees), and an accounting and the return to her of her one-half share of the stock dividends.

In asserting an equitable claim for partition of the disputed shares in Count One, Bartlett alleges that: (1) she is the joint owner of the disputed shares with Fitts and no longer wishes to maintain the co-tenancy; (2) the stock certificates are in his possession; and (3) he has willfully and wrongfully withheld the stock certificates from her and denied her a joint interest in the disputed shares. Joint tenants in real or personal property have equal interests in that property by virtue of the four unities of interest, title, time, and possession. Knibb v. Security Ins. Co., 121 R.I. 406, 411 (R.I. 1979) (citing 2 Blackstone, Commentaries 180; 4 Thompson, Real Property § 1777 at 15 (1961); 2 Tiffany, Real Property § 418 at 196 (3d ed. Jones 1939)). [I]t is presumed, in the absence of clear and convincing evidence to the contrary, that each holds an undivided one-half interest in the whole. Lucchetti v. Lucchetti, 85 R.I. 105, 111 (R.I., 1956) (citing 48 C. J. S., Joint Tenancy, § 6, p. 930, 14 Am. Jur., Cotenancy, § 17, p. 88). As this Court has found that the transfer of the shares created a valid joint tenancy, Bartlett and Fitts each own an undivided one-half interest in the disputed shares. The shares presently at issue, being easily divisible personalty, need not be sold to effectuate a partition. Instead, this Court shall grant Bartlett's request for partition by ordering both Bartlett and Fitts to simultaneously execute stock powers in favor of one another such that each becomes the sole owner of one-half of the 3,136 shares of the Exxon Mobil stock at issue. Through this partition, as ordered, Bartlett and Fitts each will become the sole owners of 1568 shares of the disputed stock.

As a joint owner of the stock, Bartlett also claims that she is entitled to a one-half share of all dividends that have been issued since 1964 when the stock was transferred into the names

of she and Fitts jointly. She asserts that Fitts has received, presented and deposited quarterly dividend checks made payable to the two of them as joint tenants into his bank account since that time, without her endorsement or consent and over her protest, so as to make him liable, in Count Two, for conversion of the dividend checks. She further alleges, in making a demand for an accounting in Count Three, that this Court should impose a constructive trust on her one-half share of all dividends, requiring Fitts to account for and convey to Bartlett her share of all dividends held in trust for her benefit.

A claim for an accounting can be asserted either at law or in equity. Under R.I. Gen. Laws § 10-2-1, when two or more individuals hold property as joint tenants, if a wrongdoer takes benefits for himself or herself in excess of what he or she is entitled to, the injured owner has an action against the wrongdoer for an accounting. Apart from statute, Rhode Island law also permits an injured owner to assert an equitable claim for an accounting. See R.I. Gen. Laws § 8-2-13; Rebello v. Cardoso, 91 R.I. 153, 155, 161 A.2d 806, 807 (1960).

Bartlett asks for an equitable accounting, alleging that she and Fitts jointly own the disputed stock and that he has retained possession of the stock and all stock dividends that have been distributed for over thirty-five years. She claims that Fitts, as co-owner of the disputed shares, has wrongfully denied her the use of and profits from the stock, namely the dividends issued over that period of time.

An equitable action for an accounting arises from a breach of fiduciary duty such as exists in a trustee-beneficiary relationship; pursuit of the claim is limited not by a statute of limitation but by the doctrine of laches.¹¹ See Rebello v. Cardoso, 91 R.I. 153, 162, 161 A. 806,

¹¹ As discussed previously by this Court in addressing Fitts's affirmative defenses, Bartlett's claim for an equitable accounting is not barred by laches. See Decision, supra, at 13-18. While Fitts attempts to characterize her accounting claim as a legal claim under R.I. Gen. Law § 10-2-1 that would be governed by the ten-year statute of

811 (R.I. 1960). When a dispute is between co-owners of property, the court may impose a constructive trust if one of the owners is benefiting from the property to the other owner's detriment. Id. 91 R.I. at 161, 161 A. at 810 ("That there is such a community of interest between those who hold a common title as to forbid one such co-tenant from acquiring any benefit from the acquisition of an outstanding superior title, is undeniable. That a court of equity upon timely application will convert such a purchasing tenant into a trustee for the common benefit is, true."). The party wrongfully benefiting is thus deemed to be holding the wronged party's share in trust.

Equitable claims for the partition of property and an accounting of rents and profits usually concern real, not personal, property. The nature of such an action often renders it advisable, or even necessary, for the court to appoint a master to conduct hearings and make findings as to how the property should be divided and whether one party is indebted to the other. See, e.g., Cherubino, 756 A.2d 174, 176-177 (R.I. 2000). In this case, however, it is undisputed that all income derived from the disputed stock in the form of dividends has been received and retained by Fitts. This Court finds, therefore, that Bartlett is entitled, as a matter of equity, to a one-half share of all dividends that have been distributed since she became a joint owner of the stock. Based on the stipulation of the parties, Bartlett thus is entitled to \$27,992.53, representing her one-half share of all dividends issued and deposited by Fitts from 1965 through the first quarter of 2004. In addition, Fitts is ordered to account for any additional dividends issued with

limitation in R.I. Gen. Law § 9-1-13(a) and that would run from the date Fitts first denied the rights of Bartlett as his co-tenant with her knowledge, see Almy v. Daniels, 15 R.I. 312, 319-20, 10 A. 654, 661 (1887), she asserts not a statutory but an equitable claim for an accounting, governed solely by the doctrine of laches. See Rebelo, 91 R.I. at 162, 161 A. at 811. Moreover, even were Bartlett's accounting claim to be characterized as both statutory and equitable, this Court would have concurrent jurisdiction over both claims. Cavanaugh v. Bostitch, Inc., 191 R.I. 239, 253, 162 A.2d 785, 792 (1960). Even if the statute of limitation served to bar the statutory claim, at least in part, it would not bar an equitable claim that is not barred by laches. Id. (noting concurrent jurisdiction in equity and law over an action for an accounting and that, while the statute of limitation had run, the equitable claim for an accounting was not barred by laches).

regard to the disputed stock to date. Bartlett is entitled to a one-half share of any such additional dividends.¹²

As this Court has found that a valid joint tenancy existed between Bartlett and Fitts and that Bartlett is thus entitled to a partition of the stock to return to her a one-half ownership interest in the disputed shares and an accounting and return to her of one-half of any dividends issued, it need not address Bartlett's claim for conversion. See Cherubino v. Cherubino, 756 A.2d 174, 176 (2000); Calcagni v. Cirino, 65 R.I. 408, 410, 14 A.2d 803, 803 (1940). Because Bartlett seeks the same funds in both her conversion claim and her claim for an accounting, this Court finds that the conversion claim is duplicative and that it need not be addressed on the merits.¹³

¹²A true accounting in this case would allow for any taxes on Bartlett's share of the dividends paid by Fitts from 1965 to date to be offset against her share of those dividends determined to be due and owing. The parties agreed that he paid taxes on all dividends issued. See Joint Stipulation of Facts ¶26. Yet at trial, Fitts failed to prove the amount of any such taxes paid. As such, no such offset is ordered by this Court.

¹³ Even were this Court to address Bartlett's claims for conversion, it would find them meritorious and not time-barred. A cause of action for conversion of personal property accrues on the date the defendant takes possession and exercises dominion over the property and runs regardless of the plaintiff's knowledge or ignorance of the defendant's possession. Fuscellaro v. Industrial Nat'l Corp., 117 R.I. at 559-560, 368 A.2d 1227, 1230 (1977). The Uniform Commercial Code, as codified under Rhode Island law ("U.C.C."), provides that the law applicable to the conversion of personal property applies to negotiable instruments. R.I. Gen. Laws § 6A-3-420(a). The U.C.C. provides that a negotiable instrument is "unauthorized" when an instrument contains fewer than all of the signatures that are required as authority to pay a check. Id. § 6A-3-403. If a negotiable instrument is unauthorized, then the person negotiating the instrument is potentially liable for conversion in that he or she may be unlawfully taking possession and exercising control over another's property. See King v. White, 962 P.2d 475, 38 U.C.C. Rep. Serv. 2d 469 (Kan. 1998).

Here, Bartlett does not claim that Fitts converted the stock itself. Indeed, the stock certificate still exists in their names jointly. Her conversion claim is limited, like her accounting claim, to the quarterly dividend checks issued with regard to that stock. It is unfair for Fitts to characterize her conversion claim, therefore, as a single act of conversion with continuing consequences, as his transfer of the stock to he and Bartlett jointly was not a conversion. In addition, he would not be liable for any later conversion of any dividend checks, even given his view that the stock was his, unless he deposited them into his own account with only his signature and without her signature or consent. Put another way, even if Bartlett had ownership and control over a one-half interest in the stock, any dividend check that was issued to her and Fitts jointly and that he then presented and deposited without her signature or consent would be unauthorized and subject to a claim for conversion. As such, Fitts's action with regard to each dividend check stands separate and apart from his action with regard to any other dividend check, and he may be liable for conversion for each time that he deposited a dividend check made payable to them jointly into his account without Bartlett's signature or consent.

As to the applicable statute of limitation, the general limitation statute codified at R.I. Gen. Laws § 9-1-13(a), and upon which Fitts relies, does not apply to Bartlett's action for conversion of the dividend checks. Instead,

D. The Defendant's Counterclaims

Fitts has asserted a counterclaim against Bartlett alleging, inter alia, that he has an exclusive interest in the subject shares and that his ability to transfer the shares as exclusive owner is hindered by the appearance of Bartlett's name on the stock certificates and corporate books. Fitts petitions the Court first for a declaratory judgment, pursuant to R.I. Gen. Laws §§ 9-30-1 et seq., declaring that he is the sole owner of the disputed stock and that Bartlett has no interest in it. He asks further for specific performance to compel Bartlett to execute the appropriate documents necessary to have her name removed from the stock certificates and pertinent records. This latter claim is premised on the applicability of certain provisions of the

Article 3 of the U.C.C., which contains its own specific statute of limitation governing certain claims involving negotiable instruments, is applicable. It is, after all, the statute of limitation that more closely relates to this action. See Gruke v. Erickson, 920 P.2d 845, 849 (Co. Ct. App. 1995); see also Warwick Housing Auth. V. McLeod, 913 A.2d 1033, 1037 (R.I. 2007) ("When a specific statute conflicts with a general statute, our law dictates that precedence must be given to the specific statute.") In fact, R.I. Gen. Laws § 6A-3-118(g) specifically provides for actions for conversion of negotiable instruments:

Unless governed by other law regarding claims for indemnity or contribution, an action (i) for conversion of an instrument, for money had and received, or like action based on conversion, (ii) for breach of warranty, or (iii) to enforce an obligation, duty, or right arising under this chapter and not governed by this section must be commenced within three years after the cause of action accrues.

Thus, the statute of limitation applicable to Bartlett's claim for conversion is three years.

Yet, when a series of checks are cashed as part of an ongoing scheme or plan, the plan constitutes a single transaction for purposes of the commencement of the statute of limitation, and the date on which the last check was deposited governs as the date for all checks in determining when the statute of limitation begins to run. Haddad's of Illinois, Inc. v. Credit Union 1 Credit Union, 678 N.E. 2d 322, 32, U.C.C. Rep. Serv. 2d 507 (Ill. 1997); see also Michael D. Osteen, Annotation, Payee's and Drawer's Right of Recovery in Conversion Under Pre-1990 U.C.C. § 3-419, or Post-1990 U.C.C. § 3-420, for Money Paid on Unauthorized Endorsement, 91 A.L.R. 5th 89, § 9 (2001). In the present case, Fitts received and deposited dividend checks after April 20, 1997, the date three years prior to Bartlett's action being filed. A number of dividend checks were deposited throughout those three years and onward until at least the first quarter of 2004. As the last deposit in 2004 or thereafter governs as the date for all dividend checks deposited in Fitts's ongoing plan or scheme, and that date is clearly not barred by the three year statute of limitation, all dividend checks that Fitts received and deposited are proper subjects of a claim for conversion.

Even if Fitts were to be found liable for conversion of each dividend check, however, this Court would not find him liable for punitive damages and attorney's fees under the facts of this case. Fitts did, after all, put Bartlett on notice of his claim decades ago, kept the dividend monies segregated for her benefit should he ultimately be determined to be liable to her for those funds, and paid taxes on the dividends. Attorney's fees would have accrued for each of these parties, given their respective positions as to ownership of the stock, regardless of the passage of time. The partition and accounting remedies ordered by this Court, together with interest, are sufficient in this Court's view to compensate Bartlett in full for the wrongs she has proven on the part of her ex-husband.

parties' separation agreement. Fitts also has requested an award of attorney's fees in connection with his counterclaim.

Given that this Court has found that Bartlett is the owner of an undivided one-half interest in the 3136 shares of stock in dispute and is entitled to a partition thereof, Fitts's request for declaratory relief must be denied. Similarly, having found that Bartlett has an ownership interest in the stock, this Court finds that Fitts's request for specific performance of paragraphs Sixth, Seventh, and Eleventh paragraphs of the parties' separation agreement are inapplicable. Paragraph Sixth requires the parties to release all interests, rights, or claims to property belonging to the other. Paragraph Seventh requires the parties to release all interests in, rights, or claims to property belonging to the other, and that each will execute instruments necessary to effectuate such releases. These paragraphs are obviously inapplicable in light of this Court's finding that each of the parties owns a one-half interest in the disputed shares of stock. Bartlett thus seeks only to recover her own property and not the property of the other (namely Fitts). In paragraph Eleventh, the parties agreed to "own, have and enjoy, independently of any claim or right of the other party, all real and personal property (tangible and intangible) of every kind, nature and description and wheresoever situated, now owned by him or her." Far from ordering specific performance of this provision for the benefit of Fitts, this Court is of the view that it is he who arguably has breached this provision of the agreement by denying Bartlett her rightful share of the disputed stock and dividends. Bartlett, the owner of one-half of the disputed shares, has never been able to have and enjoy the stock and the dividends independent of Fitts's claims to them. Fitts's counterclaim for declaratory relief and specific performance are, therefore, denied as meritless, as is his related claim for attorney's fees.

Conclusion

For the foregoing reasons, this Court grants plaintiff Ann Strauss Bartlett judgment on Counts One and Three of her Second Amended Complaint for partition and an accounting, respectively. It denies her claim for conversion, and her related claim for attorney's fees and punitive damages, in Count Two of her Second Amended Complaint, finding it unnecessary to reach that claim based on its decision as to her accounting claim in Count Three. As to Count One, this Court orders a partition of the 3136 shares of Exxon Mobil stock jointly owned by plaintiff Ann Strauss Bartlett and defendant Peter C. Fitts. The Court directs the parties to execute the appropriate legal instruments simultaneously to effectuate the partition by placing one-half of the disputed shares solely in the name of Bartlett and one-half of that stock in the name of Fitts. As to Count Three, the plaintiff is awarded \$27,992.53 on her claim for an accounting as her share of the stock dividends through the first quarter of 2004. Fitts is further ordered to account for any additional dividends issued after the first quarter of 2004, and Bartlett is awarded one-half of any such dividends issued.¹⁴ The defendant's counterclaim is denied.

Counsel are directed to confer and submit to this Court forthwith for entry an agreed upon form of order and judgment that is consistent with this Decision.

¹⁴ If the parties agree as to the amount of Bartlett's share of any additional dividends issued, judgment may enter for that amount. Alternatively, either party may move post-trial for a further hearing on this issue.