

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2015/PRO/cpr/00045

BETWEEN

IN THE MATTER of the Estate of Lincoln Oswald Hercules Late of No. 1 Tuckaway Estates, Village Road of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas, deceased.

AND

IN THE MATTER of the Administration of Estates Act (2002) Chapter 108 of the Statute Laws of The Bahamas

BETWEEN

ARLENE MARIE HERCULES

Applicant

AND

CORALEE BODIE

(Co-Executor)

SYLVIA MORTIMER

SHEENA NEWBOLD

STEPHON CAREY

LINCOLN HEERCULES JR

LAVELL CAREY

MICHAEL BELGRAVE

Respondents

Before Hon. Mr. Justice Ian R. Winder

Appearances: Trevor Lightbourne for the Applicant

Darell Taylor for the 1st, 4th, 5th, and 6th Respondents

18 October 2018

JUDGMENT

WINDER J

This is an application by an executor for declarations that a devise in a will be disregarded on the basis of estoppel.

1. The claim was commenced by Originating Summons. The real claim in this dispute is found at paragraphs 3 and 4 of the Originating Summons which provide:
 3. A Declaration that the Applicant is entitled at least to a fee simple interest and not a life interest in the Testator's house at Number Sixty-nine (69) Village Road (now No. 2 Tuckaway) in the Island of New Providence, in the Commonwealth of The Bahamas on the principle of estoppels.
 4. A Declaration that the Applicant is entitled to the fee simple in No. 69, Village Road by virtue of equitable estoppel.
2. The Originating Summons is supported by the Affidavits of Arlene Hercules. The principal affidavit of the applicant which provides as follows:
 1. I am a co executrix of the estate of Lincoln Oswald Hercules, deceased, late of No. 2 Tuckaway Estates, Village Road, in the Island of New Providence in the Commonwealth of The Bahamas.
 2. I make this affidavit in support of the Originating Summons filed herein and the contents are made from my own knowledge, information and belief and are true and correct.
 3. I am the oldest of three living children of the marriage between Lincoln Oswald Hercules (hereinafter referred to as "my father") and my mother, Patricia Maedawn Johnson nee Ingraham (hereinafter referred to as "my mother"). The other children of the marriage are Slyvia (sic) Elaine Hercules-Mortimer and Sheena Marina Hercules-Newbold.
 4. In July of 1973, my father purchased a residence at Lot No. 1 Tuckaway Estates (#69 Village Road) (hereinafter referred to as "the Village Road home"). Shortly after the purchase, my mother released her dower interest in the Village Road home.
 5. Since the aforesaid purchase, the only occupants of the Village Road home have been my father, myself, Slyvia (sic) Elaine Hercules and Sheena Marina Hercules-Newbold and during the course of his life my

father always said that the Village Road home belonged to the children of his marriage to my mother.

6. As time progressed, my other siblings left the Village Road home and I remained at the Village Road home up to and during the later stages of my father's life and was his primary care giver.
7. In acknowledgment of the sacrifices I have always made regarding the upkeep of our home and family, my father made a promise to me that if I continue to care for him, he would leave the Village Road home for me upon his death.
8. I continued to care for my said father right up to the time of his death at our residence on the 28th day of February, 2008.
9. Shortly after that promise to me, my father consulted The Law Partnership in relation to creating a will. I was provided with a draft will which was said to represent my father's wishes for the distribution of his property. Upon perusal of the draft will I was able to verify the truth of my father's promise concerning the Village Road home as the draft will provided at paragraph 3(i) that,
"I give and devise my house at number sixty nine (69) Village Road "my said house" in the island of New Providence aforesaid to my daughter Arlene Marie Hercules absolutely."
10. I believed that my father's initial promise and the subsequent assurances made to me were true. To the best of my recollection, neither my father nor other any other member (sic) of my family gave me any reason to believe otherwise and I continued to rely on the said promise and ordered my life in accordance with that promise.
11. As a result, I made major life decisions in reliance of my father's promise. I continued to live on the property and I have spent and continue to spend considerable sums of money on the property. Up until the swearing of this affidavit I have maintained the property without the financial contribution of any other individual.
12. On the 28th day of February, 2008, my father passed away and I discovered that he executed his Last Will and Testament on the 28th day of April, 2006 (hereinafter referred to as "the said Will"). ...
13. On the 21st day of December 2009, a Grant of Probate was issued out of the Supreme Court in its Probate Division in Action pro/00765 of 2009 to Coralee Bodie and myself as joint executrices. ...

14. Unlike the draft will which I originally obtained, the said will contained a clause, namely clause 3(i) which provides,

"I GIVE AND DEVISE My house at Number Sixty-nine (69) Village Road "my said house" in the Island of New Providence aforesaid to my daughter **ARLENE MARIE HERCULES** absolutely, upon her death to **SYLVIA MORTIMER, SHEENA NEWBOLD, STEPHON CAREY, LINCOLN HERCULES, JR., LAVELL CAREY, MICAEL BELGRAVE** absolutely;"

15. In my capacity as joint executrix, I have encountered difficulty reconciling the promise of my father and the bequest at clause 3(i) of the draft will with what appears in the probated will and I have been advised that there is a legal conflict in the phrase "absolutely, upon her death".

16. I have also been advised that the devise in the probated will may only give me a life interest which is far less than was promised me by my father and which is much less than should come to me on the basis of the principle of equitable estoppels would afford me.

17. I therefore make this affidavit in support of the Originating Summons filed herein seeking a determination of my entitlement and my rights, title and interest to the Village Road home as a result of the promises made by my father and the right that my father Lincoln Oswald Hercules would bequeath the said property to me absolutely.

18. The said Lincoln Hercules Jr., Lavell Carey and Micael Belgrave have all been made beneficiaries of other property in the probated will.

3. The applicant's case is that the deceased Lincoln Oswald Hercules promised her that he would let her have the Village Rd home upon his death. She says that shortly thereafter the deceased gave her a draft will leaving her the home. Instead, the deceased made his will in April 2006 which appeared to limit her interest to a life interest and thereafter the interest to pass to others. The 1st, 4th, 5th and 6th respondents deny the applicant's case and say that the allegation are inconsistent with the facts as they understood them.

4. The parties tend to agree on the principles of proprietary estoppel. The learned authors of *Commonwealth Caribbean Property Law* provide a succinct statement of proprietary estoppel at page 107 where it says:

[W]here X intends to make a gift of land to Y, but the gift is incomplete because the appropriate formalities have not been complied with. A well known example is *Dillwyn v Llewelyn*, where a father allowed his son to have possession of his (the father's) land and signed an informal memorandum purporting to transfer the fee simple to the son. The latter spent a large sum on building a house for himself on the land. After the father's death, the son claimed to be entitled to the fee simple. It was held that the father's representations, together with the son's expenditure, entitled the son to call for the imperfect gift to be perfected (as an exception to the maxim that 'equity will not perfect an imperfect gift') by conveyance of the fee simple to him.

An analogous situation is where the owner of land expressly promises that he will make a gift of the land at some time in the future and the promisee incurs expenditure in reliance on the promise. Two Commonwealth Caribbean cases neatly illustrate the application of proprietary estoppel in this context. In the Barbadian case of *Sealy v Sealy*, a father had invited and encouraged his son to erect a dwelling house on half an acre of the father's land, promising that, when the building reached a certain stage, he would convey the land to the son by way of gift. The father failed to carry out his promise. King J (Ag) held that an equity had arisen in the son's favour, which would be satisfied by ordering the father to convey the plot to the son. He said:

Lord Westbury in *Dillwyn v Llewelyn* [said]:

If A puts B in possession of a piece of land, and tells him, 'I give it to you that you may build a house on it', and B, on the strength of that promise, with the knowledge of A, expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform the contract and complete the imperfect donation which was made.

It is clear from the above that, once an equitable right has arisen, the donee may call on the donor to complete his promise. In other words, the plaintiff in this instant case may sue for the promise to be made good and this court has jurisdiction to hear and determine the matter.

5. Where the parties diverge is as to the true facts of what did or did not transpire. The resolution of this dispute is to be determined entirely upon which evidence I accepted. For this reason, I caused the parties to attend to be cross examined on their evidence, a method preferred by the parties rather than converting the matter

to a Writ action. The applicant, Coralee Bodie, Lavell Carey and Lincoln Hercules Jr were all subject to cross examination.

6. I must note that it is regrettable that it took the applicant seven years after the death of the deceased to commence these proceedings. Having heard the witnesses, observed their demeanor as they gave their evidence, I do not accept the applicant's evidence on a balance of probabilities. Whilst I accept that at one time the deceased contemplated leaving the fee simple in the property to the applicant absolutely, he subsequently, as was his right with respect to his property, determined ultimately to give her the life interest and the remainder to be shared with his other children. I do not accept that there was a promise or encouragement by the deceased that she would have the property simply for coming to move in with him, in a self-contained apartment, remodeled at his expense. Even if there was such a promise, I did not find that there was any detrimental reliance on her part or that she has lost anything in reliance on this promise. The relocation appeared, on my assessment of the evidence, to have been an advantage rather than a detriment.
7. In all the circumstances therefore, I dismiss the applicant's claim with costs to the 1st, 4th, 5th, and 6th respondents.

Dated this 29th day of March 2019



Ian Winder
Justice