

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV2002/0296

BETWEEN:

MARIE ROSE EMILIA MARTYR also known as
MARIE ROSEMELIA MARTYR also known as MA DUJON

Claimant

and

THERESA JULES also known as THERESA POLIDORE qua Administratrix of the
Estate of the late FRANCOISE OPHELIA ANNE JOSEPH also known as OPHELIA
JOSEPH also known as FRANCOISE OPHELIA JULES also known as FRANCOISE
OPHELIA ANNE JULES also known as MA NORMAN as appears by L.A. 151 of 2001

Defendant

Appearances:

Ms. Estelle George for the Claimant.

Mrs. Kimberley Roheman for the Defendant

2003: September 30, October 02
November 24

CONSTRUCTIVE TRUST/ PROPRIETARY ESTOPPEL... ARTICLES 12 AND 14 OF CIVIL
CODE (AMENDMENT) ACT NO. 4 OF 1988...WHETHER WORDS AND ACTIONS OF
DECEASED COULD GROUND COMMON INTENTION...DID CLAIMANT ACT TO HER
DETRIMENT...IRREVOCABLE PROMISE...JUSTICE AND GOOD CONSCIENCE

JUDGMENT

1. **HARIPRASHAD-CHARLES J:** The Claimant, Marie Rose Emilia Martyr's claim is based in equity under the principle of constructive trust. She seeks a declaration that the estate of the Deceased is held in trust for her. Mrs. Martyr also seeks an order that Ms. Jules transfers the title to the said properties to her including title to Parcel 1046B 140 with the house thereon or

alternatively, that she gets damages for works carried out on the Deceased's property in proportion to her contributions.

2. Mrs. Martyr bases her claim on the following arguments:
 - (i) That for 2 years and 10 months immediately preceding the death of the Deceased, at the request of the Deceased, she resided with the Deceased at her house.
 - (ii) That the Deceased promised her that if she resided and cared for her (the deceased) until her death that she would inherit all of her property.
 - (iii) That in consideration of the promise, she resided with and cared for the Deceased until her death without payment as the Deceased was unable to pay for her upkeep and.
 - (iv) That in consideration of the said promise, she planted crops worth \$6,260.00, repaired the Deceased's house at a cost of \$15,830.00 and spent \$800.00 per month for groceries, medical bills, medicine, hire of taxis and purchase of disposable diapers totaling \$27,200.00 to care for the Deceased.

3. The Defendant, Theresa Jules in her defence denied most of the allegations contained in Mrs. Martyr's claim. According to Ms. Jules, she visited the Deceased sometimes once a month or once every two or three months and was never informed by the Deceased that Mrs. Martyr resided with her nor did she ever meet Mrs. Martyr at the Deceased's home on her frequent visits. Ms. Jules next alleged that the Deceased had a prior stroke and suffered from bad and swollen feet so a nurse was employed and was paid \$100.00 per night to take care of her and someone cleaned and washed for the Deceased. Ms. Jules also alleged that the Deceased was financially able to pay for her own upkeep and that the matters contained in Mrs. Martyr's claim are unsubstantiated and untrue. She counterclaimed for vacant possession of the property as well as for mesne profits and damages.

Background Facts

4. Francoise Ophelia Anne Joseph (the Deceased) affectionately known as "Ma Norman" of Ti Rocher, Castries was a sorcerer or in local dialect, a "gardare" by occupation. She sold "bush medicine" and seemed to have had a thriving business earning a decent income. She was therefore a lady of some means and was able to upkeep herself financially. As the years slip by, Ma Norman's health began to fail. She became blind. She had cataract. She later suffered

more than one stroke. She could no longer prepare or sell "bush medicine". As a result of ill health, she had to pay various persons to care for her including Mrs. Betty Johnson.

5. On 25th October 1993, the Deceased made a Last Will and Testament leaving ALL of her property to Mrs. Johnson. Problems arose with her and Mrs. Johnson and on 21st February 1995, the Deceased revoked that Will. A few months before her death, the Deceased saw her Solicitors at least twice and gave them certain instructions. On 4th March 1996, she died intestate at the Victoria Hospital at the age of 83 years. She was buried two days later. Her death certificate revealed that the causes of death were recurrent stroke, aspiration, pneumonia and hypertension.
6. Mrs. Martyr is an elderly woman. She was encouraged by the Deceased to come and live and care for her and that if she does so she will inherit all of her property. Mrs. Martyr sold her house and came and lived with the Deceased in or about October 1994. She expended some of her own money in caring for the Deceased. She washed and cooked for her and it appeared that the Deceased was relatively comfortable. The Deceased died 17 months later. After the Deceased's death, Mrs. Martyr continued to live in her house. On 23rd April 1996, Ms. Jules, a lawful heir at law and the personal representative of the Deceased, through her Solicitor wrote a letter to Mrs. Martyr claiming immediate possession of the house failing which legal action would be taken against her. In the intervening period, Mrs. Martyr make an application under Section 6 of the Casual Revenue Appropriation Ordinance, Chapter 209 appealing to the Cabinet of Ministers to give special consideration to her application for a Declaration of Title in her favour to the Deceased's property (the subject matter of these proceedings) which escheats to the Crown under the Civil Code of St. Lucia. That application was not favourably considered. This was largely due to a letter written by Ms. Jules' solicitor on 20th October 1999.
7. Subsequently, Ms. Jules applied for and was granted Letters of Administration (LA 151 of 2000) on 16th August 2001. She claims that Mrs. Martyr is in unlawful possession of the property as a trespasser. She wants her out.

The Issues

8. The issues which arise for determination are:
 - (a) Whether Mrs. Martyr believed she would receive a beneficial interest in the property of the Deceased.
 - (b) Whether or not the Deceased made an irrevocable promise to Mrs. Martyr that she (Mrs. Martyr) would inherit her property.
 - (c) Whether or not if a promise were made the Deceased reserved the right to change her mind.
 - (d) Whether Mrs. Martyr acted to her detriment with regards to the estate of the Deceased.
 - (e) Whether or not Mrs. Martyr expended any monies on the Deceased, the Deceased's property or at all and
 - (f) Whether Mrs. Martyr is in unlawful occupation of the property as a trespasser.

The Evidence

9. Mrs. Martyr gave oral testimony and called five witnesses in support of her case. The first witness was Mr. Sylverius Joseph. His evidence was taken first because of ill health. In fact, he was hospitalized while the case was in progress and could not have been recalled. He deposed that he became acquainted with the Deceased in or about 1993. He had a garden near the Deceased's home. When he started to visit the Deceased, Mrs. Martyr was not residing there but shortly thereafter she began to do so. At paragraph 4 of his witness statement Mr. Joseph averred:

"One day Ma Norman (the Deceased) called me and said that she had no money, but that she got a good friend namely the Claimant to take care of her. Ma Norman told me that the Claimant was a godsend and that she wants the Claimant to have all her property when she dies."

10. Mr. Joseph also alleged that he assisted Mrs. Martyr by going to the store and purchasing goods for the Deceased. He next alleged that on many visits to the Deceased's home, he observed Mrs. Martyr caring for the Deceased by washing, cleaning and cooking for her and for about a year before the Deceased died, Mrs. Martyr had to fit her with diapers which he

sometimes went to purchase. Mr. Joseph said that Mrs. Martyr sold her house to take care of the Deceased and he was instrumental in getting a purchaser.

11. Under intense cross-examination, Mr. Joseph said that he did not know the Deceased to have relatives and that Mrs. Martyr went to live with the Deceased between 1993 to 1994.
12. The next witness to testify was Mr. Andrew King, a Quantity Surveyor. He was deemed an expert witness. His job entails carrying out valuations and estimates of properties on behalf of Banks. In or about March 2002, Mrs. Martyr hired him to value work carried out on the house of the Deceased. Mrs. Martyr and her husband showed Mr. King what they wanted him to value. At paragraph 4 of his witness statement, he stated that the house was an old house and he could visually see that additional work had been undertaken by way of extensions and repairs. He noticed some boards and windows had been changed. He carried out a valuation and provided a report (Exhibit MRM 15). He estimated the monthly rental of the premises to be \$500.00 per month.
13. The third witness called by Mrs. Martyr was Mrs. Claire Greene-Malaykhan, an Attorney-at-Law with the Firm of Messrs. Peter Foster & Associates. She deposed that on 9th August 1995, she and her colleague, Mr. Foster visited the Deceased at her home. The Deceased informed them that she was sick and complained that Mrs. Johnson had ill-treated her. The Deceased also informed them that Mrs. Martyr was caring for her and that in consideration, she (the Deceased) wanted Mrs. Martyr to inherit all her property movable and immovable after her death. Mrs. Malaykhan stated that the Deceased instructed them that once Mrs. Martyr took care of her until her death, all of her property must go to her (Mrs. Martyr) and the Deceased instructed them to prepare a Will which they never did because the Deceased was not ready to sign it due to her experience with Mrs. Johnson. Mrs. Malaykhan averred that to the best of her knowledge, Mrs. Martyr took care of the Deceased and she was not aware of any complaints by the Deceased against Mrs. Martyr. According to Mrs. Malaykhan:

“The Deceased always instructed us that whoever took care of her must be the one to inherit from her. That was the intention that she expressed to us from the day she executed the Will in favour of Betty Johnson. Once Betty Johnson stopped caring for her she revoked the Will. Once the Claimant started caring for her she expressed to us her

intention that the Claimant should inherit from her. Her only concern was that she wanted to ensure that she was cared for until her death.”

14. The next witness was Mr. Peter Foster, a distinguished Attorney-at-Law of 20 years standing at the local bar. He was the Solicitor of the Deceased from 1993 until her death and had met with the Deceased on divers occasions at his office and also at her home to discuss matters relating to her care and her Last Will and Testament. He corroborated to a large extent the evidence of his colleague, Mrs. Malaykhan wherein the Deceased expressed that Mrs. Martyr was caring for her and that in consideration for that she wanted Mrs. Martyr to inherit all her property movable and immovable after her death. Mr. Foster also stated that the Deceased instructed him to inform Mrs. Martyr that he would prepare the Will which he did. However, the Will was never signed because the Deceased was fearful that if she did so, there would be a repetition of her previous experience with Mrs. Johnson. Mr. Foster asserted that the Deceased clearly stated to him that Mrs. Martyr should get all of her property upon her death. Like Mrs. Malaykhan, he also stated that he got the impression that the Deceased had no relatives as she informed them that after her husband died she was left without a family. Mr. Foster was subject to intense cross-examination by Mrs. Roheman, Counsel for Ms. Jules.
15. The fifth witness to give evidence on behalf of Mrs. Martyr was Mr. Patrick George, a retired police officer who was deemed an expert in Crops Valuation. In so far as his report (page 2 of Exhibit MRM16) relates to crop valuation, the remainder of it was disregarded.
16. The final witness to take the stand was Mrs. Martyr herself. She had known the Deceased for well over 20 years having previously worked for her. She claimed that the Deceased invited her to come and live with her which she did. Mrs. Martyr said that she cared for the deceased. She cleaned, cooked and washed for her. Indeed, she attended to every need because the Deceased could not help herself as she was blind and suffered more than one stroke. Mrs. Martyr claimed that she was not paid and in fact, used her own funds totaling \$27,200.00 to provide for the penniless Deceased. She stated that the property in question was in a deplorable state when she went to live with the Deceased and she had to expend her personal funds to repair it. She even had to pay to reconnect the electricity, water and telephone services to the property. She did all of that in good faith because the Deceased promised her

that the property would be hers upon her death. Mrs. Martyr said that the Deceased always told her that she did not have any children or any relatives and that her husband was already dead. She said that she believed what the Deceased told her because she was aware that the Deceased had left a Will for Mrs. Johnson which she subsequently revoked. So, based on that, she cared for the Deceased up to her death and in addition, she paid all her funeral expenses with the expectation that she would become the owner of all her properties, movable and immovable.

17. After the death of the Deceased, Mrs. Martyr received a lawyer's letter on behalf of Ms. Jules who claimed to be the niece of the Deceased asking her to leave the property. Mrs. Martyr then sought legal advice and as a consequence, instituted these proceedings claiming a beneficial interest in the Deceased's properties.
18. Ms. Jules called three witnesses in support of her case. The first to be called was Mr. Oswald Wilkinson Larcher, another distinguished Attorney-at-Law of comparable standing to Mr. Foster. Mr. Larcher knew the Deceased very well. He acted as her Attorney from 1987 to May 1991 during which time she was unable to walk. They became very close and he assisted her in many ways. He withdrew funds on her behalf. He took doctors and deacons to visit her at her home. He arranged nurses for her. He arranged for someone to stay with her and he even cooked for her. He was also aware that the Deceased had a warm relationship with Mrs. Johnson.
19. Mr. Larcher stated that the Deceased had relatives who visited her but they were not the ones whom he employed to care for her. The Deceased complained to him of loneliness. Mr. Larcher however, ceased to be her Attorney in May 1991 and did not maintain the close contact they had previously enjoyed.
20. The second witness for Ms. Jules was Mr. Carlos Dusauzay who was deemed an expert in valuation. At the request of Ms. Jules, he proceeded to execute an inspection of and to submit a valuation of the Deceased's property on 16th October 1999. He valued the land at

\$19,267.50, the building at \$44,400.00 and the crops at \$2,415.00. Under cross-examination, it became evident that he did not enter the property to do the requisite inspection.

21. The next witness called to give evidence was Mrs. Betty Johnson. She is 79 years old and knew the Deceased well. She knew that the Deceased made and sold "bush" medicine for a living. Mrs. Johnson took the Deceased to live with her sometime in late 1992 or early 1993 and was caring for her. She knew that the Deceased had executed a Will in her favour in 1993. She is not aware that the Will was revoked. The Deceased left her home in October 1994. According to Mrs. Johnson:

"She was a little troublesome. She was too much for me. I couldn't take it. She wanted to go to her home. She was an independent woman. There were no problems between us. I never beat or ill-treated Ma Norman...When I go to America, I used to have Ma Dujon look after Ma Norman for a month...I asked Ma Dujon to do carpentry work on the house because the house was all broken up. Rats had eaten it up making big holes in the house...When I took Ma Norman to her home, I asked Ma Dujon if she could take care of Ma Norman and she said yes and then they moved to her house. That was about October 1994... I used to pay Ma Dujon. I paid her for two months. I paid her about \$500.00. I bought everything for Ma Norman for Christmas 1994 and never went back to their home. I did not want to go back because I wanted to get away from that trouble because it was costing me too much in money. It was like slavery job for me....Ma Norman had money. She was a lady of means. I gave her bankbook to her when I sent her to her home. To my knowledge, before Ma Dujon moved into the house, there was not much crop on the land."

22. Under cross-examination, Mrs. Johnson stated that when the deceased came to live with her, she was no longer making "bush" medicine. She also stated that the Deceased told her that she had no family. Mrs. Johnson admitted that taking care of Ma Norman was like slavery. In her own words, she said "it was a very hard job. She couldn't keep her urine. She used to use diapers. Servants did not have to do what Ma Dujon did for her."

23. The next to take the witness stand was Theresa Jules herself. She is now 63 years old, a mother as well as a grandmother. She stated that she is the niece of the Deceased and claimed to have resided with the Deceased from the ages of 5 to 17. She agreed that it was a very long time ago. Ms. Jules alleged that she continued to maintain a good relationship with the Deceased over the years but she was unable to sacrifice her own home and family to care for the Deceased. She also alleged that the Deceased had told her that she had employed a

nurse whom she paid \$100.00 per night to care for her and that on her frequent visits to her aunt, she never saw Mrs. Martyr. Ms. Jules became aware of her aunt's death in April 1996, approximately one month later. She attributed this to the fact that there was no death announcement. She expressed concerns at the mysterious way the Deceased was buried. After Ms. Jules realized that Mrs. Martyr was living in her aunt's home, she proceeded to her then solicitors who issued a Notice to Quit. However, Mrs. Martyr was adamant and refused to vacate the premises.

24. The final witness to give evidence in support of the case for the Defendant is Anna Polidor, a sister of Ms. Jules. She alleged that she maintained a good relationship with her aunt and went very often to wash, cook and clean for her. The last time she did so was two months prior to her aunt's death. Ms. Polidor stated that she was very surprised to learn of her aunt's death because her aunt was not bedridden. Apart from her aunt's deformed finger and the stroke, Ms. Polidor knew her aunt to be in fine shape.

Relevant Factual Findings

25. I had the opportunity of seeing and hearing all of the witnesses. Weighing the oral evidence given, I preferred that of the Claimant and her witnesses. Even though the Claimant at first exaggerated the number of months that she resided with the Deceased before her death (which she later retracted) and also, the compensation which she seeks as an alternative remedy, I think that her evidence as well as that of her witnesses is more straightforward and honest. I believed all of the Claimant's witnesses and in particular, the evidence of Mr. Sylverius Joseph, Mrs. Malaykhan and Mr. Foster. They were frank, unhesitating and composed in giving their evidence. Under oath, they categorically stated that the Deceased's intention was that all her property must go to the person who took care of her. Both Mr. Foster and Mrs. Malaykhan asserted that the Deceased always instructed them that whoever took care of her must be the one to inherit from her. I have no reason to doubt the veracity of their evidence.
26. I must however add, that I also accept the evidence given by Mr. Larcher and Mrs. Betty Johnson as honest and truthful. However, Mr. Larcher was unable to assist the Court with what

transpired post 1991 when he ceased to be the Deceased's Solicitor and thereafter, had very little, if any contact with the Deceased.

27. In my opinion, the most helpful bit of evidence came from the Defendant's witness, Mrs. Johnson. She appeared honest and frank in her evidence and I believed her. She stated that besides the strokes, the Deceased was also blind with cataract. Mrs. Johnson stated that the Deceased told her that she had no family and during the two years that the Deceased lived with her, no family visited her house.
28. Mrs. Johnson stated that the Deceased was a lady of means. However, she admitted that she spent a lot of her own money caring for the Deceased. She deposed as follows: "I did not go back because I wanted to get away from that trouble. It was costing me too much money."
29. A proper analysis of her Savings Activity Statement showed that the Deceased had \$31,698.35 as at October 1993. However, by the time Mrs. Martyr came to live with her, her savings had diminished considerably to about \$4,000.00. With the exception of approximately \$3,000.00 which was withdrawn during the week preceding and shortly after her demise, a total sum of \$1,200.00 was withdrawn during the seventeen months that Mrs. Martyr lived with the Deceased. Even though the Deceased were a woman of means, by the time, Mrs. Martyr took care of her, she was no longer so affluent. In that vein, it appeared that Mrs. Martyr had to expend her own funds to care for the Deceased.
30. In contrast to the evidence given by Mrs. Martyr and her witnesses, I am afraid that I could not regard Ms. Jules as a truthful witness. Her sister, Ms. Polidor was to my mind, even less credible than her. Ms. Polidor was extremely dogmatic in her manner and appeared to have one objective only: to do everything possible to show that she and her siblings had a great relationship with their deceased aunt. Indeed, their evidence contradicted in a material way the evidence of the Defence's own witness, Mrs. Johnson who stated that no family member visited the Deceased when she lived with her. I do not think that Ms. Jules or Ms. Polidor visited their deceased aunt as regularly as they portrayed. I do not believe Ms. Jules when she testified that her aunt told her that she was paying a nurse to take care of her. Judging from the

Deceased's savings, if she were paying \$100.00 a day, she would have been financially broke long before Mrs. Martyr even commenced taking care of her.

31. With respect of the evidence of Mr. Desauzay, the expert witness for the Defence, I have to disregard his evidence since he himself stated: "You must enter the house the make a valuation. If you do not enter, the valuation is not worthwhile." I have already found that he never entered the property to inspect as he had no keys to do so.
32. In light of the highly unsatisfactory evidence by Ms. Jules, her sister, Anna and Mr. Desauzay, I am afraid I am disinclined to accept anything put forward by them. As I indicated above, I accepted the evidence of Mrs. Johnson and Mr. Larcher except where it conflicts with the evidence of Mrs. Martyr and her witnesses.
33. But the matter does not end here as this case revolves basically around legal issues.

The Law

34. At the time of her death, the Deceased was a single woman within the meaning of Article 14 of the Civil Code (Amendment) Act No. 4 of 1988.
35. Article 12 of the said Amendment makes it clear that 'intestate successions pass to the heirs of the Deceased in the order established by law.' Ms. Jules, as an heir at law and the personal representative of the Deceased applied for and was granted Letters of Administration (LA 151 of 2000) on 16th August 2001.
36. The question with which this court is faced is whether the entitlement established by law can be displaced by the equitable doctrine of constructive trust/ proprietary estoppel.

Constructive Trust/ Proprietary Estoppel

37. At a high level of generality, there is much common ground between the doctrines of constructive trust and proprietary estoppel. They are both concerned with equity's intervention to provide relief against unconscionable conduct.

38. The basis upon which the claimant can establish that the defendant is holding a beneficial interest in a property is to be found in Article 916A (2) of the Civil Code. That provision applies the English Law of implied, constructive and resulting trusts to the laws of St. Lucia:¹ In that case, Peterkin J. went on to apply the law set out by Lord Denning MR in the case of *Cooke v Head*². These principles were explained in *Gissing v Gissing*.³ Lord Diplock's very well-known statement brings this out:

" A resulting, implied or constructive trust – and it is unnecessary for present purposes to distinguish between these three classes of 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."

39. Important observations were made by Browne-Wilkinson V-C in *Grant v Edwards*⁴ where he said:

"I suggest that, in other cases of this kind, useful guidance may in the future be obtained from the principles underlying the law of proprietary estoppel which in my judgment are closely akin to those laid down in *Gissing v Gissing*. In both, the claimant must to the knowledge of the legal owner have acted in the belief that the claimant has or will obtain an interest in the property. In both, the claimant must have acted to his or her detriment in reliance on such belief. In both, equity acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. The two principles have been developed separately without cross-fertilization between them; but they rest on the same foundation and have on all other matters reached the same conclusions."

40. Lord Bridge of Harwich puts it this way in *Lloyd's Bank PLC v Rosset*⁵

"The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time

¹ See: *John v Smith* (1973) High Court Suit No. 184 of 1970 (unreported).

² [1972] 2 All E.R.38

³ (1971) AC 886 at p. 905

⁴ (1986) Ch. 638 at p.656

⁵ (1990) 1 All ER 1111 at pp 1118-1119

prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppel."

Irrevocable Promise

41. Mrs. Roheman's arguments, although skillfully developed in different directions, were all based on the central submission of the Deceased reserving the right to change her mind and that her intention was not to make an irrevocable promise. She argued that it is clear in the contemporaneous statement recorded by the Solicitors of the Deceased that the offer of inheritance was conditional upon Mrs. Martyr caring for the Deceased and therefore it was not an irrevocable promise nor did it belie a common intention. Counsel relied heavily on the cases of *Taylor v Dickens*⁶ and *Gillett v Holt and another*⁷. In the former case, it was held that the plaintiff's claim based on proprietary estoppel failed because there was no equitable jurisdiction to hold a person to a promise simply because the court thought it unfair, unconscionable or morally objectionable for him to go back on it. Further, it was not sufficient for a person to believe that he was going to be given a right over another's property if he knew that the other person had reserved the right to change his mind; the first person must also show that the other had created or encouraged a belief on his part that the other would not exercise that right.
42. In the case of *Gillett v Holt*, it was held that the overriding principle of proprietary estoppel, in the context of an alleged promise to make a will, was that the testator should be held to his representation only if it would be unconscionable for him to go back on it. Thus, while a binding contract in law was not necessary, and the estoppel might be founded on an agreement in principle, or a mere 'expectation, created or encouraged' by the party alleged to be bound, in reliance on which the other party had acted to his detriment, the party to be bound had to have

⁶ (1998) 1 FLR 806

⁷ (1998) 3 All ER 917

been aware that he was so acting. Furthermore, since the facts had to be looked at against the ordinary presumption that intentions in relation to the contents of a will were subject to change, he plaintiff needed to show words or conduct by the prospective testator which went beyond mere statements of intention, and which, having regard to all the circumstances, he could reasonably claim to have regarded as amounting to an irrevocable promise by the prospective testator as to how his estate would be disposed of.

43. It seems to me that on the basis of these two cases, Mrs. Martyr must establish words or conduct by the Deceased which went beyond mere statements of intention. Mrs. Roheman submitted that Mrs. Martyr did not appear to have acted to her detriment because she gained a home for her and her husband to occupy and she gained an income from the Deceased and from the crops she planted.
44. Mrs. Roheman contended that Mrs. Martyr knew that a will in favour of another was revoked, she knew that the Deceased refused to make a will in her favour given the brevity of time within which she lived with the Deceased and she knew that the promise of inheritance was conditional and as such, it was not reasonable for her to have placed so much reliance on an alleged promise.
45. Counsel also submitted that there is no basis for the presumption of a trust in the circumstances as there was no certainty of words or sufficient certainty of intention to create a trust. She posed the question: who would determine whether Mrs. Martyr cared for the Deceased? In that context, she suggested that the evidence of Mr. Foster and Mrs. Malaykhan should be disregarded as it referred to one isolated occasion on 9th August 1995.
46. According to Counsel, it is the law which provides who has the right to inherit in the absence of a will and the fact that Ms. Jules did not abandon her home to care for the Deceased is not a consideration for her or any of the lawful heirs to be disinherited. Ms. Jules' right is established by law and she and her heirs need not do anything to inherit.

47. Ms. George for the Claimant argued that Ms. Jules' defence seems to be largely based on the Deceased reserving the right to change her mind. She submitted that there is absolutely no evidence of the Deceased ever changing her mind. All Mrs. Martyr ever knew is that the Deceased promised her that if she took care of her and maintain her property (which she did) she would inherit all of her properties. Additionally, Mr. Foster told her that the Deceased told him to tell her so. She never at any time knew, or was ever told otherwise.
48. I agree with Ms. George that there is no evidence of the Deceased ever changing her mind. This point does not arise here because the Deceased's intention, on which Mrs. Martyr relies, had remained unchanged until death and there is no suggestion the Deceased had ever considered changing her intention.
49. While the cases referred to by Mrs. Roheman are extremely helpful, in my respectful opinion, they are distinguishable to the present case. Both of these cases dealt with situations where wills were made prior to the testator's death and the testator having changed his mind later. The right to decide and change one's mind as to, the devolution of one's estate is a basic and well-understood feature of our law. The law allows one to disappoint the expectations of those who have no more than a moral claim on one's affections, however strong. During the lifetime of the potential testator, that is a risk which anyone seeking to rely on such a representation necessarily faces. But such situation does not obtain here. As Ms. George indicated, there is no evidence of the Deceased ever changing her mind.
50. In order for Mrs. Martyr to succeed on her claim, she must prove:
- (a) That it was the common intention that all of the Deceased's properties should go to her upon the Deceased's death and
 - (b) That she acted to her detriment on the basis of that common intention.

Common Intention

51. Mrs. Martyr must establish that words and conduct went beyond mere statements of intention. Ms. George submitted that the evidence of common intention can be easily gleaned from the evidence of the following witnesses namely:

- (i) Mr. Sylverius Joseph – At paragraph 4 of his witness statement, he stated that “Ma Norman told him that the Claimant was a Godsend and that she wants the Claimant to have all her property when she dies.
- (ii) Mr. Peter Foster and Mrs. Claire Greene-Malaykhan – They were the Solicitors for the Deceased. They both gave evidence of meetings and conversations with the Deceased. They both made contemporaneous notes when they met with the Deceased. Mrs. Malaykhan’s notes of 9th August 1995 reflects the Deceased’s intention very clearly: “make the paper that when I die she will get what I have but she must take responsibility for my life.”
- (iii) Marie Rose Martyr (the Claimant)- Paragraphs 9, 10, 11, 14 and 15 of her witness statement demonstrates words and conduct which went beyond mere statements of intention. Under cross-examination she stated:

“Ma Norman asked me to clean the land and plant as much as I can and one day all these things would be mine...I believed her when she told me to take care of her and I will get everything she owned...She never changed her mind.”
- (iv) Betty Johnson – Mrs. Johnson was called as a witness for the Defendant and as I have already iterated, I thought that she was the most critical witness. In re-examination, Mrs. Johnson stated: “I was not taking care of her anymore so I did not need her will.” This to my mind infers that whoever is taking care of the Deceased would be the one to inherit.

52. In my judgment, it was the Deceased’s intention that she wanted Mrs. Martyr to inherit what she had so long as Mrs. Martyr took care of her until her death. No evidence was presented to show that Mrs. Martyr did not care for the Deceased. In fact, the evidence of Mr. Joseph shows that Mrs. Martyr was the one taking care of the Deceased. He stated that on his many visits to the Deceased’s home, he observed Mrs. Martyr caring for the Deceased by washing, cleaning

and cooking for her and for about a year before the Deceased died, Mrs. Martyr had to fit her with diapers which he sometimes went to purchase.

53. Mr. Foster's evidence adds much weight to the aspect of common intention: paragraph 8 of witness statement. It went beyond mere statements of intention. He was the Deceased's Solicitor. She told him that Mrs. Martyr should get all of her property upon her death. He stated that the Deceased never changed her mind or told him otherwise. In fact, the Deceased told both him and Mrs. Malaykhan to inform Mrs. Martyr of her intention which they both did.

54. All in all, it seems to me that the common intention necessary to establish constructive trust has been adequately met.

Detriment

55. In *Gillet v Holt*, Carnwath J. at p. 926 said:

"With regard to the element of 'detriment', the claimant should have 'incurred expenditure or otherwise have prejudiced himself or acted to his detriment.' In considering whether the detriment was sufficiently substantial, the test was – 'whether it appears just and inequitable that the representor should not be allowed to resile from his representation having regard to what the representee has done or refrained from doing in reliance on the representation.' "

56. Mrs. Roheman submitted that Mrs. Martyr does not appear to have acted to her detriment. On the contrary, she gained a home for her and her husband to occupy, she gained an income possibly from the Deceased and from the garden she planted.

57. Ms. George contended that Mrs. Martyr acted to her detriment by nursing the deceased without any remuneration; caring for the Deceased and expending her own personal funds; repairing and maintaining the Deceased's house and land without recompense; leaving her family to reside with the Deceased and selling her house to come and live with the Deceased and using the funds derived therefrom to care for the Deceased.

58. I had already found that Mrs. Martyr had to expend her personal funds to care for the Deceased. She did not only expend her own monies to care for this sick lady but she cleaned, washed and cooked for her. She worked hard in caring for the Deceased who had to be fitted with diapers for almost a year before her death. The Defendant's witness, Mrs. Johnson who had previously cared for the Deceased said that caring for the Deceased was very hard work. She was relieved from that burden when Mrs. Martyr took over. She did not go back when the Deceased went back to her home because she wanted to get away from that trouble. It was costing her too much money. It was like slavery.

59. In *Wayling v Jones*⁸, Balcombe LJ at page 173 added the following points:

"(1) There must be a sufficient link between the promises relied upon and the conduct which constitutes the detriment....(2) The promises relied upon do not have to be the sole inducement for the conduct: it is sufficient if they are an inducement...(3) Once it has been established that promises were made and that there has been conduct by the plaintiff of such a nature that inducement may be inferred then the burden of proof shifts to the defendants to establish that he did not rely on the promises..."

60. In my judgment, I find that the common intention and detriment as required by law have been made out and that the burden of proof now shifts to Ms. Jules. Ms. Jules has not produce an iota of evidence to dispel Mrs. Martyr's evidence of common intention and more particularly, to show that Mrs. Martyr did not rely on the promise of the Deceased that she would inherit all of her property to her detriment. It seems fundamentally unfair to make findings when those who make the charges have not in the event put their heads above the parapet to support them.

61. The important factor in this case is whether justice and good conscience require that an equity should arise, and if so, then the same justice and good conscience should determine the manner in which that equity should be satisfied.

62. What then is the equity which arises in favour of Mrs. Martyr? From the facts as I found them, Mrs. Martyr nursed, cared and provided for the Deceased in reliance on the promise that she would inherit all her properties. In considering the evidence in its entirety, it is to be observed

⁸ (1993) 69 P & CR 170

that the Deceased with a number of living relatives, made a will leaving all of her property to Mrs. Johnson because Mrs. Johnson was caring for her. When Mrs. Johnson stopped caring for her, she revoked the will. This to my mind is cogent evidence that the Deceased in fact intended her estate to be inherited by the person who cared for her. It seems that it would be in consonance with the realities of the evidence that Mrs. Martyr should inherit all of the properties of the Deceased because justice and good conscience require it.

Conclusion

63. In the premises, I find that Ms. Jules holds the Deceased's properties moveable and immovable in trust for the Claimant, Mrs. Martyr. I therefore order that she transfers the legal title to the properties including the title to Parcel 1046B 140 with the house thereon to Mrs. Martyr. The counterclaim is accordingly dismissed. There shall be Costs to the Claimant in the sum of \$12,000.00 as agreed at the trial.

INDRA HARIPRASHAD-CHARLES
High Court Judge