

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2007/CLE/GEN/FP/00199
BETWEEN

LLOYD POWELL
GILROY POWELL
JENNIFER MOSS
MARILYN RUSSELL
Plaintiffs

AND

GRACE JUANITA FARQUHARSON
Defendant

BEFORE	The Honourable Mrs Justice Estelle Gray-Evans
APPEARANCES:	Mr Jethro L. Miller for plaintiffs Mrs Mavis Johnson-Collie for defendant
HEARING DATES:	2012: 8 and 9 October
CLOSING SUBMISSIONS:	
Plaintiffs:	2012: 14 December and 2013: 19 April
Defendant:	2013: 16 April

JUDGMENT

Gray Evans J.

1. This is family dispute involving property following the death of a parent. The plaintiffs and the defendant are all surviving children and beneficiaries of the estate of the late Olive Louise Powell Antonio ("the deceased") who died testate on 18 December 2004 in Nassau, New Providence, The Bahamas.

2. By her last will and testament dated 9th September 2003, the late Mrs. Antonio appointed the defendant as the executrix thereof and made the following devises therein:

"Subject to payment of all my just and lawful debts funeral and testamentary expenses, I give, devise and bequeath all my real and personal property of whatsoever kind and wheresoever situate as follows:-

(A) To my five (5) children, namely GRACE JUANITA FARQUHARSON, LLOYD POWELL, GILROY POWELL, JENNIFER MOSS and MARILYN RUSSELL, and to my husband, HIRAM ANTONIO, ALL THAT piece parcel or lot of land situate at Key West street, New Providence aforesaid, including the four (4) stucco houses situate thereon, for their use absolutely as Joint Tenants. It is my desire that my sister, IVY MILLER, should reside on the above-mentioned lot of land so long as she desire, up to her death.

(B) To my aforesaid five (5) children, namely GRACE JUANITA FARQUHARSON, LLOYD POWELL, GILROY POWELL, JENNIFER MOSS and MARILYN RUSSELL, and to my husband, HIRAM ANTONIO, ALL THAT piece parcel or lot of land situate at Carmichael Road, New Providence, aforesaid containing my duplex situate thereon, for their use absolutely as Joint Tenants.

(C) To my six (6) children, namely GRACE JUANITA FARQUHARSON, LLOYD POWELL, GILROY POWELL, JENNIFER MOSS and MARILYN RUSSELL, and PETER EUGENE HEPBURN, and to my husband, HIRAM ANTONIO, sums of monies in my accounts including my fix account and savings account with FINCO, Robinson Road Branch, to be divided equally amongst them for their use absolutely.

(D) To my six (6) children, namely GRACE JUANITA FARQUHARSON, LLOYD POWELL, GILROY POWELL, JENNIFER MOSS and MARILYN RUSSELL, and PETER EUGENE HEPBURN, and to my husband, HIRAM ANTONIO, sums of money from my Pension Plan with Bahamas Hotel and Catering and Allied Workers union, to be divided equally amongst them, for their use absolutely.

(E) To my six (6) children, namely GRACE JUANITA FARQUHARSON, LLOYD POWELL, GILROY POWELL, JENNIFER MOSS and MARILYN RUSSELL, and PETER EUGENE HEPBURN, and to my husband, HIRAM ANTONIO, the residue of my real and personal property of whatsoever kind and wheresoever situate, to be divided equally amongst them, for their use absolutely."

3. A grant of letters of probate in respect to the said will was issued by the Supreme Court on 28 June 2005 and by a deed of assent dated 16 August 2005, the defendant, as executrix and personal representative of the deceased, assented to the aforesaid devises.

4. However, approximately two years after the execution of the said deed of assent, the defendant had still not accounted to the plaintiffs for the said estate or distributed the properties in accordance with the said will. The plaintiffs, therefore, commenced this action on 14 September 2007 by a specially indorsed writ of summons in which they allege, inter alia:

(1) That notwithstanding the clear directions and bequests in the aforementioned will, particularly paragraphs 3 (A) to (E), the defendant has failed or refused to account for all money believed to have been lodged in divers accounts of

the Testatrix or divers parcels of land listed in the will and has improperly refused or failed to distribute the pieces or parcels of land as directed in the will to the plaintiffs.

- (2) Both before and after the grant of probate aforesaid the defendant has taken steps inconsistent with her obligation as Executrix and in breach of her duty of trust to the plaintiffs, being the beneficiaries, namely:
 - (a) Deceitfully or at best incorrectly understated the amount of money left in various accounts of the Testatrix as \$1,200.00 knowing full well or having means to know that such amount was not correct. Such act was intended to conceal the true cash balances or amount left in the Estate.
 - (b) Asserting since probate that at least one parcel of land, clearly left for distribution to all beneficiaries, is beneficially owned by her knowing full well that the said property was put in her name, in the Testatrix's life time, in trust for all the children.
 - (c) Continuing to rent divers parcels of land at favourable rents to relatives without accounting to the plaintiffs for the proceeds or other mesne profits derived from those parcels of land.
 - (3) The defendant is in breach of her duty as Executrix of the Estate and in breach of her oath as Executrix to duly administer the Estate of the Testatrix and has thereby unlawfully and or improperly enriched herself.
5. And the plaintiffs claim against the defendant:
- (1) An order releasing the named Executrix and appointing one of the plaintiffs as Executor/Executrix, or, alternatively an order directing the Executrix to immediately carry out the Testatrix directions under the Will.
 - (2) An order requiring full and accurate accounting of all money, in various accounts in any banks situated in The Bahamas, in the name or to the benefit of the Testatrix at the date of her death including providing copies of all bank statements and deposit books or otherwise and payment or distribution of such portion as was due to the plaintiffs.
 - (3) An order directing the Registrar of the Court to execute conveyances of the divers properties listed in the will to the beneficiaries of the Testatrix.
 - (4) Damages for breach of trust payable from the portion of the Estate ordinarily due to the defendant in the event she has no other means to pay such damages or alternatively an order depriving the defendant of any benefit under the Will as a beneficiary.
 - (5) Costs and any further or other relief which to the Court may seem just.
6. The defendant in her defence filed 8 January 2008 denies the plaintiffs' claim.
7. In answer to the plaintiffs' claim regarding the accounts allegedly left by their deceased mother, the defendant avers as follows:
- (a) The defendant is not aware of any bank accounts standing in the name of the Testatrix alone.
 - (b) The defendant was joint owner on two (2) accounts along with the testatrix, one being a fixed deposit account.

- (c) The total balance of one thousand dollars (\$1,000.00) is available for distribution to the named beneficiaries.
8. As regards the real property, the defendant avers as follows:
- (a) The two (2) properties divested in the will are accounted for as follows:
- (i) Key West Street – only two (2) of the units are the property of the Testatrix. Of the two, one generates revenue.
- (ii) Carmichael Road – one unit is vacant, the other unit has always been reserved and available to be used by visiting family members.
- (b) That all mesne profits or otherwise relative to all relevant rented units have been placed in a Bank Account pending a decision by the family as to disbursements, and that the records for all transactions are available for review.
- (c) The defendant is currently attempting to obtain the records of the pension fund and any other funds held in the name of the Testatrix. These funds will be made available to the beneficiaries as soon as a true balance can be obtained.
- (d) As to the plaintiffs' allegation made at paragraph 4(b) of the statement of claim [paragraph 7(2)(b) above], the defendant puts the plaintiffs to strict proof.
9. The defendant avers further that she used personal funds to supplement funds belonging to the Estate in order to settle the Testatrix's outstanding debts and funeral expenses.
10. Evidence at the trial was given by the parties on their own behalf, each of whom provided a witness statement, which was adopted as their respective evidence in chief.
11. As I understand the plaintiffs' case, they are of the view that their sister, the defendant, as executrix of their late mother's estate, has not provided full disclosure of all of their late mother's estate which they say comprised several thousand dollars, sufficient for each of them to get at least \$10,000.00, as well as rental property at Key West Street. The plaintiffs are clearly of the view that their mother left more money than the defendant has accounted for to them. Part of the reason for the plaintiffs' belief appears to be a computer printout said to have been produced by FINCO bank for the late Olive L. Antonio on which nine accounts are listed. Although it is unclear when that list was produced, it is clear from the evidence that three of those accounts, including a time deposit account, were closed prior to the testator's death. Further, the balances of five of those (personal regular savings) account totaled \$1,233.56. It is not clear the effective date of those balances. The ninth account, a fixed deposit, was, according to the list, closed on 9 May 2005.
12. At the close of the defendant's case, I ordered the defendant, as executrix of the estate of the late Mrs Antonio, to provide the plaintiffs, as beneficiaries of said estate, within 30 days, with a proper accounting of all funds held by or coming into the said estate at the date of the late Mrs Antonio's death and received by the defendant in her capacity as executrix, including any funds held on bank accounts in the name of the deceased and all rental income collected by the defendant since the date of the late Mrs Antonio's death as well as all disbursements made therefrom to the date of the said account.
13. That order appears to have been complied with by the delivery on 27 March 2013 of a financial report prepared by Accounting Solutions for the defendant on properties and funds left by the late Mrs Antonio.

14. Further, in light of the deed of assent having already been executed by the defendant (it seems that the plaintiffs nor their counsel may have been aware of this at the commencement of this action), the relief sought by the plaintiffs for an order directing the Registrar to execute conveyances of the properties listed in the will to the beneficiaries, was no longer required.

15. As for the claim for an order releasing the defendant as executrix and appointing one of the plaintiffs in her stead, when I inquired of counsel for the defendant during the trial whether the defendant had any objection to such order being made, she indicated that the defendant had no objection. However, on taking further instructions, counsel advised the Court that the defendant was not agreeable to the making of such an order.

16. So, at the end of the day, in my view, the issues that arise for determination are as follows:

- (1) Whether the defendant should be released/discharged as executrix of the estate of the late Olive Antonio and one of the plaintiffs appointed in her stead?
- (2) Whether, Lot 3 Block 7 aforesaid belonged to the late Olive Louise Antonio and, therefore, formed part of her estate, or whether that property was owned by the defendant?

17. After hearing the parties, I am not minded to discharge the defendant as executrix. The plaintiffs all reside in Grand Bahama. All of the assets in the estate appear to be in New Providence. The defendant resides in New Providence. In her witness statement filed 3 October 2012, Jennifer Moss said that the reason they all agreed to their mother appointing the defendant as executrix was because the defendant was living in Nassau, while everyone else were living in Grand Bahama. It would seem to me, therefore, both sensible and practical, rather than discharging the defendant, to have one of the plaintiffs appointed to act jointly with her as co-executor of their late mother's estate. Clearly, the plaintiffs do not believe that the defendant has been upfront with them. As co-executor, that sibling will be in a position to make inquiries and obtain information regarding the estate which he or she may not have been able to obtain otherwise. Furthermore, with the deed of assent having been executed and the assets vested in the beneficiaries, the executor's duties will, no doubt, soon be at an end.

18. It is, therefore, ordered that one of the plaintiffs be appointed as co-executor, along with the defendant, of the estate of the late Olive Louise Antonio. I will leave it to the plaintiffs to decide which one of them should be so appointed and his or her name should be inserted in the order made pursuant to this judgment.

19. As for the claim for damages for breach of trust, no evidence was led as to any damages suffered, so that claim is dismissed.

20. Now to the real bone of contention between the parties – the beneficial ownership Lot 3 Block 7 Englerston Subdivision in the Southern District of New Providence and the two stucco duplex houses situate thereon (hereinafter referred to as “the said property”).

21. The evidence, which I accept, is that prior to her death, the deceased had a “wonderful relationship” with all of her children. That although the plaintiffs all lived in Grand Bahama while the deceased, the defendant and a younger brother, Peter, lived in New Providence, the family nevertheless remained a “tight knit” one. The deceased would travel to Grand Bahama several times a year or the plaintiffs would go to New Providence to see her and their siblings several times a year. The last time all the family members got together was in Grand Bahama in September 2004, approximately three months before the deceased died.

22. Prior to 1981, the deceased owned a piece of property on Key West Street on which she had two stucco houses. She lived in one and her sister, Edy, lived in the other. She eventually permitted another sister, Ivy, to bring her house onto the property. The deceased did not consider that she owned Ivy's house.

23. In May 1981, the deceased purchased the said property from one Robert Mitchell Johnson. At the time, she was contemplating marrying Hiram Antonio. The evidence is that before completing the purchase, the deceased discussed the matter with her children and it was agreed that title to the said property would be taken in the name of the defendant who was, at the time, still unmarried and living in Nassau with the deceased. This was done to enable the defendant to hold the said property in trust for the deceased, to avoid, upon her death, her husband being able to make any claim thereto, to the exclusion of the deceased's children.

24. In her said last will and testament, the deceased devised the "land situate at Key West Street, New Providence aforesaid, including the four (4) stucco houses situate thereon" to the plaintiffs and the defendant and her husband, Hiram Antonio as joint tenants.

25. It is common ground that the land and four stucco houses described in the aforesaid devise includes the said property.

26. However the defendant contends that, at the date of her death, the said property did not belong to the deceased. That, in fact, she was the legal and beneficial owner thereof, the deceased having given the same, along with the title deeds thereto, to the defendant approximately two months prior to her death.

27. The plaintiffs admit that legal title to the said property is held by the defendant but say that it was by agreement between the plaintiffs, the defendant and their late mother and that it was always intended that the defendant should hold title thereto in trust for their late mother, who intended, after her death, that her children and her husband should share ownership thereof in equal shares; and this, they say, the defendant well knows.

28. I note that notwithstanding her claim to be the legal and beneficial owner thereof, and that in her defence, the defendant averred that "only two of the units are the property of the Testatrix", I also note that nowhere in her defence does the defendant aver that the other two houses referred to in the said will were owned by her.

29. As to why she claims to be the legal and beneficial owner of the said property, the defendant at paragraph 8 of her witness statement states as follows:

"8. As my mom's condition worsened, she began to talk to me more about her affairs and what she wanted done and what role she wanted me to play. She wanted to turn most of her assets over to me. I won't let her. She eventually gave me a copy of the papers to the property next to her on Key West Street which was purchased in 1981 and said "here are the papers to your property". I told her that she had already listed it in her will to be shared with everyone else. Her response was that she had already called the Attorney's office who had advised her that she could put anything in a will but that if it is not in her name she couldn't give it. She told me it was mine that I had been there for her through her illness. She told me that she knows my siblings would fight me in Court, but not to let them run over me, to fight them back if there was a fight over the property."

30. Further, although the parties do not agree on when and how the defendant disclosed to the plaintiffs that she was of the view that the said property belonged to her, it is not disputed that the defendant did, in fact, inform her siblings of her alleged ownership before the commencement of this action.

31. The plaintiffs' evidence is that shortly after their late mother's funeral, the defendant told two of the plaintiffs, Marilyn and Jennifer, that since the deed to the said property was in her

name, she was going to take that property and that since then, the defendant has treated the said property as her own, performing renovations, renting out and collecting rents, without reference or accounting to the plaintiffs.

32. The defendant denies the plaintiffs' account. Her evidence is that she simply told her siblings that her late mother had given the said property to her and that she had witnesses to the transaction. Indeed, in her witness statement at paragraph 12, the defendant averred:

"When my mother gave me the papers to the property, it was in the presence of one of my nieces, my step father and the lady who took care of my mother, along with her husband. I did not bother them to come to Court, as most of them are not well."

33. Under cross examination the defendant said that the reason she did not call any of the alleged witnesses was because two of them were deceased, one was in hospital and the other was blind.

34. However, there is no evidence that, since their late mother's death, any of those witnesses ever confirmed or corroborated the defendant's story to her siblings, even up to the date of trial, although one of them was said to be her niece. It occurs to me that that would have been one way of settling the issue shortly after her mother's death and certainly before the trial which occurred some eight years later.

35. In response to this Court's question as to who the defendant thought the property belonged to prior to the alleged "gift" to her about two months before her mother's death, the defendant, said she thought the property belonged to her mother. I thanked the defendant for her honesty, which "commendation" was noted by counsel for the defendant in her closing arguments. Let me say here that the comment was made solely in reference to the defendant's admission in relation to the ownership of the property before the alleged gift thereof to her. Further, the reason for commending the defendant in making that admission was because I had got the impression from her witness statement that the reason the said property was conveyed to her when her late mother purchased the same in 1981, was because she had contributed to the purchase price and not because of some agreed family arrangement and that it was that contribution to the purchase price that entitled her to ownership thereof. I got that impression, which is what I believe was intended to be conveyed, from paragraph 4 of the defendant's witness statement in which she states:

"My mom gave me some money and took me to the lawyer's office to sign some papers. I had given my mom some money towards the purchase. At the time I earned about \$250.00 per week. I personally handed over funds to the law office. The conveyance was made out to me." (underline added for emphasis)

36. Nevertheless, counsel for the defendant in support of the defendant's contention that she is the owner of the said property makes, as I understood her closing submissions, two arguments. Firstly, that the defendant is the owner of the said property by virtue of the fact that legal title thereto is held in her name; and secondly, or alternatively, that the property was given to her by her late mother, shortly before her death, in contemplation of death, and, therefore, the principle of *donatio mortis causa* (gift on the occasion of death) applies and in that regard, counsel submits, the oral gift by the deceased was supported by the conveyance to the defendant.

37. In any event, counsel submits, whether or not the court accepts that *donatio mortis causa* applies, the said property legally belonged to the defendant and not the testator and as such the will could only dispose of properties belonging to the testator at the time of her death. (Williams on Wills 3rd edition, paragraph 30, Richards v Fabien (1964) 1 WIR 169 at 172).

Therefore, she submits, since the testator did not, by law, have an interest in the property that did not cease at death, the devise in the will must fail.

38. It is not disputed that a person cannot give what he does not have. In *Richards v Fabien supra*, a case from the Court of Appeal of Trinidad and Tobago, Wooding CJ, delivering the judgment of the court, expressed the following view:

"I take the view, and my lords both agree with me, that that statement in the will is no proof that he did own those premises on that date or at any other time. It is always competent in the sense of factually competent, not legally competent, for anybody to claim by writing in his will that he owns some property even though he does not own it."

39. However, it is clear that the defendant, by her own admission, accepted that at the date the testator executed her said will, 9 September 2003, the said property belonged to her, although legal title thereto was held by the defendant as trustee on her behalf. It was, therefore, legally competent for the testator to assert in her said will that she owned the same and it was also open to her on that date to dispose of the same by her will, which she did.

40. Counsel for the defendant contends that the devise in the deceased's will was nevertheless rendered inoperable in law because at the date of her death, the deceased did not own the said property. Counsel also suggested that the Court should be concerned as to why, if it was truly the intention of the testatrix to leave the said property as part of her estate, she, as a prudent lady, did not seek to have the title converted to her so that her intention would not be left to interpretation? That, no doubt, calls for speculation, but I surmise that it may have been that the deceased was confident that there would be no problems because the defendant understood that she was a mere trustee of the said property.

41. Perhaps another question may be asked: If it was the intention of the deceased that the defendant should have the said property, why would she, as a prudent lady, have dealt with it in her will, since legal title was already held by the defendant? Or, why did she not simply execute a codicil to her will or write a new will, omitting the said property therefrom?

42. In light of the foregoing, what is the Court to make of the defendant's oral assertion that the property was given to her by her mother approximately two months before her death? Well, except for her say so, the defendant provided no witnesses to confirm this, although she said there were witnesses to the "transaction", and that at least two of them were available to testify.

43. Further, there is no evidence that the defendant ever asked those witnesses to confirm her story to her siblings. It was certainly in her best interest to do so.

44. So, while I accept that the late Mrs Antonio, as beneficial owner of the said property, could have given it to the defendant, frankly, I have some difficulty believing that, if, as the witnesses testified, the mother had such a wonderful relationship with all of her children that she would have given the property to the defendant to the exclusion of the others, knowing that she had left the said property in her will, not just to the children but also to her husband.

45. Now, the defendant says that at the time her mother "gave" her the property, she drew to her mother's attention that she had already "listed it in her will to be shared with everyone else" to which she said her mother responded that she had already called the attorney's office who had advised her that she could put anything in a will but that if it was not in her name she could not give it. Counsel for the defendant argues that such advice is in keeping with the law.

46. So, presumably, armed with that bit of information, the defendant as the executrix of her late mother's estate and apparently with the assistance of the same attorney who had prepared the will, not only had the said will probated, but also proceeded to have prepared, by the same attorney, a deed of assent, assenting to the devise in the will. One would have thought that the

attorney would have been aware, in light of the defendant's alleged conversation with her late mother, or the defendant ought to have alerted the attorney that, notwithstanding the devise in her late mother's will, her mother only owned two of the stucco houses on Key West Street, so as to ensure that only two stucco houses were included in the deed of assent. She says she did and while I accept her counsel's argument that as a lay person she may not have known the import of the deed of assent, the fact is she was represented and she had an obligation to disclose all the relevant information to her attorney in order to ensure that she received proper advice and representation. So, whatever may have been the defendant's reason for failing to make full disclosure to her attorney, such failure, was, in my judgment, to her detriment.

47. Moreover, notwithstanding her evidence that there were witnesses to this "transaction", no such witnesses have come forward and in light of the other evidence, I think it would be unwise to accept simply the defendant's "say so" that her mother gave her the said property, especially in light of the evidence regarding the deceased's relationship with all of her children. Furthermore, I confess that I find it difficult to believe that the strong, organized mother of an admittedly "close knit" family, who was "in control of her affairs", rather than telling all of her children of her decision to give the said property to the defendant, if she had made such a decision, would, instead, leave her affairs in such a way that four of her children would be fighting the other child in Court over property which belonged to her to do with as she wished. In that regard, I note the following comment by the defendant in her witness statement:

"She told me that she knows my siblings would fight me in Court, but not to let them run over me, to fight them back if there was a fight over the property."

48. Finally, there is the deed of assent giving effect to the devises in the said will. By the deed of assent, title to the "land situate at Key West Street, New Providence aforesaid, including the four stucco houses situate thereon", which include the said property, became vested in the plaintiffs, the defendant and Hiram Antonio "for their own use absolutely as joint tenants".

49. An assent in relation to real estate operates to vest in any person entitled thereto the estate or interest to which the assent relates and relates back to the deceased's death. See section 25 of the Administration of Estates Act, chapter 108, Statute Laws of The Bahamas. See also Halsbury Laws of England, 3rdedn. Volume 16, page 342 where the learned authors state:

"The title to a legacy vests immediately upon the assent to the legatee so as to enable him to bring an action in law against the executor or any person in possession of the bequest. An assent in relation to real estate relates back to the deceased's death unless a contrary intention appears, and the legatee of the specific legacy has the right to recover the intermediate profits of the thing bequeathed. Where executors who are also trustees under the will have assented they cease to hold the property as executors and thenceforth hold it as trustees."

50. Moreover, the assent once given is irrevocable. See *Noel v Robinson* (1681) 2 Vent. 358. The assent has not been set aside and, therefore, remains in full force and effect.

51. In the circumstances, I accept the submission of counsel for the plaintiffs that the deed of assent is evidence against the defendant who executed the same notwithstanding her claim that the said property belongs to her and I reject the defendant's claim that her said mother gave her the said property approximately two months prior to her death to the exclusion of the plaintiffs. Further, I find that the said property was beneficially owned by the late Olive Louise Antonio at the date of her death and that she was legally competent to assert her ownership of the same and at liberty to dispose of it, as she did, in her said will dated 9 September 2003, which disposition was assented to by the defendant on 16 August 2005.

52. In the result, I give judgment for the plaintiffs and as a consequence I make the following orders:

- (1) One of the plaintiffs (as they determine among themselves) is to be appointed as co-executor along with the defendant for the purpose of completing the administration of the estate of the late Olive Louise Antonio and distributing the assets to the beneficiaries.
- (2) The defendant is to provide to the plaintiffs within 14 days of the date hereof a full and accurate accounting of all moneys collected and disbursed by her in relation to the said property since the deceased's death in December 2004 to the date of such accounting.
- (3) The defendant is to pay the plaintiffs' costs in this action, such costs are to be taxed if not agreed.

53. I am grateful to counsel for the authorities provided, all of which I have considered although not specifically referred to herein.

DELIVERED this 14th day of June A.D. 2013

Estelle G. Gray Evans
Justice