JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 2 of 1973

BEFORE: The Hon. Mr. Justice Luckhoo, P.(Ag.).
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Watkins, J.A.(Ag.).

In the Matter of the Estate of Ferdinand A. Reid

Harold George Reid)
and) Defendants/Appellants
Cynthia Joyce Reid)

vs.

Herbert Grant - Plaintiff/Respondent

and

Greta May Reid - Defendant/Respondent

Enos Grant for Defendants/Appellants.
Michael Nunes for Plaintiff/Respondent.
H.D. Carberry for Defendant/Respondent.

March 4,5,22,23,24; April 9; May 12, 1976

WATKINS, J.A.(Ag.):

This is an appeal from the order made on January 8, 1973 by Master McCarthy (as he then was) upon an originating summons issued at the instance of the Plaintiff/Respondent, surviving executor of the estate of Ferdinand A. Reid (hereinafter referred to as the deceased) whereby answers were sought to the following questions:

(i) Did the sum of £6000 (hereinafter referred to as "the fund") together with interest accrued thereon which immediately prior to the death of the deceased was on a time deposit at Barclays Bank D.C.O. May Pen Branch in the joint names of the deceased and the first defendant (Greta May Reid) form part of the assets of the deceased's estate?

(ii) If the answer to the first question is in the affirmative, then is the said fund to be distributed in accordance with the provisions of Clause 4 of the will of the deceased?

(iii) If the answer to the second question is in the negative, then how is the said sum to be distributed?

(iv) How are the costs of this summons to be paid?

Answering the first question in the negative the Master found that the fund did not form part of the assets of the deceased's estate, but belonged to the Defendant/Respondent, Greta May Reid, to whom he ordered it, together with all interest accruing to date of payment, to be paid, and further ordered that all costs incident to the hearing be paid out of the estate. The second and third questions called for no determination in the circumstances. On April 9, 1976 this Court allowed the appeal, set aside the order of the Master save as to costs, and answered the first question in the affirmative, the second in the negative, and as to the third question came to the conclusion that the fund together with accrued interest formed part of the residue of the estate of the deceased and so ordered. We promised to put our reasons in writing and now do so.

Ferdinand Augustus Reid died on Christmas Day 1963. By his will which was admitted to probate in January 1964 he made a number of specific bequests and devises. Particularly by clause 4(1) he left to his grandson Fitz Albert Reid and his granddaughter, Greta May Reid, the defendant/respondent "all moneys at credit at my Savings account with Barclays Bank D.C.O. May Pen Branch in equal shares"; and finally in a residuary clause he gave devised and bequeathed "all the rest residue and remainder of my estate of whatever consisting and wheresoever situate whether the same shall accrue to me before or after my death to my sons ..... Othniel Leonard Reid and Harold George Reid, as to realty as tenants in common and as to personalty, absolutely in equal shares". Othniel Leonard Reid subsequently died leaving as the executrix of his estate Cynthia Joyce Reid, the other Defendant/Appellant. The deceased was not an educated man. His correspondence makes this plain. Equally plain is the fact that want of formal educational training did not stand in the way of his natural industry, shrewdness and business acumen. His was not a holograph will. His native intelligence had obviously counselled him that in so important a matter he should seek and obtain professional assistance, but that the details of the will were the product of his dictation is also plain to see. In the words of the Master "He was very specific in his business transactions and wanted no one to misunderstand him - a plain spoken successful businessman who had built up

an empire of real estate and actual cash or money".

At the time of his death the deceased had had a sum of £6000 in the May Pen Branch of Barclays Bank D.C.O. and as it is this sum of money or fund out of which the issues in these proceedings emerged, the circumstances therefore of its creation and the subsequent handling of it must now be narrated. Upon the maturity in August 1963 of an earlier time-deposit account of £2000 the deceased forwarded a cheque for an additional sum of £4000 to his Bank Manager and asked him to create a new one-year deposit account for a total sum of £6000 in the names of himself and his granddaughter Greta May Reid. The Bank Manager duly complied and forwarded to him an appropriate receipt in acknowledgment on August 15, 1963. That same day the deceased and his granddaughter signed the following instrument referred in argument before us as document 41:

"Deposit Joint Account

To Barclays Bank
May Pen Branch

Date 15. 8. 63

We hereby authorise and request you to open a deposit account in the name of Ferdinand A. Reid & Greta M. Reid and to honour withdrawals in respect of principal or interest from the account or to accept discharges on deposit receipts standing in the name(s) of Ferdinand A. Reid, provided any such withdrawal or discharge is signed by Ferdinand A. Reid or authorise by him in writing.

This authority is to remain in force until (1) either of us shall have expressly revoked it by a notice in writing to you at the above-mentioned branch: and it shall not be revoked by the death of any of us whereafter the signature of the survivor or survivors may be accepted as a sufficient discharge for any balance on this account or any part of such balance.

Signed Ferdinand A. Reid
X Greta M. Reid
P.O. Box 15 Lionel Town"

Two days later the deceased wrote to the Bank as follows:

"This is to inform you that my granddaughter Miss Greta M Reid which was in England is now with me here a Lionel Town since 2/8/63 and expected to be here permanently.

There is a small saving a/c I open in both of us names and will be having that remaining to the convenience of both of us to deposit and withdraw but this fix deposit a/c I also have it in both of us names but the deposit and withdrawal must be controll by myself alone, only if I hand her a written authority to the manager then you comply to my request.

In case of death of either of us the full amount must be pass over to the survivor.

I am unable to come through illness but expecting to see you soon.

With best respect
Yrs
F.A. Reid."

On September 21, 1963 the deceased wrote his last letter to the Bank. It was in these terms:

"This is to inform you that my granddaughter Greta May Reid that was in England and was out here has gone back to England yesterday the 20th inst. against my will and expectation.

There are two a/c there one small saving a/c and one large 12 month a/c. Well I had written you to have the 12 months a/c of £6000 entirely under my controll and I am now asking you to pay to no order by her wherever she may be for I will be having the both a/c control in my will as early as possible.

Yrs
F.A. Reid."

It was out of the above circumstances and against the background of clause 4(1) and the residuary clause of the will of the deceased that the question of the title to the fund together with interest thereon arose and the contention of the defendant/respondent with which Master McCarthy agreed was that this fund belonged to her by way of advancement by her grandfather who throughout their joint lives had acted towards her 'in loco parentis'. The defendants/appellants on their part equally vigorously challenged the evidence of advancement and contended that the fund fell into residue under the will of the deceased, and with this latter contention this Court agrees.

The primary question of law raised on these facts may be briefly framed thus: What was the state of title, both legal and equitable, of the defendant/respondent, to the fund, immediately prior to the death of the deceased? There is however a preliminary matter of evidence upon

the determination of which the answer to this question depends. This matter is as to whether the letters of the deceased written subsequently to the establishment of the joint deposit account were properly admitted in evidence. Counsel for the defendant/respondent contended that they were not and he cited in support Warren v. Gurney (1944) 2 All E.R. 472 and Shepherd v. Cartwright (1954) 2 All E.R. 649. In the earlier case it was stated as settled law that subsequent acts or declarations by an alleged donor are only admissible if they are against his interest. "If the rule were otherwise" said Morton, L.J. "it would be extremely easy for persons to manufacture evidence even although at the time when they made the purchase they in fact intended the child (or donee) to have the gift of the property". In the later case the material headnote reads "The acts and declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration: subsequent acts and declarations are only admissible as evidence against the party who did or made them and not in his favour." What, however, is the rule of evidence relating to the admissibility of post-transaction acts and declarations where a donor or purchaser at the time of the transaction by a contemporaneous declaration expressly reserves a right, whether absolute or qualified, of control over the appropriation of the subject-matter of the transaction? Clearly the exclusionary rule in Warren v. Gurney and Shepherd v. Cartwright the rationale of which is the discouragement of the manufacture or fabrication of evidence cannot on principle and in reason be applied to such circumstances. On August 15, 1963 the deceased and the defendant/respondent together signed document 41. That document, as we have seen, authorised the bank (a) to open the deposit account in their joint names (b) to honour withdrawals in respect of principal or interest from the account (c) to accept discharges on deposit receipts, provided any such withdrawals (under (b)) or discharges (under (c)) were signed by, or by the order of, the deceased. It provided also that total revocation of the whole document could be effected by the delivery to the bank of a written notice by either the deceased or the defendant/

respondent. Death of either signatories of the document did not work a revocation thereof, but the signature of the survivor to any document in acknowledgment of receipt of the outstanding balance would afford a complete discharge to the bank. Upon the creation then of this joint account the deceased as grantor not only expressly reserved for his exclusive exercise in the future the matter of withdrawals and discharges, but the very continuance itself of the joint account as such was reserved for termination, if either party saw fit, by an express notice in writing. The inescapable inference was that the deceased as grantor had reserved for future determination the matter of the beneficial ownership of the fund. Whatever then were the initial intentions of the deceased at the time of the establishment of the joint deposit account, if indeed he had any settled intentions at all, he was careful enough by his contemporaneous express reservations to preserve for the future total freedom of action over and control of the fund. This Court can in these circumstances see no room for the application of the rule in Warren v. Gurney and we therefore hold that the post-transaction acts and declarations of the deceased were properly admitted in evidence and that such effect as they are rightly capable of ought to be given to them.

Reverting then to the paramount question in the case, namely, What was the state of title, both legal and equitable, of the defendant/respondent to the fund immediately prior to the death of the deceased? - the approach to the answer must clearly be made by a progressive analysis of the effect in law and in equity of the various acts of the deceased contemporaneous with and subsequent to the establishment of the fund. First, there is the joint deposit account the entire fund of which was provided by the deceased, the granddaughter being a mere volunteer. As to the title in law there can be no controversy. It is now settled beyond controversy that at common law the relationship between a depositor and his banker is that of creditor and debtor and that pursuant to this contractual relationship the depositor holds the legal title to the debt or chose in action (Peace v. Creswick (1843) 2 Hare 286, Standing v.Bowring (1885) 31 Ch.D. 282, McEvoy v. Belfast Banking Co. (1934) All E.R. Rep.800). The title to this chose in action vests immediately upon the making of the deposit and accordingly upon the creation of the joint deposit account, and

subject to the terms thereof, both the deceased and the defendant/respondent became at common law jointly entitled to the debt or chose in action against the bank. The defendant/respondent, as already indicated, had made no contribution whatever to the fund, the donor, the deceased had made no expression of his intention and by the terms of document 41 which accompanied the deposit, she had no authority, except with the leave of the deceased, to make any withdrawals at all. Indeed her only independent authority was so to revoke the instrument by a written notice to the bank as to sever and determine the joint deposit account altogether, with the inevitable consequence of the loss to her of all claims of any nature whatever to the fund. The authority vested by document 41 in her, if she survived her grandfather, to issue a receipt for any outstanding balance on the account in sufficient discharge thereof served merely to relieve the bank of liability for payment in the stated circumstances and gave her no beneficial interest therein. Looking then at the situation in law as of August 15, 1963 the bare legal title to the fund which vested at common law in the defendant/respondent as joint holder with the deceased carried with it no express beneficial interest in her and any claim by her that she was entitled beneficially to the fund must depend upon equity. Counsel for the defendant/respondent argued strenuously from the affidavit evidence of payments made by the grandfather to his granddaughter and stretching over many years beginning with her childhood when she was in his charge, that the deceased regarded and treated his granddaughter as his own child, thereby letting in the equitable doctrine of advancement. Equally strenuously, Counsel for the defendants/appellants strove to repudiate the contention. Despite the citation of numerous cases and the ingenious arguments of Counsel on both sides, the Court finds it unnecessary to pursue this matter to a determination having regard to the subsequent acts and declarations of the deceased which we consider were properly admitted in evidence. By the letter dated August 17, 1963 the deceased in exercise of his reserved powers spoke authoritatively thus "In case of death of either of us the full amount must be paid over to the survivor." In short, any beneficial interest in the fund was to pass to the defendant/respondent when but only when and if she survived him.

Counsel for the defendants/appellants contended however that such a disposition of the beneficial interest in the fund as the letter of August 17 purported to effect was testamentary in nature, did not comply with the obligatory requirements of the Wills Law and was therefore ineffectual. The contention is not new. It has been raised in a number of Irish and Canadian cases, references to which are made in Young v. Sealey (1949) 1 All ER 92, the leading English authority on the subject, and in the Australian case of Russell v. Scott 55 CLR 440. In Young v. Sealey Romer, L.J. after examining many cases rejected the contention with some diffidence but it does not appear that Russell v. Scott had been brought to his notice. The facts of this latter case were these: An elderly lady and her nephew opened a joint account in a Savings Bank by the transfer of a large sum from an account in the lady's name. The nephew made no contribution to this account which was used solely for purposes of the aunt's needs. As the need arose the nephew withdrew funds from the bank on withdrawal slips signed by them both. When the account was opened the aunt told the nephew and others that any balance remaining in the account on her death would belong to the nephew. Upon the aunt's death the nephew claimed the balance of the account. At first instance this claim was rejected as the disposition was testamentary in nature and required to conform, which it did not, with the relevant Statute of Wills.
In reversing this decision the High Court of Australia, Dixon and Evatt JJ. said:

> "In principle there is no reason why, when at law a chose in action accrues to the survivor of two persons in whom it was jointly vested, equity should fix the survivor with a resulting trust in favour of the personal representatives of the deceased who furnished the value it possesses, if the joint chose in action was so vested by the deceased with the purpose of imparting beneficial ownership to the survivor on his death. The reason which is assigned for such a resulting trust rests at bottom upon the notion that the deceased, by intending to reserve the right in her lifetime of applying all or any of the money in the account for

> her own purposes and by continuing in fact to enjoy the use of that money, retained the full beneficial ownership of the property which in law vested in herself and her nephew jointly in consequence of the account standing in the names of both of them. For it is said that the deceased's intention that her nephew on surviving her should take the amount of the bank account is a testamentary wish to which effect could be given only by a duly executed will. This must mean that, while retaining full beneficial property in a corpus, she intended that on her death some other person should succeed to her property in that corpus or to some interest therein to which he was not before entitled either absolutely or contingently, and to which the law gave him no title to succeed. It is only in this sense that an intention to benefit can be said to be testamentary. Law and equity supply many means by which the enjoyment of property may be made to pass on death. Succession post mortem is not the same as testamentary succession. But what can be accomplished only by a will is the voluntary transmission on death of an interest which up to the moment of death belongs absolutely and indefeasibly to the deceased. This was not true of the chose in action created by opening and maintaining the joint bank account".

With respect we adopt the reasoning as well as the conclusion of these eminent judges and hold that by the letter of August 17, the defendant/respondent obtained the beneficial interest in the fund contingent on her surviving her grandfather but subject to revocation at any time at the instance of her grandfather as well. On September 21, 1963 the deceased once more exercised the powers he had reserved in himself as grantor by document 41. Disappointed, and perhaps hurt, by the rather unexpected return to England of his granddaughter, the deceased mandated the bank "to pay to no order by her (the defendant/respondent) wherever she may be, for I will be having the both a/c controlled in my will as early as possible". If in accordance with this final direction the Bank were required "to pay to no order by the defendant/respondent wherever she may be" then it seems uncontrovertible that the beneficial interest by survivorship conferred by the letter of August 17 had been taken away or revoked by this letter. Mr. Grant for the defendants/appellants invited

us to go further. He would have us treat document 41 as wholly set aside by this letter, thus terminating the joint account and reverting the fund, both in law and in equity, entirely and exclusively in the deceased. It is not necessary to go so far, nor does such a conclusion seem warranted on the facts. Document 41 provides that it should remain in force "until either of us shall have expressly revoked it by a notice in writing delivered to you at the above-mentioned branch". It seems quite impossible to assimilate the letter of September 21 with such an instrument of express revocation as is demanded by document 41. The revocation of the defendant/respondent's beneficial interest in the fund by survivorship had the inevitable effect therefore that upon the death of her grandfather, as at the time of the creation of the joint deposit account, she held the legal title to the chose in action as the surviving co-tenant but bound in conscience in equity as to the beneficial interest therein upon a resulting trust for the estate.

It only then remains to decide the proper disposition of the fund pursuant to the will of the deceased. It was urged that the words in Clause 4(1) "all moneys at credit of my Savings a/c with Barclays Bank DCO May Pen Branch" are wide enough to embrace the joint deposit account as well as the savings account inasmuch as a deposit account partakes of the nature of a savings account. Neither the intrinsic nor the extrinsic evidence of the intention of the deceased supports this view. It has already been observed that the will was not a holograph will. The professional touch is manifest, but conformity with the wishes of the testator is also equally manifest. If Clause 4(1) was intended to embrace both accounts which the deceased had at the May Pen Branch, the use of the plural "Savings Accounts" rather than the singular "Savings Account" would be expected. More compelling, however, is the extrinsic evidence contained in the letters of August 17 and September 21 wherein the deceased exhibited the clearest distinction in his mind between, on the one hand, "his small savings account" and, on the other hand, his "fix deposit a/c" or "large 12 months a/c". The Court finds no difficulty in coming to the conclusion that the fund falls outside clause 4(1) of the will and that in the circumstances that it fell into residue.

For these reasons the appeal was allowed, the order of the Master save as to costs, was set aside and it was ordered as follows:

(i) that the answer to Question 1 on the originating summons is in the affirmative

(ii) that the answer to Question 2 is in the negative

(iii) that the answer to Question 3 is that the sum of £6000 ($12,000) together with interest thereon which immediately prior to the death of the deceased was on a time deposit at Barclays Bank DCO May Pen Branch in the joint names of the deceased and the defendant/respondent forms part of the residue of the estate of the deceased

(iv) that the costs of and incidental to this appeal shall be borne by the deceased's estate.