IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E 205/1996

BETWEEN	CATHERINE VICTORIA SIMMONS	PLAINTIFF
AND	MADGE OLIVENE WRIGHT Executor Estate GWENDOLYN MIRANDA SIMMONS	1ST DEFENDANT
AND	CONRAD MARTINEC	2ND DEFENDANT
AND	CATHERINE VERONICA MARTINEC	3RD DEFENDANT

Ms. Janet Nosworthy for the Plaintiff.

Mr. Samuel Harrison for the Defendants.

Heard on 12th, 13th, 14th, 15th, 16th, February 2001, 5th, 6th, 7th, 8th March 2001 and 27th May, 2002

Campbell J.

The Plaintiff is 96 years old and blind. She is the mother of the deceased and the First Defendant. She is the mother-in-law of the Second Defendant and the grandmother of the Third Defendant. The Plaintiff's family was once a harmonious

and loving unit however it was quite clear as the evidence unfolded that the family had polarised behind the parties in this matter.

The issue that has torn this family asunder concerns the ownership of a dwelling house. It culminated in an action commenced by Writ of Summons and Endorsement filed on the 8th of July 1996 in which the Plaintiff claims as party entitled to the legal and beneficial interest in the land known as 22 Cairncurran Avenue in the parish of St. Andrew, against the first Defendant as Executor of the estate of the deceased and the Second and Third Defendants, the beneficiaries and devisees under the deceased Will. The Plaintiff seeks a Declaration that she is the true legal owner of the said property and consequential Orders incidental to such transfer and an Injunction restraining the Defendants from including the land in any of property of which the Deceased was seized and from proving the deceased Will dated 2nd July 1993 and taking steps to apply for a grant of letters of administration in respect of the said Estate of the Deceased.

The Plaintiff's Statement of Claim alleges inter alia:

> 8. That by Agreement with the Plaintiff and the said Vendor, a Vendor's Mortgage in the sum of $1,383.15 was available to the Plaintiff in her capacity as purchaser in respect of the purchase price, being Mortgage No. 168775 endorsed on Certificate of Title for the said land to Century Mortgage Company Limited, a limited liability company, to secure the said sum of One Thousand, Three Hundred and Eighty-three Pounds Fifteen Shillings (£1,383,15s) with interest which said mortgage was transferred to the Insurance Company of Jamaica on

the 30th September 1963 and was by transfer No. 203451 dated 22nd day of February and registered on the 16th day of March 1965 transferred to Rema Construction Limited, the Vendors of the said land.

9. That on application for the said mortgage, the Mortgagee by and through an officer of its company informed the Plaintiff that by reason of her age and lack of employment outside of the house she should place the name of one of her children on the said application form for the said mortgage in order to secure the said mortgage loan and that she was further instructed that title for the said land should be issued in the name of the said child. That at all material times the mortgagee well knew that the Plaintiff was the sole contributor to the said purchase moneys. That she was further informed that both in law and in fact she would still be regarded as the true owner of the said land.

10. That the Plaintiff duly informed the deceased of the foregoing requirement and that it was agreed between the Plaintiff and the Deceased that the Deceased name should be substituted for the Plaintiff's in application for the said mortgage and that title for the said loan should be issued in the name of the Deceased and transfer registered in her favour but she should not thereby become bestowed with legal and beneficial interest in and in fact the same would remain vested in the Plaintiff as the true legal owner and it was further agreed after payment and discharge of the said mortgage the Deceased before her said demise would make and execute transfer and register Title in favour of the Plaintiff of otherwise execute a last Will and Testament giving and devising the said land to the Plaintiff absolutely to the exclusion of any other person or body, in order to facilitate registration of Title in the name of the Plaintiff.

11. That during the lifetime of the deceased, notwithstanding settlement and discharge of the said mortgage, she failed/refused/neglected to make and execute any transfer or to register Title in favour of the Plaintiff or to otherwise transfer the said land to the Plaintiff.

The Defendants filed on the 17th May 1999 a Defence in which it is contended inter alia;

3. Paragraphs 5 to 13 inclusive of the Statement of Claim are denied. The Defendants shall say further that all the estate and interest in the said land was the deceased's. Further, the deceased obtained a mortgage for the said land and paid the mortgage payments therefor.

4. Further and/or alternatively, the Plaintiff's cause of action did not accrue within twelve years from the commencement of this action and is statute barred.

5. Further and/or alternatively, the Plaintiff is barred by her own laches and acquiescences from maintaining any claim to the said land.

The Plaintiff had worked as a postmistress after leaving school to the time of her marriage in 1926, at age 21. She was never employed after that date. After her marriage she lived at several addresses in Kingston with her husband, who she describes as being "a bus owner, he had several buses". The Plaintiff testified that she and her husband stopped living together in 1970, and that he died in 1975. However, she states that at the time that the house was purchased in 1962, she thought he was then in Panama. The Plaintiff and her husband had six children, one of whom, Clarence, was killed in the Kendal Rail Disaster in "1956 or 1957". The Second Defendant, Gwendolyn, the deceased, who died in July 1993, was the Plaintiff's second child. There was one adopted child.

The family aptly demonstrates the migratory trends of the twentieth century Jamaican family. Of the surviving children, the eldest, Edith Senior resides in the United States. Lola Birthwright lives in Canada. Benjamin Simmons resides in England. Madge Wright resides in Connecticut, in the United States. The last child, Lidgett, being the only child of the Plaintiff who has remained in Jamaica. Of her children, Lola and Gwendolyn were both nurses. Benjamin was a mechanical engineer, and Edith a seamstress.

The Plaintiff was supported largely on the remittances from abroad of her children and brother. More directly in respect of the purchase of 22 Cairncurran she testified that she had received Seventeen Pounds (£17) from the insurance company and Four Pounds (£4) from "visiting sympathetic friends" in respect of her son Clarence who had died in the rail crash at Kendal. She testified that she had owned lands at Balcrest. Additionally, both her parents had owned lands in St. James. She said she obtained some measure of monetary support from her parents after her marriage. Her mother died in 1945 and her father in 1950.

The Plaintiff testified that "in the early part of the 1960's I looked at the lands.....the place was then called Rhema Estate." She said the land was being sold, "and after the death, I would buy piece in memory of my son". Of her initial encounter with the representatives of the land developer, she testifies, "there was a

woman there who was instructing what to do. I was not working, they don't sell the land to people who are not working.....so I went to my daughters and tell them about it". It appears that, with the exception of the deceased, her daughters were at the time still living in Jamaica. In her examination-in-chief, the Plaintiff states that, "after the lady spoke to me and I wrote to Gwendolyn, she had just left Annotto Bay and gone to England to do midwifery".

There was no evidence before the Court to suggest that the idea, for the acquisition of the property was derived from any source other than the Plaintiff. Neither is there raised any challenge to the Plaintiff's testimony that she was driven to acquire the property to preserve the memory of her son, Clarence.

Counsel for the Defendants opening salvos during cross-examination were aimed at undermining the Plaintiff's testimony as to her means to acquire the property. She had testified in chief that she had paid a deposit of £150 on the property. Of that sum she said "I paid a deposit of £150 from the monies I had at home."

She testified that she maintained a bank account "with the Bank of Nova Scotia. It was a savings account." Cross examined about her testimony, as to whether she had given the Second Defendant (son-in-law) $3,000.00 to purchase a motorcar, the Plaintiff said, "I gave Catherine (granddaughter) $2,000.00 to

purchase a car. I did not give Mr. Martinec money to buy a car. I gave him money to buy a burial plot beside his wife." She said later that, "it was two different cars. The money to Mr. Martinec was before Catherine money to buy the car."

This bit of evidence is of importance in determining the issue of means of the Plaintiff. It is clear from the evidence that on the Defence case she was of sufficient means to provide her granddaughter with a trip to Greece, a motorcar and other gifts to the deceased's household. The Third Defendant testified that she knew of her grandmother's savings account at a branch of the Bank of Nova Scotia on Young Street, Ontario, Canada. There was no suggestion that the First Defendant had contributed to the purchase price of 22 Cairncurran Avenue. Mr. Harrison submitted that the highest the Plaintiff's claim goes is that she paid the deposit and some of the mortgage payments.

In respect to the mortgage payments, it was suggested to the Plaintiff "that the money to make the monthly payment was given to you by Gwenie (the deceased)." The Plaintiff response was, "not Gwenie alone give me money.....Gwenie gave me some of the money for the monthly mortgage payments when she could afford it."

One of the issues for determination is whether there was an agreement between the Plaintiff and the deceased as to each parties' entitlement to the legal and beneficial interest in the property.

The Defense has submitted that there is no evidence to support the Plaintiff's contention that there was an agreement between the parties that there should be a resulting trust to the Plaintiff. The Defense contended that the effect of S. 68 and S. 70 of the Registration of the Title was to render the Certificate of Title Act conclusive evidence of ownership and indefeasible as against the deceased, except in the case of fraud. To defeat the Title on the basis of fraud, actual fraud must be shown, i.e., conduct that involves moral turpitude. Mr. Harrison argued that there was no such evidence to support fraud on the part of the deceased.

It was further submitted on behalf of the Defendants that where there was an attempt to impute Agreement to a deceased person, the Court should view such evidence with great suspicion. He relied on ***Gosine v Huggins*** (1969), 15 W.I.R. 158 where at page 161 Des. Iles, J. delivered himself thus;

> "Another point was taken. It was said that this release cannot be questioned because the person to whom it was given is dead and also that it be questioned unless those who object and state certain facts are corroborated, and it is said that there was a doctrine of the Court of Chancery. I do not assent to this argument. There is no such law. Are we to be told that a person whom everybody on earth would believe, who is produced as a witness before the

> Judge, who gives his evidence in such a way that anybody would be perfectly senseless who did not believe him, whose evidence the Judge, in fact, believes to be absolutely true, is according to a doctrine of the Court of Equity, not to be believed by the Judge because he is not corroborated? The proposition seems unreasonable the moment it is stated. There is no such law. The law is when an attempt is made to charge a dead person in a matter in which, if he were alive, he might have answered the charge. The evidence ought to be looked at with great care. The evidence ought to be thoroughly shifted and the mind of any Judge who hears it ought to be first of all in a state of suspicion; but if in the end the truthfulness of the witness is made perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, the suggested doctrine becomes absurd. And what is ridiculous and absurd never is to my mind to be adopted either in Law or in Equity."

I therefore approach the evidence to discern if there is support for the resulting trust claimed against the deceased estate with the jealous suspicion and the great care that is required. I have already indicated that the Plaintiff was 96 years old and blind, when she gave her evidence. She had testified that she had loved "the deceased as all her other children" dearly and had been with the deceased at the period leading up to her death. She had testified as to the nature of the conversations she had with the deceased. The Third Defendant had testified that her grandmother was her closest friend and knew her much better than her parents. There were inconsistencies and contradictions in the Plaintiff's evidence.

There are two main reasons for these; the length of time that had elapsed since the events took place and the witness' age. Nonetheless, she was subjected to intensive cross-examination.

At the time of the acquisition of the property the deceased was then living in England. The deposit on the property was paid solely by the Plaintiff. This begs the question, why would the Plaintiff make this outlay on behalf of the deceased to the exclusion of her other children? Why were the changes made to the property done without reference to the deceased if it was that she was beneficially entitled to the property? There is independent support for the Plaintiff's testimony that a Mrs. Munro at the sales office had advised her to put one of her children's names on the Title. There is no evidence that the purchase was at the behest of the deceased. In 1962, when the property was purchased, the Plaintiff was resident in Jamaica. She moved into the house in December 1962 and remained there for about eight years, leaving for Canada in 1970, the same year the Third Defendant was born. From the time the property was acquired up to the time of her death, the deceased never returned to reside in Jamaica. She never derived any income from the property. All the rental incomes went to the Plaintiff. If the acquisition was by the deceased, I consider it strange that the deceased and the Third Defendant were prepared to be paying a mortgage for a house from which they derived no benefit

or income, whilst they occupied rented accommodations. Stranger yet was that the deceased and Second Defendant were prepared to be paying mortgage in Jamaica, whilst it became necessary for the Plaintiff to purchase or make deposit on cars for one of or both the Second and Third Defendants. Against this backdrop provided by the examination of the evidence, it is necessary to determine if there was a resulting trust in favour of the Plaintiff.

In equity and the Law of Trusts by Phillip H. Petit – Second Edition at page 93. The learned authors state;

> "Whenever a man buys either real or personal property and has it conveyed or registered or otherwise put in the name of another, or of himself and another jointly, it is presumed that other holds the property on trust for the person who has paid the purchase money. The classic statement of the law is to be found in the Judgement of Eyre C.B. in ***Dyer v Dyer*** (1788) 2 Cox Eq. Cas. 92;
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> > 'The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold copyhold, or leasehold; whether taken in one name or several; whether jointly or successive results to the man who advances the purchase money.'"

The Defendants seek to rebut the presumption of a resulting trust to the Plaintiff, by relying on the fact that the receipt of deposits and mortgage payments were in the name of the deceased. That follows of necessity because the

deceased's name was on the Title. For that same reason the communication from the mortgage company went to the deceased when the mortgage was discharged.

The presumption that the deceased holds the property on a resulting trust for the Plaintiff is a rebuttable presumption that itself, may be displaced by evidence to support a presumption of an advancement from the Plaintiff to the deceased or that the parties intended that the deceased should be seized wholly of the legal and beneficial interest in the property.

In ***Nelson v Nelson*** (1995) 4 LRC453 at p 491, Dawson J. said:

> "The mother in this case must, therefore rebut the presumption of advancement to establish a beneficial entitlement to the proceeds of sale of the house. That is to say, in order for there to be a resulting trust in her favour, she must rebut the presumption of advancement, which is really an exception to the basic presumption that a resulting trust occurs where the legal title to property is vested in a person other than the person who provided the purchase price...."

The presumption of advancement may arise where there is a special relationship, that places a moral obligation on one person to make provision for the other. However, in ***Nola Gowe v Fay Lurch*** (1987), 24 JLR. 508 where the parties before the Court of Appeal were a mother and her daughter, Carberry JA remarked:

> "The other comment that I would make is to observe that the doctrines of resulting trust and presumption of

> advancement all raise presumptions that may be rebutted, and are most useful in a situation in which one or other of the parties have died and the court is faced with the problem of dealing with the situation left behind. In this situation however, both parties here were alive and able to give evidence, for what it was worth, of what they intended in the transactions that took place between them. In any event, **as between mother and daughter no presumption of advancement arises**, and it is useful to refer to the remarks of Jessel M.R. in ***Bennett v Bennett*** (1879) 10 Chd 474. (Emphasis mine)

The remarks to which Carberry JA. referred are noted as follows:

> 'But in our law there is no moral legal obligation – I do not know how to express it more shortly – not according to the rules of equity - on a mother to provide for her child: there is no such obligation as a Court of Equity recognises as such.'"

The social realities in Jamaica are that a substantial percentage of all households are headed by women. The Maintenance Act, S. 3, obliges a woman to maintain her children in the event the father fails to perform his obligation for so long as such children by reasons of tender years or bodily or mental infirmity are unable to maintain themselves. This may make more relevant the approach adopted by the High Court of Australia, as demonstrated by the remarks of Dawson J. in ***Nelson v Nelson*** (Supra).

> "In my view, whether the basis for the presumption is a moral obligation to provide for a child or the reflection of

> actual probabilities, there is no longer any justification for maintaining the distinction between a father and a mother. In the United States the presumption of advancement applies alike to a mother as a father (see Scott on Trusts (4th edn. 1989) vol. 5 pp181-182) and that should now be the situation in this country."

The evidence that is admissible in determining whether the presumption of advancement arises, is constituted by the contemporaneous words or actions of the parties at the time of the acquisition of the property, subsequent declarations are only admissible against the maker. In ***Shephard v Cartwright*** (1955) A.C. 431, Viscount Simmonds said;

> "It must then be asked by what evidence can the presumption be rebutted, and it I think be very unfortunate if any doubt were cast (as I think it has been by certain passages in the judgments under review) upon the well-settled law on this subject. It is I think correctly stated in substantially the same terms in every textbook that I have consulted and supported by authority extending over a long period of time .I will take as an example, a passage from Snell's Equity, 24th edn. p. 153, which is as follows: 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 in evidence only against the party who made them, and not in his favour."

The words of the Plaintiff, that she wanted to purchase the property in memory of Clarence is admissible for the Plaintiff, as a declaration made by her

before the acquisition of the property. Similarly, the actions of the Plaintiff, in making the deposit, and consulting with Edith, as to which of her children's name she should use to address the concerns of Mrs. Munro, is admissible in favour of the Plaintiff and is an important indicator that she purchased the property for herself. I find that the evidence adduced by the plaintiff establishes a resulting trust in her favour. The presumption of advancement was well rebutted by the evidence adduced to demonstrate that the mother had no moral obligation to support her daughter, who was an adult, a trained nurse, whilst the mother was unemployed. The monies that the Plaintiff acknowledged she received from the deceased were not directly referable to the acquisition of the property. The Plaintiff had testified that all her children sent her monies. Would all of the Plaintiff's children, by remitting monies to their mother regularly have acquired an interest in 22 Cairncurran Avenue? I think not. Many Jamaicans still consider it their duty to participate in the maintenance of a parent, particularly where that parent is unemployed. The Maintenance Act, S. 4, obliges every person to maintain a mother who is unable to maintain herself. The deceased's gifts to her mother on the evidence were not given for any specific purpose but for her mother's general use and benefit. Of the uses the Plaintiff put her income to were to buy gifts for her relatives, e.g. motorcar for the Third Defendant and the Second Defendant and

contributions towards the deceased's household needs. In ***Cupid v Thomas*** (1985) 182 Bishop, J.A. quoted with approval, the dictum of Fox, C.J. in ***Burns v*** **Burns** (1984) 1 ALL E.R 244, stating what was needed to be proven so as to constitute a contribution towards the acquisition of property said at page 195;

> "What is needed, I think, is evidence of a payment or payments by the plaintiff, which it can be inferred was referable to the acquisition of the house...a payment could be said to be referable to the acquisition of the house, if for example, the payer either (a) pays part of the purchase price, or (b) contributes regularly to the mortgage installments, or (c) or pays off the mortgage, or (d) makes a substantial financial contribution to the family expenses so as to enable the mortgage installments to be paid. But if a payment cannot be said to be, in a real sense, referable to the acquisition of the house it is difficult to see how, in such a case as the present, it can base a claim for an interest in the house."

I hold that the monies sent by the deceased was for the Plaintiff's general use and benefit, and therefore not referable to the acquisition of the property.

On behalf of the Defendants it was urged that the Plaintiff has countenanced a long delay, and that such a delay defeats equities. That the period prescribed by the Limitation Act has expired. That the Plaintiff should have exercised her claim from 1982.

Ms. Nosworthy submitted that time does not run against the Plaintiff who is in possession and occupation. There was nothing done by the Plaintiff that would

lead the Defendant to believe that she was waiving her rights in respect of her claim to the property. She submitted that the Plaintiff did not find out the true situation until the death of her daughter. In ***Rosaline v Singh***, (1974) 22 W.I.R 104, in dealing with the question of laches, the Guyana Court of Appeal, per Cummings, J.A;

> "It is clear that these authorities in effect determine that the circumstances in each case must be carefully analysed; mere delay by itself cannot justify the invocation of the doctrine of laches. There must be some form of acquiescence, some acquiescence which misleads the person who seeks to invoke the doctrine."

I therefore ask myself, how were the Defendants misled? It could not have been by the Plaintiff's actions of renting the premises through the agency of her daughter, Edith, or ejecting those tenants. The Defendants could not also have been misled, by the payments of the land taxes on the Plaintiff's behalf. The Defendants ought not to have been misled by the Plaintiff's effecting repairs generally and specifically after Gilbert, without reference to the Defendants. The Plaintiff's acts of insuring the property and planning extensions to the property, some of which were never effected are unequivocal acts demonstrating control and proprietorship over the property. These acts are inconsistent with acquiescence on the part of the Plaintiff.

I find that the Plaintiff was in possession of the property. Rent collected for the property were being paid into the Plaintiff's bank account. She maintained a room in the house in which her belongings were kept. The deceased did not adduce any evidence upon which a Court could find she was ever in possession. In claims under the Limitation Act time is deemed to run from the date of adverse possession. In Modern Law of Real Property, Tenth Edn. P. 809, the learned authors cautions;

> "Before dealing with these different cases, however, it is necessary to notice an overriding provision of the greatest importance. This is that time does not begin to run from the specified dates unless there is some person in adverse possession of the land. It does not run merely because the land is vacant. There must be both absence of possession by the Plaintiff and actual possession by the Defendant."

The Plaintiff is declared the true legal owner and proprietor and is entitled to all

1. the legal and beneficial interest in the lands and to be registered as proprietor thereof under the Registration of Titles Act.

2. The First Defendant is ordered to execute Transfer under the Registration of Titles Act and to endorse and register the said transfer in favour of the Plaintiff against Certificate of Title for the said parcel of land registered at Vol. 984, Folio 535 aforesaid.

3. That the Plaintiff pays the costs, duties, fees and charges incident to such transfer.

4. An injunction to prevent the Defendant from taking steps to execute and or register any transfer on transmission in favour of the Second and or Third Defendant and or any person or body other than the Plaintiff.

5. An Order for the delivery to the Plaintiff of an account of all outstanding rentals due to the Plaintiff collected by the First Defendant or for on her behalf.

6. Costs to the Plaintiff to be agreed or taxed.