IN THE COURT OF APPEAL

STATE OF ST. CHRISTOPHER NEVIS ANGUILLA

CIVIL APPEAL NO. 3 OF 1978

BETWEEN:

SHELLEY ROSS	Defendant/Appellant
and	
THE ROYAL BANK TRUST COMPANY (BARBADOS) LIMITED	Plaintiff/Respondent
and	
JACQUES ROSS	Defendant/Respondent

Before: The Hon. Sir Maurice Davis, Q.C. - Chief Justice
The Honourable Mr. Justice Peterkin
The Honourable Mr. Justice Berridge (Acting)

Appearances: T. Hobson for Appellant,
N. Butler with him.

C. Wilkin for Respondent No.(1)
D. Byran for Respondent No.(2)

1979; March 27 and 29

J U D G M E N T

PETERKIN, J.A.:

This is an appeal against the judgment of Hewlett, J dated 24th July, 1978. The matter was commenced by Originating Summons dated 4th March, 1977, taken out by the 1st named Respondent. It sought the determination of the Court on whether the proceeds of a fixed deposit of $31,008.67 made by Esbon Anthony Ross, deceased, at the Antigua Branch of the Royal Bank of Canada on the 6th day of March, 1972, formed part of the estate of the said Esbon Anthony Ross deceased, or whether they are the property of the Appellant Shelley Ross. The trial Judge concluded that there was neither a

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gift nor a valid declaration of trust in favour of the Infant Shelley Ross.

The facts as set out by affidavit evidence disclose that after the grant of probate, the 1st named Respondent took possession of the contents of a safe deposit box at the Basseterre Branch of the Royal Bank of Canada in which was found an envelope with the name of the Appellant written thereon and marked "personal" and which contained a deposit receipt dated 6th March, 1972, issued by the Royal Bank of Canada in Antigua in the sum of $31,008.67. The 1st named Respondent collected the proceeds of the deposit after it matured on the 7th March, 1973. The deceased was survived by seven lawful children of a former marriage and by his spouse of the second marriage, and three lawful children of whom the Appellant is the youngest. The 2nd named Respondent is a son of the first marriage. The deceased's estate which was valued at $246,583.42 did not include the amount on deposit in Antigua as at the material time the executors had contemplated paying over the amount to the Infant Appellant. In his affidavit sworn to on 7th March, 1977, Roger Simms, a former Accountant of the Royal Bank of Canada, Basseterre, states at paragraphs 4, 5 and 6 at page 6 of the record,

> "4. In or about the year 1972 the said Esbon Anthony Ross visited the Bank and inquired in my presence as to how he could put Term Deposits into the name of his daughter Shelley Ross without her having to pay tax on the interest which accrued on the said deposit. He was advised that he would have to make the deposit in his name so that he would receive the interest and pay income tax on it.
>
> 5. During the said discussion the said Esbon Anthony Ross expressed the desire to make a specific allocation to the said Shelley Ross but he did not mention the amount of the allocation.
>
> 6. I do not know whether or not he made the allocation of which he spoke."

The Appellant in paragraphs 3, 4 and 5 of her affidavit sworn to on 19th July, 1978, stated,

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"3. I accompanied my late father Esbon Ross early in 1972 to the Royal Bank of Canada in the town of Basseterre where he spoke to a bank official about the procedures for putting money in a Term Deposit in my name and the question of tax obligation, but I cannot remember what advice he was given.

4. On or about the 21st day of August, 1972 my said father (who was then suffering from Thrombosis) and I were driving alone in his car and he confided in me that he was going to die pretty soon. I said to him that he should not say such things, but he replied that I would be alright because inter alia there is a large amount on Fixed Deposit in the Royal Bank of Canada in Antigua and "it is all yours".

5. On a number of occasions I was advised by the Trustees of my father's said Estate that the money in the said account in Antigua was mine and specifically in a letter addressed to my mother Inez Ross dated the 5th day of October, 1972, by the Royal Bank Trust Company Limited."

There is little doubt that on the facts as disclosed the deceased Esbon Anthony Ross intended to benefit his daughter Shelley Ross. The question which falls to be considered is whether the method by which he purported to benefit the Appellant is sufficient in law to transfer the benefit.

It has been submitted on behalf of the Appellant that the facts constituted a valid trust. Counsel referred the Court to Equity and The Law of Trusts by P.H. Pettit, and argued that apart from statute, there are no requirements as to writing or other formalities in connection with the creation of trusts or dealings with equitable interests, whether inter vivos or testamentary, and whether relating to real or personal property. He referred to the evidence, and asked the Court to draw the necessary inference in the instant case. Counsel also referred the Court to the following cases:-

(1) Milory v Lord, 1861-73 A.E. Reprint, 783

(ii) Jones v Lock, 1865 1 Ch. App. 25

(iii) Rose, Re Rose, v. Inland Revenue Commissioners 1952, 1 A.E.R. 1217.

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In dealing with this issue, the trial judge has stated at page four of his judgment,

> "The law then is clear that an imperfect gift will not be construed as a declaration of trust because equity will not interfere to perfect an imperfect gift, and for the donor to be the trustee he must have expressly declared himself to be such, or done something or used expressions which are equivalent to it. The facts in this instant matter certainly do not point to that conclusion unequivocally".

I would agree. As Professor Pettit has put it in his treatise Equity and The Law of Trusts, at page 61,

> "There is a vital distinction between an intention to transfer property and an intention to retain it albeit in an altered capacity as trustee. An intention to do the former, even though the execution is ineffective cannot be construed as the latter quite different intention."

In the case of Autrobus v Smith 1803 to 1813 A.E. Reprint 531, cited by Counsel for the 1st named Respondent, it was held that the Court will not assist in completing an incomplete gift by holding that the alleged donor is a trustee for the alleged donee unless it is clearly established that the donor intended to make himself a trustee. In my view, in the instant case the evidence does not permit the Court to draw any such inference.

Since Equity will not assist a volunteer to perfect on incomplete gift, the only question left to be considered is whether it can be effective as a gift mortis causa. In order for a donatio mortis causa to be effective, there are three conditions which must be complied with. Firstly, a clear intention to give; secondly, the gift must be made in contemplation of death; and thirdly, the donor must part with dominion over the subject matter of the donatio. While the first two conditions are easily satisfied in the instant case, the third in my view falls far short of complying with the necessary prerequisites. Parting with the dominion means, primarily, physical delivery of the subject matter of the donatio with intent to part with the dominion and not merely, for instance, with intent

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to ensure its safe custody, and failure to part with the dominion inevitably means failure of the donatio mortis causa. So long as the gift is incomplete for want of delivery the donor has a locus poenitentiae and may revoke the gift at any time.

For the reasons given I would reluctantly conclude that there was neither a gift nor a valid declaration of trust in favour of the Appellant. Accordingly, I would dismiss the appeal, and order that the costs of all parties be paid out of the estate.

It is to be noted that the 2nd named Respondent has, through his counsel, expressed a wish that the intention of the deceased to benefit the Appellant should be respected. In the circumstances, I would hope that it is not too late for the interested parties to get together with a view to arriving at a settlement to the satisfaction of all concerned.

(N. A. Peterkin)
JUSTICE OF APPEAL

I agree.

(N. A. Berridge)
JUSTICE OF APPEAL (AG.)

I also agree.

(Sir Maurice Davis)
CHIEF JUSTICE