IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO HCV 00920 OF 2005

BETWEEN	JUDITH PARCHMENT	CLAIMANT
A N D	MARRION GENUS (Executor, estate Alpheus Parchment)	DEFENDANT

Mr. Michael Brown for Claimant instructed by Messrs. Michael B.P. Erskine & Co.

Mr. Debayo Adedipe for Defendant instructed by Clarke Nembhard & Co.

CLAIM OF BENEFICIAL INTEREST IN HOUSE FORMING PART OF DECEASED'S ESTATE- EVIDENCE – WHEN DECLARATIONS MADE DURING LIFETIME OF PERSON, SINCE DECEASED, ADMISSIBLE- INHERITANCE ACT- CLAIM BY SPOUSE- WHETHER DECEASED JUSTIFIED IN EXCLUDING CLAIMANT AS A BENEFICIARY

BROOKS, J.

HEARD 14TH JUNE AND 19TH SEPTEMBER, 2006

Mrs. Judith Parchment feels hard-done by her late husband Alpheus Parchment. After his death she discovered that he had bequeathed the house that he lived in, to Miss Marrion Genus. Mrs. Parchment says that although the property was registered in his name only, she is, by contract, a co-owner. He was therefore not entitled to dispose of it as he has attempted.

Miss Genus on the other hand asserts that Mrs. Parchment should not be surprised by Mr. Parchment's decision. Miss Genus says that the spouses had been estranged for some time. Mrs. Parchment lived in the United

States of America while Mr. Parchment lived in Jamaica. Miss Genus goes further to say that Mr. Parchment was ill and Mrs. Parchment had abandoned him. It was she, Miss Genus, who cared for him. Miss Genus resists Mrs. Parchment's claim under the Inheritance (Provision for Family and Dependants) Act on this basis. She also denies that Mrs. Parchment has any interest in the house. Finally, Miss Genus asserts that the bequest to her arises from Mr. Parchment's contract with her.

The questions which arise are firstly which contract, if any, is enforceable, and secondly, what, if anything, is Mrs. Parchment entitled to under the Inheritance Act. I shall first examine the evidence so as to determine the facts. Thereafter I shall examine the law as it applies to claims of beneficial interests in property, the admissibility of statements said to have been made by Mr. Parchment during his lifetime, and the Inheritance Act claim. In conclusion, I shall apply the law to facts as I find them in order to arrive at a decision.

Mrs Parchment's Case

Mr. and Mrs. Parchment commenced their union on 11th March, 1985, in the United States of America. He sponsored her entry to that country. It is common ground that Mr. Parchment owned land at Great Bay in the parish of St. Elizabeth (the property) prior to the marriage. The property is

now the subject of the dispute between the parties. It is Mrs. Parchment's case that a development in 1992 changed Mr. Parchment's sole ownership. On her case, Mr. Parchment, in that year, "suggested to (her) that (they) pool (their) resources together to build a retirement home on (the property)". In her witness statement, her evidence is that Mr. Parchment told her:

> "If I agreed to build the said house together with him we would become equal joint owners of the said property, including the land and the house".

She says that she acted upon Mr. Parchment's proposal and pooled monies with him in the construction of a house on the property. She says that she also purchased a number of items for the house. In her words:

> "If (Mr. Parchment) had not represented to me in 1992 that I would be given half of the land and building thereon, I would not have invested so much of my personal funds in the construction of the said building."

It is important to note that nowhere in her evidence, either in her witness statement, or in cross-examination, does Mrs. Parchment say that Mr. Parchment, at any stage, acknowledged that she was a part owner of the property. I shall make further reference to this aspect anon.

For the claim under the Inheritance Act, the logical starting point would be a reference to Exhibit 1. This is the will dated 15th April 2004 executed by Mr. Parchment (he died on 4th September 2004). After appointing Miss Genus his sole executrix, Mr. Parchment went on to make the following gifts in his will:

> "I give and devise to Marion Genus all that parcel of land situate and lying at Great Bay in the parish of Saint Elizabeth registered at Volume 1369 Folio 20 of the Register Book of Titles with dwelling house situate thereon absolutely.
>
> I give and bequeath to Marion Genus all my furniture and household effects absolutely.
>
> Marion Genus is to be responsible for taking care of me up until the time of death.
>
> And I give all the rest and residue of my real or personal property of what nature or kind soever not herein otherwise disposed of to the said Marion Genus."

Clearly Mrs. Parchment is excluded as a beneficiary. She asserts that it is unreasonable for Mr. Parchment not to have made a financial provision for her in his will. She states that the property is valued at $5,000,000.00, but there is nothing by way of a professional or other valuation to support this figure. There does not seem to be much else in this estate.

Juxtaposed against the value of this asset is Mrs. Parchment's testimony to the effect that she is in need. She asks that the court remedies the imbalance. She therefore desires an order in her favour pursuant to the Inheritance Act. Her testimony is that she is unemployed and suffers from a number of serious illnesses which have prevented her from working since January 2004. In any event she is now sixty years old and would, in the normal course of events, be looking toward retirement. She does not receive a widow's pension. Though she does not express it in this way, it is evident from her testimony, that she would have been presently better off financially if she had not invested her money in the property. Among the things she

said that she did was to liquidate three insurance policies and contribute the proceeds (US$10,000.00) directly toward the construction of the property. There is a receipt (Exhibit 6) issued by a Mr. Joshua Roberts, dated 25/5/93, indicating that she paid him the sum of $152,000.00 advance on "roofing at Great Bay St. Elizabeth". These are not contradicted in any way.

In addressing the matter of their living separate and apart, Mrs. Parchment testified that on 28th December, 2001, her husband left home in the United States in order to come to Jamaica for four weeks. She says he did not return home up to the time of his death. She said that she, on the other hand, could not come to live in Jamaica because their son Chase was, at least initially, still in high school. She did, however, visit Jamaica:

> "In January 2003, Chase and I visited the deceased in Jamaica. (Mr. Parchment) agreed that he would come to the United States of America and spend half of the year until Chase finished school. I returned to Jamaica in December 2003 and I found the Defendant and her son living in our house. I put her out and I returned to the United States on the 10th day of January 2004."

In cross-examination, Mrs. Parchment agreed that she had been seeking to enforce maintenance orders secured in legal proceedings instituted against Mr. Parchment. The maintenance was for their son, then in college. She explained that she took "steps to have the court apply (Mr. Parchment's) social security payments to the maintenance because that was the only money he was earning apart from the rent he was collecting".

Despite these legal proceedings, Mrs. Parchment, in an amplification of her witness statement, said:

> "The relationship between me and Alpheus Parchment was very good, I would say.... While he was living in Jamaica I would call him daily."

On the matter of rental, Mrs. Parchment asserts that her husband had rented a portion of the property to Miss Genus. She produced receipts (Exhibit 4) made out by Mr. Parchment to that effect. It is surprising therefore that she would put out a legitimate tenant, but no reason has been provided for her action.

Miss Genus' Case

Save for the alleged limitation to Mr. Parchment's interest in the property, there is no contest concerning the validity of the testamentary gifts to Miss Genus. She also asserts that these bequests to her were not out of the goodness of Mr. Parchment's heart, but a matter of contract, the terms of which are alluded to in the will. Miss Genus says that, at his request, she left her home and lived at Mr. Parchment's home in order to care for him in his illness. She says, at paragraph 3 of her witness statement:

> "...He promised me expressly that he would give me all that he owned on his death if I would live with him at his house and take care of him. He said that he would make a will leaving everything to me and he did do so."

As is the case with Mrs. Parchment, Miss Genus did not seek to say that Mr. Parchment made any declaration which was speaking to a situation already in existence. These declarations spoke to the future.

In cross-examination she insisted that she "went to the house on the basis that he would give me his property". She says that she had no intimate relationship with Mr. Parchment. He was, according to her witness statement (paragraph 2.):

> "unable to take care of himself. He had a serious heart condition...he was diabetic, hypertensive and he was partially blind."

Miss Genus denied that she was a tenant at the property, or that she had ever paid rental for living there. When confronted, in cross-examination, with the rental receipts (Exhibit 4), she sought to give an explanation based on what Mr. Parchment had said. In the event that their relationship was questioned, this was, according to her, his explanation:

> "He told me he would give me receipts that I was paying rent"

The receipts themselves raise some questions. Some were drawn up in pairs, each pair bearing the same date and covering an identical period. Despite those questions I do not find Miss Genus' evidence on this point credible.

In reference to the relationship between Mr. Parchment and his wife, Miss Genus states in her witness statement:

> "9. (Mrs. Parchment) made absolutely no contribution to Alpheus Parchment's care or welfare, financially or otherwise, nor did she show any concern for him

> whilst I was taking care of him. They were estranged and there was no contact between them."

I accept the truth of this statement. It is improbable that Mr. and Mrs. Parchment would have been on cordial terms, speaking daily together on the telephone. If that were so, it is unlikely that she would have found it necessary to initiate court proceedings against him, or having secured an order, to have had to pursue enforcement. I reject Mrs. Parchment's testimony to the contrary.

Finally, Miss Genus has asserted that Mrs. Parchment has her own house in Black River, St. Elizabeth. There is no contest in this regard.

It was only these two persons who gave evidence.

Findings of Fact

1. Mr. and Mrs. Parchment were married for over 19 years at the time of his death.
2. He, at that time (March 1985), already owned the property.
3. He built a house on the property, and she contributed to the cost of the construction and outfitting.
4. He left their home in the United States of America in December 2001, and came to live in Jamaica. He thereafter refused to return to the matrimonial home.
5. She remained resident in the United States.

6. After his return to Jamaica he did not provide any maintenance for either Mrs. Parchment or their son Chase.

7. Mrs. Parchment secured a Maintenance Order against him. It was in favour of Chase. She was in the process of having it enforced by deductions from his Social Security payments.

8. Mrs. Parchment visited Mr. Parchment in January 2003.

9. Mr. Parchment became seriously ill while in Jamaica.

10. He had Miss Genus come to live at his house with him in or about October, 2003.

11. Miss Genus cared for Mr. Parchment during his illness.

12. Mrs. Parchment came to Jamaica in December, 2003, found Miss Genus living in the house with Mr. Parchment and chased her from the premises.

13. The relationship between the spouses was not cordial, they were estranged.

14. Mrs. Parchment returned to the United States of America, and Miss Genus returned to live at the house.

15. Mr. Parchment made his will in April, 2004. It explains his reason for the bequest of his whole estate to Miss Genus.

16. He died in September, 2004.

Claims of Beneficial Interests

There is a large body of authority which speaks to a legal owner being estopped from denying a beneficial interest to a party who acts to, in this case, her, detriment while relying upon promises made by the legal owner. In *Gissing v. Gissing* [1970] 2 All E.R. 780 Lord Diplock, in delivering his opinion in that seminal decision, said, at p. 790 a:

> "A resulting, implied or constructive trust...is created by a transaction between the trustee and the *cestui que trust* in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui *que trust* a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the *cestui que trust* to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land."

In the normal case of a claim of a beneficial interest in property, the defendant is the legal owner of the property and the person whose interest would be affected by an order in favour of the claimant. In such cases the legal owner is able to speak for himself and the tribunal is able to assess his credibility. More importantly statements, promises and agreements said to have been made by him are admissible in evidence. He is then entitled to confirm, deny or otherwise comment on those matters. The court is able, in those circumstances, to decide, based on that evidence, what arrangement, if any, existed between the legal owner and the claimant.

The instant case does not fall within that norm. Statements made by Mr. Parchment ostensibly constitute hearsay. I am of the view that they do not fall within any exception to the rule against hearsay regarding statements by deceased persons, particularly that of declarations against interest. In the twelfth edition of *Phipson on Evidence* the learned authors opine at paragraph 893:

> "The declarations must also have been against interest *at the time* they were made; it is not enough that they might possibly turn out to be so afterwards."

(See *Lloyd v. Powell Duffryn Steam Coal Company* [1913] 2 K.B. 130.) The statements by Mr. Parchment could however, be considered original evidence, thereby becoming admissible for the fact that they were made, rather than for the truth of the content. (See *Subramaniam v Public Prosecutor* [1956] 1 W.L.R. 965.)

If Mrs. Parchment is to be believed, there would be evidence (the declarations by Mr. Parchment) to be considered in determining whether she had a beneficial interest in the property. The principle also applies to Miss Genus' evidence. There were two cases which were cited to me by Mr. Adedipe who appeared for Miss Genus. Though he cited them in her favour, they would also, if accepted, benefit Mrs. Parchment. The first is *Greasley and ors. v. Cooke* [1980] 3 All E. R. 710. In that case it was held that:

> "... assurances given by the representors ... that the defendant could remain in the house far as long as she wished raised an equity in the defendant's favour and it was to be presumed that the defendant had acted on the faith of those assurances. The burden of proof was therefore on the plaintiffs to establish that the defendant had not acted to her detriment or her prejudice by remaining there."

The second case is that of *Trenchfield v Leslie* (1994) 31 J.L.R. 497. As in many of the cases in this area, the facts in *Trenchfield* were very similar to the instant one, but with the added feature of our own culture as its backdrop. There, the executors of A.T's estate sought to evict the occupant of his house. She resisted the action on the basis that she was entitled to remain by virtue of, according to the headnote:

> "an oral agreement between A.T. and herself whereby the former promised to give her the house and land in return for her taking care of him. As a result, she moved into the house, expended money repairing its facilities as well as taking care of the deceased."

Patterson J.A. (Ag., as he then was), made it clear that the contract, if there was one, between the occupant and A.T. could not have been enforced at common law. He however held that the reliance on the declaration by the occupant, to her detriment, created a promissory estoppel against the executors who stood in the shoes of A.T. The court proceeded on the finding of the learned Resident Magistrate that the declaration had been made and had been relied upon. Patterson J. A. (Ag.) noted at p. 500 D:

> "This finding of fact was not challenged. It is well known that in Jamaica the kind of agreement contended for by the respondent is not uncommon."

For my part, I am extremely uncomfortable accepting a witness giving evidence of what a person, since deceased, is supposed to have said. This is so particularly where the witness stands to benefit from the alleged statement, and especially so where that testimony stands by itself, unsupported by any document, or independent source. I find that the statements quoted by Mrs. Parchment, unlike those cited by Miss Genus are not supported by any unequivocal document. I am not prepared to accept Mrs. Parchment's testimony in this regard. I therefore do not accept that there was a contract between Mr. and Mrs. Parchment whereby she acquired a beneficial interest in the property.

On the other hand, since the will speaks for Mr. Parchment I accept that he did make the statements attributed to him by Miss Genus. These latter statements however did not amount to a declaration against Mr. Parchment's interest. They spoke to a future intention. He did fulfil that intention in his will but I find that that purported action by him cannot override the power given to this court by virtue of the Inheritance Act.

The Inheritance Act Claim

The provisions of the Inheritance Act allow the court to make reasonable financial provision from the estate of a deceased person, for a surviving spouse (section 4). The prerequisite to the court making such an

order is that it must be satisfied that the testator's will, does not make reasonable provision for the maintenance of the surviving spouse (section 6). Section 7 (1) of the Act then goes on to state:

> "Where an application is made for an order under section 6, ...if the court considers that such reasonable financial provision has not been made, in determining whether and in what manner it shall exercise its powers under that section, have regard to the following matters-
>
> (a) the size and nature of the net estate of the deceased
>
> (b) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;
>
> (c) the financial resources and financial needs which any other applicant for an order under section 6 has or is likely to have in the foreseeable future;
>
> (d) any obligations and responsibilities which the deceased had towards any applicant for an order under section 6 or towards any beneficiary of the estate of the deceased-
>
> (e) any physical or mental disability of any applicant for an order under section 6 or any beneficiary of the estate of the deceased
>
> (f) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;
>
> (g) the deceased's reasons, so far as they are ascertainable, for making provision or for not making provision or for not making adequate provision, as the case may be, for any person by his will;
>
> (h) the conduct of the applicant towards the deceased;
>
> (i) the relationship of the applicant to the deceased and the nature of any provision for the applicant which was made by the deceased during his lifetime;
>
> (j) any other matter which, in the circumstances of the case, the court may consider relevant.

In, what I believe is, the first written judgment in this jurisdiction based on the provisions of the Inheritance Act, K. Harrison J. (as he then

was) gave some insight to the provisions of section 7(1). This was in *Williams v. Mavaou and Anor.* (2000) 61 W.I.R. 302. The facts of that case are not dissimilar to the instant one, except that Harrison J. found that though the applicant and the deceased had had marital difficulties, these did not cause them to live separate and apart from each other. The learned judge (at p. 317j-318 b) said:

> "I accept the principle established in *Franklyn .v Biddy* ((1960) 2 W.I.R. 346) that interference with a testator's will should not be governed by the personal inclination of the judge, if he were the testator, but rather by what a just and wise testator ought to have done in all the circumstances of the case. It is my considered view however, when all the circumstances of this case are looked at, reasonable financial provision should be made for the applicant's maintenance which, according to Goff L.J in *Re Coventry deceased*, ([1979] 2 All E.R. 418) 'will enable her to live neither luxuriously nor miserably, but decently and comfortably according to her station in life'."

By section 6(1), the orders which the court may make where the testator has failed to make reasonable provision are:

(a) an order for the making to the applicant out of the net estate of the deceased of such periodical payments and for such term as may be specified in the order;

(b) an order for the payment to the applicant out of that estate of a lump sum of such amount as may be so specified;

(c) an order for the transfer to the applicant of such property comprised in that estate as may be so specified

(d) an order for the setting up of a trust fund out of the net estate for the benefit of two or more applicants;

(e) an order for the settlement for the benefit of the applicant of such property comprised in that estate as may be so specified;

(f) an order for the acquisition, out of property comprised in that estate, of such property as may be specified and for the transfer of

> the property so acquired to the applicant or the settlement thereof for his benefit.

Conclusion

I am of the view that any claim for a beneficial interest in real property must be based on some evidence which makes it clear, as Lord Diplock stated in *Gissing (supra),* "that it would be inequitable to allow (the legal owner) to deny to the cestui *que trust* a beneficial interest in the land". Where the legal owner has since died, it is my view that statements attributed to him, by which statements his property would be alienated, must be established by very credible evidence. Preferably, the alleged statement should be supported by some document by the deceased. I am not convinced by Mrs. Parchment's evidence. Even if Mr. Parchment intended that the property would be their retirement home, it did not mean that Mrs. Parchment would acquire an interest therein. The result, I find, is that there is no evidence of a contract between Mr. and Mrs. Parchment upon which she may properly base a claim for an interest in the property.

Similarly I find that there is no evidence of any conduct by Mr. Parchment from which this court could impute an agreement between the parties which would vest Mrs. Parchment with a beneficial interest in the property.

Mr. Parchment, having made no provision whatsoever for Mrs. Parchment in his will, the prerequisites have been satisfied for an order under section 6 of the Inheritance Act. The court is therefore enabled and required to consider the provisions of section 7(1). In balancing the matters therein to be considered, the items in Mrs. Parchment's favour are:

1. Her poor health. (Exhibits 10 and 12)
2. Her expenses, particularly as a result of her health conditions. (Exhibits 11 and 12)
3. Her indebtedness to health providers. (Exhibits 13 and 14)
4. Her age
5. Her unemployed status.
6. The period for which the couple were married.
7. Miss Genus is a younger person and is still employed as a teacher.

On the other side of the coin are the following factors:

1. The parties having lived separate and apart for over three years
2. Her court action against Mr. Parchment for maintenance.
3. The fact that she already owns a house.
4. An absence of information as to her income, and other assets.

Mrs. Parchment's residence outside of this country is also a fact to be taken into account in determining the appropriate relief.

The fact that the parties were estranged does not prevent Mrs. Parchment receiving a benefit under the Inheritance Act. Guidance is provided by Wooding C.J. in *Thompson v. Roach and Roach* (1968) 13 W.I.R. 297. In dealing with a case where the parties had been separated for upwards of ten years, he said at p. 298 G:

> "...the question must be asked, what moral obligation did he have to provide for her by his will? Because the question of moral obligation is most important. As Wynn-Parry J., pointed out in *Re Andrews, Andrews v.* Smorfitt (1935) 3 All E.R. at p. 249, on applications such as this:
>
> > "a most important, if not the most important, consideration which the court should have in mind is the extent to which, if at all, the testator was under a moral obligation to the person claiming relief."

The institution of court action for maintenance by Mrs. Parchment does not disentitle her from receiving a benefit. It would, on the contrary, seem to indicate that, even in life, Mr. Parchment had neglected his responsibility to his family. In *Williams v. Mavaou* (cited above) the applicant widow who had secured an interim order for maintenance against the testator during his lifetime, was granted an award under the Inheritance Act. It is not a unique case.

In my view, Mr. Parchment had a moral obligation to provide for Mrs. Parchment. The length of time for which they were married, the fact that (on my finding) she contributed to the cost of the construction of the house in which he lived, her age and station in life (she latterly worked as a baby-

sitter), all support that finding. Considering that his association with Miss Genus was relatively short and that Miss Genus is a younger person, who is still in the job market, Mr. Parchment, if he acted as a "just and wise testator", ought to have made a significant provision for Mrs. Parchment for her maintenance.

She says in her witness statement that her expenditure (medical and regular maintenance) is in the vicinity of US$2,517.00. The frequency is not however specified. There is no evidence as to the level of her income, but there is evidence of her own asset which should be capable of generating some income. The main purpose of an order under the Inheritance Act is to provide maintenance, not a bequest.

Miss Genus is also entitled to benefit in large measure in light of her care of Mr. Parchment during a period of great need. He clearly indicated his reason for his gifts to her and his intention ought not to be ignored.

The nature and size of this estate is such that it should be sold to achieve the competing demands on it. The relationship between these two parties is not such that they should be thrown together in the co-ownership of the property. In any event Mrs. Parchment lives abroad.

Before making the order, it must be noted that although the parties have both stipulated that the property is registered at Volume 1186 Folio

506, there is a different reference (Volume 1369 Folio 20) stated in Mr. Parchment's will. The copy title produced in evidence as Exhibit 2 shows the former reference numbers as having been deleted and replaced by the latter. This change has not been addressed by either party, but it seems to have been effected by the Registrar of Titles. Without evidence explaining the change I shall not make reference to the Volume and Folio numbers in the order.

Also important is the evidence that a Mr. Christopher Parchment, a son of Mr. Alpheus Parchment, was declared to have an interest in land forming part of the property. This declaration was made by the Resident Magistrate for Saint Elizabeth on 16th January 2002 in Plaint No. 898/99. Both parties to the instant case have agreed that this is so. That portion of the property would not form part of Mr. Alpheus Parchment's estate.

The order of the court therefore is:

1. The net estate of Alpheus Parchment (deceased) is to be divided equally between Mrs. Judith Parchment and Miss Marrion Genus.
2. The property situate at Great Bay in the parish of Saint Elizabeth containing by estimation Four acres more or less and butting Northerly on lands belonging to Beatrice Parchment, Southerly by the Great Bay Parochial Road, Easterly by a private road belonging

to Cleveland Swaby, Westerly on lands belonging to Wesley Powell, **less** that portion of the said property comprising two acres belonging to Christopher Parchment as declared by the Resident Magistrate for the said parish sitting at Black River on the 16th January, 2002, be sold and the net proceeds divided equally between the said Mrs. Judith Parchment and Miss Marrion Genus.

3. Liberty to apply.
4. The costs of this action shall be paid from the estate of the said Alpheus Parchment.