IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2009 HCV 01885

IN CHAMBERS

BETWEEN	GRANVILLE SCOTT	APPLICANT
AND	YVONNE ADOCIA SCOTT- ROBINSON	RESPONDENT

Mr. Sean Kinghorn instructed by Kinghorn and Kinghorn for the Applicant.

Mr. Richard McTyson for the Respondent.

Trust – Father purchasing realty in joint names of adult daughter and himself – Daughter not contributing to the cost of acquisition -Whether resulting trust arising – Whether irrevocable gift to daughter – Whether presumption of advancement rebutted -Whether joint tenancy may be severed by father

2nd December 2009 and 27th January 2010

BROOKS, J.

Mr. Granville Scott is a disappointed father. He says that his daughter Mrs. Yvonne Scott-Robinson has behaved shamefully. In 1994 he purchased the fee simple to real property in Mickleton Meadows in Saint Catherine. He, however, had the title to the property placed in their joint names. He now wishes for her to transfer her interest therein to his wife. Mrs. Scott-Robinson has refused. She asserts that her interest was intended as a gift to her. When faced with Mrs. Scott-Robinson's refusal, to accede to his wishes, Mr. Scott's attorneys-at-law issued a letter purporting to sever the joint tenancy.

The issue to be decided is whether a gift was intended or whether Mrs. Scott-Robinson holds her interest on a resulting trust for Mr. Scott. It also falls to be determined whether their joint tenancy has been severed. There are no disputes as to fact and the claim has been brought by a Fixed Date Claim Form pursuant to the provisions of the Partition Act. There was no cross-examination of the parties as Mrs. Scott-Robinson

did not attend the hearing. A defect in the execution of her affidavit was waived by Mr. Kinghorn, appearing for Mr. Scott. This was to enable the court to hear the claim.

Mr. Scott's case

The critical part of Mr. Scott's affidavit states as follows:

> "6. ...I decided that I would put her name on the title for the property so that in the event of my death she would benefit from owning the property.
>
> 7. That I told her so and in fact it was never our intention that she was to be owner of this property during my lifetime. She was merely put on the title of the property so that she would have the benefit of it after my death without the need to go through the hassle of Probating a Will and paying expensive Estate duty."

It is important to note that the property is Mr. Scott's matrimonial home. It is also worth noting that Mrs. Scott-Robinson has at all material times been resident in England. She was, however, visiting Jamaica when she swore to the affidavit filed on her behalf.

Mrs. Scott-Robinson's case

Mrs. Scott-Robinson's recollection of the transaction is set out in her affidavit:

> "4. That at the time of the purchase of the said property...my father did not indicate to me that I would be holding the property as one joint tenant in trust for himself or for anyone.
>
> 5. That at the time of the purchase, my father indicate (sic) to me that my name was being placed on the Registered Title **as a gift to me since in the event of his death that would avoid the property being subjected to a Grant of Probate or Letters of Administration**.
>
> 6. That [the] correspondence received from the Attorneys representing my father in the purchase...did not indicate that I would be holding the said property in trust for anyone..." (Emphasis supplied)

She attempted to further explain her father's motive for the gift, but this was by way of surmise on her part. She postulated that he was doing so as compensation for having neglected her when she was a child. I find that this conjecture is not admissible to assist the court.

The Law

The issues thus being joined, I shall first examine the law relevant thereto, particularly in respect of presumed resulting trusts and the presumption of advancement.

Presumed Resulting Trusts

The concept of a presumed resulting trust is concisely stated by Eyre, C.B. in *Dyer v Dyer* [1775-1802] All ER Rep. 205 at page 206 I:

> "The clear result of all these cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold, whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser, whether in one name or several, and whether jointly or successively, results to the man who advances the purchase-money....it goes on a strict analogy to the rule of common law, that where a feoffment is made without consideration, the use results to the feoffer."

It is also well established that the presumption of a resulting trust may be rebutted by evidence which indicates that the person providing the purchase money, did not intend to keep the beneficial interest in the property purchased.

In addition to allowing for contrary evidence, the law also allows for contrary presumptions to apply. Where the purchaser is the father or, (less so in recent times) the husband, of the holder of the paper title, the presumption of advancement displaces the presumption of a resulting trust.

The presumption of advancement

The presumption of advancement may be simply summarized as the courts deeming the purchase of property, by a father or husband in the name of his offspring or wife respectively, as a gift of the beneficial interest to the latter. Eyre, C.B. explained in *Dyer v Dyer,* the origin of the difference in approach in such relationships, as opposed to the application to strangers. He said at page 207 B:

> "Natural love and affection raised a use at common law: surely then it will rebut a trust resulting to the father."

Jessell, M.R., in *Bennet v Bennet* (1879) 10 Ch.D. 474, held that the presumption of advancement applied in the case of a father and his child, because a father was under a moral obligation to provide for his child (see page 477).

As with the resulting trust, the presumption of advancement may be rebutted by evidence that a contrary effect was intended. It was made clear in *Dyer v Dyer* that the onus of proof to displace the presumption of advancement lies on the party asserting that no gift was intended.

The approach that the court must adopt was outlined in *Antoni and Another v Antoni and Others* [2007] UKPC 10 (delivered 26 February 2007). In an appeal from the Bahamas, the Privy Council, at paragraph 20 of its judgment, said that the judge ought to start with the evidential presumption that the father intended to benefit the child whom he had caused to become the legal owner of the property. The judge should then ask himself or herself what evidence there was to rebut that presumption. The required evidence must show what the true intention of the father was at the time of the relevant transaction.

In *Shephard v Cartwright* [1955] A.C. 431 at p.445 Viscount Simonds approved the following passage from *Snell's Equity* 24th Edition, page 153:

> "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...But subsequent declarations are admissible as evidence only against the party who made them, and not in his favour."

There is, however, some difference of judicial opinion as to the proof required.

Evidence rebutting the presumption of advancement

The traditional view is that clear evidence is required to displace the presumption of advancement; rebuttal cannot be inferred from slight circumstances. Lord Denning, in *Chettiar v Chettiar* [1962] 2 W.L.R. 548, said at page 549:

> "...whenever a father transfers property to his son, there is a presumption that he intended it as a gift to his son; and if he wishes to rebut that presumption and to say that his son took as trustee for him, he **must prove the trust clearly and distinctly**, by evidence properly admissible for the purpose, and not leave it to be inferred from slight circumstances: see *Shephard v Cartwright.*" (Emphasis supplied)

In contrast to that position, there is the view that slight evidence may well displace the presumption. In the important case of *Pettit v Pettit* [1969] 2 All ER 385, some members of their Lordships' House, expressed the view that the presumption of advancement no longer had the force which it had in former times. Although Lord Upjohn, at page 406 B, opined that "when properly understood and properly applied to the circumstances of today...[the presumptions] remain as useful as ever in solving problems of title", he went on to say at page 406 I that these "presumptions or circumstances of evidence are readily rebutted by **comparatively slight evidence**" (Emphasis supplied).

Counsel for Mr. Scott relied heavily on the comments of their Lordships in *Pettit* concerning the status of the presumption. It cannot be ignored, however, that those opinions were rendered in the context of the relationship of husband and wife. For example, Lord Hodson said at page 404 D:

> "Reference has been made to the "presumption of advancement" in favour of a wife in receipt of a benefit from her husband. In old days when a wife's right to property was limited, the presumption no doubt had great importance and today, when there are no living witnesses to a transaction and inferences have to be drawn, there may be no other guide to a decision as to property rights than by resort to the presumption of advancement. I do not think it would often happen that when evidence had been given, the presumption would today have any decisive effect."

That comment, in my respectful view, does not address the rationale behind the presumption with respect to the relationship between father and child.

The pendulum of opinion concerning the weight which the presumption carries seems to have swung again in favour of the person holding the legal interest. Baroness Hale of Richmond, in *Stack v Dowden* [2007] UKHL 17 (delivered 25/7/07), with whom the rest of the panel of the House of Lords agreed, seems to require a higher standard of evidence to displace the presumption. She said at paragraph 68 of her speech:

> "The burden will therefore be on the person seeking to show that the parties did intend their beneficial interests to be different from their legal interests, and in what way. This is not a task to be lightly embarked upon...."

Lady Hale explained that such forays were likely to involve disproportionate costs. She concluded at paragraph 69:

> "...At the end of the day, having taken all this into account, cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual."

It is of significance that Lady Hale was a member of the panel which delivered the judgment of the Board in *Antoni* mentioned above. The closest the Board comes to establishing a standard for the evidence required is in paragraph 20 where it says:

> "In the absence of **adequate rebuttal evidence** the presumption [of advancement] bars the application of the converse presumption, namely the presumption of a resulting trust." (Emphasis mine)

Undoubtedly, the party bearing the evidential burden will seek to adduce evidence to determine the actual intention of the purchaser, at the time of acquisition of the property. Various examples exist. The use of the property after acquisition is one such, although timing is important.

In *Shephard v Cartwright* mentioned above, a father's use of company shares after purchasing them in the names of his infant children was held not to displace the presumption of advancement. Two main factors militated against a finding in his favour.

Firstly, his trading of the shares commenced some five years after the original acquisition and secondly, the children, being minors, were deemed unaware of his activities.

In *Lavelle v Lavelle and Others* [2004] EWCA Civ. 223 (delivered 11/2/04) a father who had purchased an apartment in his daughter's name succeeded in rebutting the presumption of advancement. There was evidence that the reason for the purchase in her name was to avoid inheritance tax. It was also a significant factor that although he used the apartment for only three months of each year, it had from the outset, been remodelled and furnished to meet his needs. The rest of his family did not reside there but there was some evidence that they visited the apartment "weekly".

In giving the judgment of the Court of Appeal, Lord Phillips, MR was of the view that a less rigid approach should be "adopted to the admissibility of evidence to rebut the presumption of advancement". He said at paragraph 19:

> "In these cases equity searches for the subjective intention of the transferor. It seems to me that it is not satisfactory to apply rigid rules of law to the evidence that is admissible to rebut the presumption of advancement. Plainly, self-serving statements or conduct of a transferor, who may long after the transaction be regretting earlier generosity, carry little or no weight. **But words or conduct more proximate to the transaction itself should be given the significance that they naturally bear as part of the overall picture**. Where the transferee is an adult, the words or conduct of the transferor will carry more weight if the transferee is aware of them and makes no protest or challenge to them." (Emphasis supplied)

It is also of some significance, although by itself not conclusive, that the purchaser (the father of the legal owner) retained the title deeds to the property purchased. In *Warren v Gurney and another* [1944] 2 All ER 472, Morton L.J. quoted *Coke on Littleton* to the effect that the title deeds are "sinews of the land". The retention, coupled with other evidence of intention was accepted to displace the presumption. Of much significance in that case was the statement made by the purchaser to the solicitor

acting in the purchase. The evidence, given and accepted as true, was from a son of the purchaser of the property:

> "Father required property made in my sister's name, **so that there could be no trouble at a later date**, as [the sister's husband] had to pay for it at a later date. Father said he should keep the deeds as security." (Emphasis supplied)

The nature of the transaction in the instant case

As the authorities have clearly stated, the starting point in this case is the presumption that Mr. Scott intended a gift to his daughter; that she would be the joint beneficial owner along with him. The onus is on him to rebut the presumption.

Although the evidence is sparse, both parties agree that Mr. Scott's declared intention before completing the purchase was that he wanted to avoid the property forming part of his estate when he died. His intention at the time, it seems, was to minimize inconvenience and expense **after his death**. In addition, the property has been his matrimonial home. He has not stated the period of time for which he has lived there but the property was transferred to him in 1994 and he says that he has been married to his present wife for 16 years. Mrs. Scott-Robinson has not indicated that she has had anything to do with the property.

Based on these factors and relying on the decisions in *Lavelle v Lavelle and Others*, and *Warren v Gurney and Another,* I find that Mr. Scott has rebutted the presumption of advancement. The intention, in my view, accepted by both sides at the time, was that Mrs. Scott-Robinson's interest would only mature on Mr. Scott's death.

It is of less significance, that Mr. Scott, as I am prepared to infer, has had possession of the duplicate certificate of title. I make the inference based on the fact that in the correspondence passing between Mr. Scott's attorneys-at-law and Mrs. Scott-Robinson, she was only asked to sign and return an instrument of transfer. No request

was made for her to send the title. I find, however, that even without this element, the presumption has been rebutted. There is a resulting trust in favour of Mr. Scott.

It would also seem that Mr. Scott's use of the property to the exclusion of Mrs. Scott-Robinson may well allow for him to also claim sole legal ownership by way of a possessory title. This would be by way of applying the principles set out in *Wills v Wills* PCA 50/2002 (delivered 1/12/2003). That, however, is an aside.

Mr. Scott has stated that his motivation for having Mrs. Scott-Robinson's name removed from the title. He said that he wishes for his wife to be secure in the property after his death. The authorities stipulate that where the property is purchased as a gift to another, the purchaser is not entitled to change his mind at a later date. See *Shephard v Cartwright* mentioned above.

The purported act of severance

I should also address the fact that when Mrs. Scott-Robinson baulked at her father's request and her solicitors communicated her refusal in strident tones, Mr. Scott's attorneys-at-law's response, included the following:

> "For the avoidance of doubt kindly treat this letter as our client's unequivocal indication that he no longer wishes to hold this property with your client as Joint Tenants. The Joint Tenancy is hereby severed..."

Although not falling squarely within any of the three categories specified by *William v Hensman* (1861) 1 John. and Hem. 546, this portion of the letter may well be deemed severance according to the dictum of Havers, J. in *Hawksley v May* [1956] 1 Q.B. 304. Havers, J. held then that a unilateral letter by one of the joint tenants, "was a sufficient act...to constitute an act of severance of the joint tenancy".

Counsel for Mrs. Scott-Robinson submitted that "when a joint tenancy is severed, tenancy in common in equal shares operates". With respect, however, that does not go

far enough. It is the beneficial interest which is the subject of this contest. I find that the letter although severing the legal interest does not affect the beneficial interest, especially in the context that the severance was effected. The letter does not acknowledge any beneficial interest in Mrs. Scott-Robinson; it is clearly sent, solely to avoid her taking the whole interest, in the event of his death.

Conclusion

By his contemporaneous declaration that his reason for placing Mrs. Scott-Robinson's name on the title was to avoid the formalities of having his will probated, his keeping the title deeds and his occupation of the property as his matrimonial home, Mr. Scott has displaced the presumption of advancement. He has shown that he did not intend for the beneficial interest to pass to his daughter during his lifetime. He is therefore entitled to a declaration that she holds her interest on trust for him.

The order of the court, therefore, is:

1. It is declared that the Applicant Mr. Granville Scott is solely entitled to the beneficial interest in all that parcel of land, with buildings thereon, known as 16 Mickleton Drive, Linstead, in the parish of Saint Catherine, being the land comprised in Certificate of Title registered at Volume 1050 Folio 431 of the Register Book of Titles (hereafter called 'the property');

2. It is declared that the Respondent Mrs. Yvonne Adocia Scott-Robinson holds the property on trust for the benefit of the Applicant;

3. The Respondent shall execute an instrument of Transfer and such other documents as may be required to transfer the entire estate in the property to the Applicant and/or the Applicant's nominee;

4. The Registrar of this court shall be and is hereby authorised to sign any and all documents required to give effect to this order, should the Respondent fail or refuse to do so within ten days of being required in writing so to do;

5. Liberty to apply

6. Costs to the Applicant, to be taxed if not agreed.