

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E256 OF 1998

BETWEEN CHRISTINE SHAW APPLICANT
A N D NATIONAL COMMERCIAL BANK 1ST RESPONDENT
A N D THE ADMINISTRATOR GENERAL 2ND RESPONDENT

Mrs. Antoinette Haughton Cardenas and Mr. Kevin Williams, instructed by Haughton and Associates for Applicant

Mrs. Lana Smith for the 1st Respondent

Andrew Gyles for the 2nd Respondent

Heard: January 23 and April 19, 2001

Harris, J:-

Ivina Henry, who was also known as Ivina White, was the aunt of the Applicant. She died intestate on May 13, 1997. At the date of her death, she was a divorcee and the mother of one child, born on June 15, 1987. She was an Informal Commercial Importer.

During her lifetime, she operated several accounts with the Manor Park Branch of National Commercial Bank. The following accounts were maintained in the name of Ivina Henry:-

Current Account for	\$124,986.87
Foreign Currency Account for	US\$55,300.91
Foreign Currency Certificate of Deposit account for	US\$29,000.00

A Certificate of Deposit No. 006580 for the sum of \$171,000.00 was issued in the names of Ivina Henry and the Applicant.

The Applicant seeks an order by way of an originating Summons for the determination of her interest in funds standing to the credit of Certificate of Deposit 006580 and for a declaration that she is entitled to the proceeds of the Certificate of Deposit. Miss Henry's death had been reported to the 2nd Respondent, the Administrator General, who has commenced investigations into her estate with a view to applying for Letters of Administration. The 2nd Respondent contends that the funds form part of the assets of the estate of the deceased. The 1st Respondent holds the disputed funds but indicates that its only interest in the matter is to ensure that the funds are paid to the proper party.

In this matter there are two main issues. The first is whether a contract exists between the applicant and the 1st Respondent, by virtue of which, upon survivorship, she is entitled to the funds forming the subject matter of the dispute. If it is not so found, then, the second is whether a resulting trust to the estate of Miss Henry ought to be presumed but such presumption ought to be rebutted on the ground that the applicant has demonstrated that there was an intention on the part of Miss Henry to have made a gift of these funds to her.

Prior to May 6, 1997 the funds were in Miss Henry's name only. They were initially deposited with the 1st Respondent in Jamaican currency and subsequently converted to United States currency on that date. A Certificate of Deposit was prepared and issued in the names of Miss Henry and the Applicant.

Miss Linda Miller, an officer of the 1st Respondent, averred in paragraph 8 of an affidavit dated July 20, 1998, that joint accounts with the bank are operated through mandates, which, are customers' written authority dictating the manner of disposal of the funds in an account. She further stated, in her affidavit, that on presentation of the Certificate of Deposit, no mandate was located verifying how the deposit was held and how the funds should be disposed of. Miss Henry was given a mandate to be executed by the Applicant and herself. There is no evidence that the relevant mandate was executed by either of them and returned. In a letter dated May 27, 1997 from the 1st Respondent to the Administrator General paragraph 4 states as follows:-

“Recently our customer indicated her intention to include Christine Shaw on her account and Certificate of Deposit was issued in their said names, signed by the customer. However, before the documentation could be completed, the customer died.”

The preparation and the issuing of the Certificate of Deposit were premature. The mandate ought to have been executed by Applicant and Miss Henry prior to the Certificate being issued. The manner in which the funds were to have been held and disposed of must be acknowledged as fundamental requirements of the terms of any contract between the 1st respondent, Miss Henry and the Applicant. There is no evidence of any written agreement in this regard. Although it has been stated that Miss Henry had intended to include the Applicant on the account and notwithstanding a Certificate of deposit had been issued, both Miss Henry and Applicant were under an obligation to have executed the mandate. That condition having not been fulfilled, it cannot be recognized that any contractual relationship between the 1st Respondent and the Applicant had been formulated.

There had been, however, a contract between the 1st Respondent and Miss Henry, she being a long standing customer of the 1st Respondent. No new contract would have been created between them on her opening account number 006589. Additionally, on receipt of funds by a bank from a depositor, the bank becomes a debtor to that person from whom the money was received and as a general rule, under a duty to pay only that person from whom the deposit was received *Stoney Stanton Supplies Coventry Limited v Midland Bank Limited* 1966 2 Lloyds Report 373. The 1st Respondent received the deposit from Miss Henry. The transaction between the 1st Respondent and the Applicant was incomplete, she having not signed the mandate. The 1st Respondent would therefore be accountable to Miss Henry alone.

The Applicant is a stranger to the contract between Miss Henry and the 1st Respondent. There were no instructions from Miss Henry as to the disposition of the funds, she having not executed the mandate. This being so, there is no contractual obligation under which 1st Respondent would be liable to pay the proceeds of the Certificate of Deposit to the Applicant.

Mrs. Houghton Cardenas in citing the case of *Young v Sealy* 1949 1 All E.R. 92, asserted that the facts of that case are similar to the case under review. Both cases are clearly distinguishable. In *Young v Sealy*, an aunt transferred certain balances standing at her credit at a bank to a new account at the same bank in the joint names of her nephew, the defendant and herself. An authority to the bank was signed by them both to pay the money to the order of both or any one of them, or to the order of the survivor or executor or administrators of such survivor and to accept the endorsement of both or any of them to cheques. She also maintained two other accounts with another bank which

were transferred in the joint names of herself and the defendant by written authority of them both with authority that the funds be disbursed to either or survivor. The aunt kept control over the accounts. On her death it was held that the nephew had not only a legal interest but also a beneficial interest in the money. In the present case there is no written authority from Miss Henry and the Applicant with respect to whom the money should be repaid.

It was also urged by Mrs. Haughton Cardenas that where a person deposits money with a bank in the name of himself and another with instructions that it is payable to either or survivor, the other's right against the bank is dependent on whether the depositor had purported to have made the other a party to the contract. She further submitted that if the depositor had done so, then he must have had authority to act as the other's agent. In support of this proposition she cited the learned author of Halsbury's, Volume 3 page 36.

This principle would be applicable if Miss Henry had given specific instructions that the funds should have been payable to either herself or the survivor (the Applicant). She would thereby have purported to have made the Applicant a party to the contract. No written instructions exist as to how the parties should hold the funds, or to whom it should be made payable in the event of Miss Henry's death. Her request that the Applicant's name be included on the account and the fact that Certificate of Deposit was issued are inconclusive. Although Miss Henry had intended to make the Applicant a party to the contract, she had not executed the relevant mandate bringing into operation a contract between the 1st Respondent, the applicant and herself, which could be ratified by the Applicant.

There remains to be considered, whether a resulting trust regarding the proceeds of the deposit has been created in favour of Miss Henry's estate and whether it was the intention of Miss Henry that the Applicant should acquire the beneficial interest in the funds.

At this point, it is necessary to deal with a submission by Mrs. Haughton Cardenas that since Miss Henry was the Applicant's aunt, having raised her as a child, she stood in loco parentis to her and having shared a close personal relationship with her during her lifetime, the doctrine of the presumption of an advancement becomes relevant.

The Applicant is Miss Henry's niece. The application of the principle of presumption of advancement does not extend to persons enjoying the relationship of aunt and niece. Consequently, no consideration can be given to the matter with respect to a presumption of advancement. However, if a resulting trust in favour of Miss Henry's estate is presumed, such presumption may be rebutted by evidence of intention by Miss Henry to have made a gift of the proceeds of the Certificate of Deposit to the Applicant.

Prior to May 1997, all accounts with the 1st Respondent were exclusively in Miss Henry's name and Miss Marcia Wilson, an Officer of the 1st Respondent stated that it was on her suggestion that the Applicant's name was added. In paragraphs 3 and 4 of her affidavit, dated July 20, 1998 she states as follows:-

"That all her accounts were in her sole name and I suggested to her that she should add someone else's name to the large deposit in case of emergency. That she advised me that her daughter was too young and lived overseas and there was not any other person she trusted.

That I persuaded her to add another relative and she added her niece's name Christine Shaw but did not have details to complete the mandate form such as her niece's address, so I gave her the form to take with her, complete sign and return."

Miss Henry was advised by Miss Wilson to add another person to the large deposit should there be an emergency. Miss Wilson's reference to the large deposit must be with respect to the US\$171,000.00. A Certificate of Deposit was issued for that amount bearing Miss Henry's and the Applicant's names.

Where a joint bank account is created from funds which is the sole property of one depositor, the other, if he acquires a legal title, prima facie holds those funds on resulting trust on the death of the original depositor. There is no presumption of advancement or gift where such an account is opened by a mother in the joint names of herself and her child, although in the case of a widowed mother little evidence will be required in such circumstances to establish the intent of a gift. If the evidence is insufficient to demonstrate the intention, effect must be given to the trust *Edwards v Bradley* (1957) 9 DLR (2nd) 673.

Miss Henry opened the account in the joint names of the applicant and herself. Although the legal title to the money is vested in them jointly, only Miss Henry provided the funds and the Applicant therefore holds those funds on trust for Miss Henry's estate. This presumption is rebuttable on proof that Miss Henry had intended to pass the beneficial interest to the Applicant. It is therefore incumbent on the Applicant to demonstrate that Miss Henry had the intention at the time she entered into the transaction with the 1st Respondent, to have bestowed upon her the proceeds of the Certificate of deposit.

The Applicant asserted that on numerous occasions in 1996 her aunt had indicated that she had added her name to the "large Certificate of Deposit" referring to Certificate of Deposit #006580 for US\$171,000.00. In 1996 that account was not in existence. The funds were not even in United States currency then.

She further declared that between 1996 and 1997 her aunt showed her various Certificates of Deposit bearing their names on each renewal. This is clearly untrue, as the first and only time a Certificate of Deposit was issued in their joint names was in May 1997. There were no joint accounts in the names of Miss Henry and the Applicant in 1996 or prior to May 1997. The account opened in May was for a period of only one month. It was never renewed. Miss Henry died several days after the deposit was made.

Miss Miller averred that Miss Henry attended the bank with the intention of removing her funds to another financial institution. By her persuasion, she refrained from doing so. She also yielded to Miss Wilson's suggestion to add the name of an adult to the account in the event of an emergency. The Certificate was issued with the Applicant's name included. Miss Miller and Miss Wilson are employees of the 1st Respondent. They have no interest to serve. The 1st Respondent has clearly indicated that its only interest in the matter is with respect to the payment of the funds to the correct party. In my judgment their evidence is cogent and reliance ought to be placed on it. I must however emphasize that although the 1st Respondent in its letter to the 2nd Respondent related that Miss Henry intended to include the Applicant on the account, this in itself does not denote that Miss Henry intended her to take the beneficial interest therein.

The roll over period for the Certificate of Deposit was 1 month. If Miss Henry had intended that the beneficial interest in the funds should accrue to the Applicant, it is unlikely that they would have been placed on deposit for only one month. It is clear that the deposit being for a short period would be to take care of any emergency which may arise in the event of Miss Henry's demise, her life being at the time under the threat of death.

Miss Henry is the mother of a child who is a minor. She had told Miss Wilson that the child was too young for her name to be placed on the account. Although the Applicant's name has been put on the account, it is highly improbable that she would have intended that the Applicant should have been made a beneficiary of the funds in lieu of her daughter. She shares joint custody of the child with her ex husband, who resides with the child in Florida.

In an affidavit sworn by Mr. Colin Chin, he averred that the Applicant and Miss Henry had enjoyed a close relationship and that she assisted Miss Henry with the running of her business. He further stated that Miss Henry was concerned about her personal safety as well as about her ex husband coming into possession of any of her assets; that she raised the Applicant as her own child and had declared on many occasions that "If anything should happen to her Christine will be taken care of". An Affidavit was also submitted by Mr. Kenneth Small, which speaks to a close relationship between the ladies and the Applicant assuming the management of Miss Henry's affairs including the conduct of her business transactions during her absence from the island.

When the Certificate of Deposit was issued, Miss Henry had not known the Applicant's address. Surely, if Miss Henry and herself were close and if the Applicant

had been assisting with the management of her business and affairs as the Applicant wishes me to believe, then it is obvious that she would have known where she lived.

There seems to be an element of doubt as to the veracity of Mr. Chin's averment that Miss Henry had stated that she did not want her ex husband to get hold of any of her assets, in light of the fact that she has assets other than the disputed funds. Several options were available to her to protect her assets from her ex husband. She could have made a Will, or could have set up a trust. But even her death on intestacy does not permit her ex husband to gain access to her assets.

The Applicant has not established that Miss Henry had intended that she should have acquired the beneficial interest in the proceeds of the Certificate of Deposit. She had never acquired a right to these funds, as Miss Henry did not have the intention to confer a gift on her by way of the money. The funds in the account enure for the benefit of Miss Henry's estate. The Application is therefore refused.