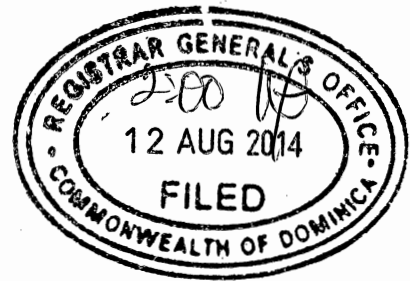


THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA



IN THE HIGH COURT OF JUSTICE

CLAIM NO: DOM/HCV1998/0349

BETWEEN:

[1] ANDREW GREEN
[2] ARNOLD GREEN
(AS PERSONAL REPRESENTATIVES OF THE
ESTATE OF DANIEL GREEN [DECEASED])

Claimants

and

[1] PAMELA GREEN-LANDER

Defendant

Appearances:

Ms. Lauri Smikle for the Claimants

Mr. Gildon Richards for Defendants

2013: July 13th
2014: August 12th

JUDGEMENT

[1] **Cottle, J.:** The claimants are the personal representatives of Daniel Green, deceased who died intestate. Before his death, Daniel Green executed a power of attorney appointing the defendant, one of his children, as his lawful attorney. By virtue of this power of attorney, the defendant transferred a substantial sum of money from the account of Daniel Green into her personal account. This transfer was effected by a letter to the bankers of the deceased demanding that they

transfer all money standing to the credit of the deceased to the defendant's account at another bank. The letter was signed by the defendant, the deceased and the solicitor of the defendant. The bankers of the deceased complied. They transferred \$713,250.00 as directed, retaining only \$20,000.00 as collateral to secure a loan for which the deceased was a guarantor. The solicitor of the defendant also wrote to tenants of the deceased directing them to pay the rent due, to the account of the defendant.

- [2] The terms of the power of attorney bear repeating. By the document the defendant was authorized to:-
- (a) To sign deposit, draw, withdraw all such sums of money and make all such necessary transactions in my name [the deceased] as she [the defendant] may think fit or admissible to carry out any and or all of my business, in any Banks, Credit Institution, or any other similar institutions in order to carry out and perform my said business;
 - (b) To pay all rates and taxes and other outgoings to be from time to time payable or chargeable for or on my account of the said premises or any other thereof and to insure or cause to be insured the buildings thereon against loss or injury by fire and other perils and when necessary to pay the insurance premiums; and more so to execute any instrument in the defendant's own name.

The Claim

- [3] The claimants say that at the time of the execution of the power of attorney, the deceased was suffering from mental impairment and as such, the said power of attorney is void and of no effect. They seek a declaration that the defendant holds the sum of \$713,250.59, \$227.02 and all other sums disbursed from the accounts of the deceased, as constructive trustee for the estate of the deceased. Alternatively, the claimants seek the following relief:-
- (c) Further and/or in the alternative, a declaration that the defendant as attorney for Daniel Green, deceased, was also a Constructive Trustee of the assets of the deceased and as such the Defendant is liable to account to the estate of the deceased for the sums of \$713,250.59 and \$227.02 and all other monies disbursed and a further declaration that the defendant is liable to

- the estate of the deceased for the sums of \$713,250.59 and \$227.02 less the amount that she was rightfully permitted to have expended on the deceased under the said Power of Attorney.
- (d) And furthermore, a declaration that the defendant was not entitled to appropriate unto herself any money belonging to the deceased under the guise of an inter vivos gift and that the purported gift be set aside.
- (e) An order that the defendant be charged with the following:-
- (1) On the sum of \$713,250.59 interest at the rate of 6% per annum from January 1994 until the date of judgment and thereafter at the statutory rate of 5% per annum to the date of payment.
 - (2) On the sum of \$227.02 interest at the rate of 4% per annum from January 1994 until the date of judgment and thereafter at the statutory rate of 5% per annum to the date of payment.
- (f) An order that the following Accounts, Inquiries be taken and made:-
- (1) An account of the defendant's dealings with the Trust personality and the income thereof;
 - (2) An inquiry as to whether any and if any what property still held by or under the control of the defendant at the date of death of the deceased to be made in answer to this inquiry comprises or represents any part of the Trust Personality or the income thereof.
- (g) Interest.
- (h) Costs.
- (i) All such further or other Accounts, Inquiries, Directions and relief as shall be just.

The Defence

- [5] In her amended defence, the defendant says the deceased was mentally competent at the time he executed the power of attorney. She also pleaded that the sums of \$713,250.59 and \$227.07 transferred from the account of the deceased into her personal account constituted inter vivos gifts from the deceased. She added that she also incurred legitimate expenses for the maintenance of Daniel Green – including maintenance of 2 minor children of the deceased to the total amount of \$242,645.00.

- [6] In her written closing submissions, Counsel for the claimant identified four (4) issues which she considered to fall for determination. They are:-
- (i) The mental condition of Daniel Green, deceased. In particular at the time of executing the Power of Attorney to the Defendant on the 18th day of January, 1994, and at the time of the transfer of funds from the Royal Bank to the Bank of Nova Scotia.
 - (ii) The Defendant's Power of Attorney, her powers and the transfer of funds from the deceased accounts to her account.
 - (iii) The 'inter vivos' gift as claimed by the Defendant.
 - (iv) The debts and expenditure for the Daniel Green's Estate as pleaded by the Defendant.

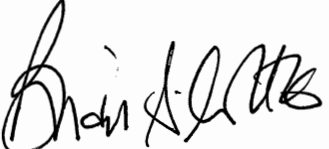
The Evidence

- [7] The witnesses for the claimant were Arnold Green, Alsay Blanc, Theodore Moses and Inspector Desmond Austrie. The medical evidence came from Dr. Phillip Griffin. Only the defendant was sworn to testify for the defence. None of the witnesses for the claimant was cross-examined.
- [8] The main issue in this claim was the mental capacity of the deceased Daniel Green in January 1994 when he executed the power of attorney to the defendant and on 19th April, 1994 when the funds were transferred from the account of the deceased into the personal bank accounts of the defendant.
- [9] Witnesses for the claimant, such as Andrew Green and Theodore Moses said that they observed behavior on the part of the deceased from about 1990 which had led them to believe that Daniel Green was losing his mental facilities. These witnesses are all lay persons.
- [10] The court saw the medical report of Dr. Sharma. Dr. Davendra Sharma examined Mr. Daniel Green and provided a report dated 31st January, 1994. On a psychiatric evaluation he found no abnormality. There was no psychosis. He did find "mild short term memory loss in keeping with aging." Dr. Sharma thought Mr. Green was in good physical and mental health. Dr. Sharma did not attend at the trial. He was not cross examined as to his report.

- [11] Dr. Phillip Griffin is a retired medical practitioner. He last practiced in 1996. He examined Mr. Green on 26th July, 1994. He concluded that Mr. Green was suffering from early Alzheimer's disease. He thought that, given the state of memory loss he saw, the illness would have started about five (5) years before the examination. He was also of the view that in July, 1994 Mr. Green was not competent to make financial decisions.
- [12] Given these two conflicting medical opinions this court preferred the evidence of Dr. Griffin who was available for cross examination though the defendant did not choose to ask any questions or challenge the evidence of the witness.
- [13] This court notes that the correspondence to the bank indicating that the funds of Mr. Daniel Green should be transferred to the defendant was signed by Mr. Green and his legal practitioner as well as the defendant under the power of attorney. At first blush it would seem to be reasonable to conclude that Mr. Green at the time possessed the mental capacity to make the decision revealed by the correspondence. The participation of legal counsel in the exercise lends some force to that conclusion. But given the absence of any positive evidence in support and without the benefit of hearing Dr. Sharma, I have arrived at the conclusion that it is more likely that Mr. Green was significantly mentally impaired at the time.
- [14] I find that at the date the letter was written to the bank, Mr. Green lacked the mental capacity to give such instructions. The moneys transferred to the defendant are thus held by her on trust for the estate of the deceased. It is not necessary for me to make a finding as to the validity of the power of attorney, but had there been need, I would have also found that to be void by reason of the lack of mental capacity of Mr. Green at the relevant time.
- [15] I therefore declare that the defendant is a constructive trustee of the sums of \$713,250.39 and \$227.02. She holds these amounts for the benefit of the estate of Daniel Green. I order that she account to the claimants as the personal representatives of the estate for those amounts. I direct the defendant make such an account forthwith, detailing her dealings with the trust property.

- [16] The defendant is ordered to repay to the claimants all sums found due to the estate upon the taking of the account.
- [17] The defendant will pay the costs of this claim in the sum of \$7,500.00 to the claimants.
- [18] I must offer an explanation for the delay in delivering this judgement. At the conclusion of the hearing both sides were required to file written closing submissions. The defendant filed no submissions. The court office staff did not return the file to me while they awaited the defendant's submissions which have still not been filed. Subsequently, I was posted to another duty station. It was only the enquiries by the claimant which alerted the court to the delay. This system of waiting for both sets of submissions before the file is returned to the judge has now been changed and hopefully there will be no more cases of delay for this reason. This court apologizes to the claimants for the delay.




Brian Cottle
High Court Judge