

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 391 OF 1994

IN THE MATTER of the Estate of WALTER  
RUDOLPH WONG, Deceased

A N D

IN THE MATTER of Section 532 of the Judicature  
(Civil Procedure) Code Law

BETWEEN	LISA WONG	1ST PLAINTIFF
	JOANNE BLACKERBY	2ND PLAINTIFF
	JODIE WONG	3RD PLAINTIFF
	CHRISTINE WONG	4TH PLAINTIFF
	RICHARD CHONG	5TH PLAINTIFF
	DONOVAN WONG	6TH PLAINTIFF
AND	PHILLIP SAMMS	DEFENDANT

Mr. Mishael Hylton and Ms. Michelle Henry  
instructed by Myers, Fletcher & Gordon for  
the Plaintiffs

Mr. Leon Green along with Ms. Charmaine Rhoden  
and Mr. Audley Foster for the Defendant

Heard: 13.5.96, 14.5.96, 15.6.96

Delivered: 3.10.96

Judgment

Theobalds J.

The deceased a well known medical practitioner in Jamaica in the 1970's subsequently migrated to Canada. In both jurisdictions he did well and it appears amassed substantial property. He was divorced from his wife, Cheryl-Ann Wong.

The first four named Plaintiffs herein are the children of the deceased Walter Rudolph Wong and the main beneficiaries of their father's estate. The fifth and sixth Plaintiffs along with the Defendant Phillip Samms, are the duly qualified executors of the deceased estate. It is not in dispute that the Defendant was a friend of the deceased and indeed his business partner in Jamaica. Whenever the deceased visited Jamaica he would reside at the home of the Defendant's parents who were also his friends. In 1994 the deceased made one of his regular trips to Jamaica. He arrived here on the 31st March, 1994.

Accompanying him was Brenda Robinson his live-in friend and companion for the previous four years. On this trip he fell ill and returned to Canada. On the 10th April he underwent surgery and died on the 3rd May, 1994. While in hospital he made and executed his last Will and Testament. There were two items of property which the Defendant claimed did not form part of the deceased estate but had been given to him by the deceased. It is in relation to these two items that the Plaintiffs by Originating Summons dated the 26th September, 1994 sought Declaration and Orders of this Court. After the first day of hearing/<sup>a</sup> Consent Order as agreed to by the parties was entered by the Court. The Defendant renounced his executorship, agreed to abandon his claim in respect of certain shares in the Medi-Centre Limited on condition that enquiries be made by order of the Court as to what compensation (if any) was due to him. A formal order embodying the terms of this consent order was duly filed. These shares in Medi-Centre Limited were one of the items of property which the Defendant claimed had been given to him by the deceased many years prior to his death.

The second item of property which the Defendant claimed and this was also said to be a gift from the deceased just prior to his final return to Canada was the sum of \$500,000.00 in Canadian currency. This gift was in the form of five bank cheques drawn on a Canadian Bank each to be filled in for \$100,000.00. The fifth and sixth Plaintiffs (co-executors of the Defendant) frankly admit that they were not aware of these funds before the death and/<sup>the</sup> Defendant urges that the fact that a sum as large as \$500,000.00 has not been specifically devised or even mentioned at all in the Will can be construed to mean that this amount did not in fact form any part of the estate. The Defendant claims the amount was a gift to him a few days prior to the death.

He asserts that the deceased was so concerned that practically on his death bed he insisted on knowing whether his instructions to complete and lodge the cheques had been carried out. The Defendant in order to allay his anxiety said that they had been. This was in fact untruthful.

Again the Defendant gives two clearly conflicting accounts as to what this \$500,000.00 was intended for. Firstly part was to be used towards the purchase of a Town House next door to his for the use and occupation of Brenda Robinson, and secondly it was to help towards her future maintenance and support. The town house was in fact purchased but without the knowledge and consent of the two Co-executors and Miss Robinson herself refused to have anything to do with the Defendant's proposal for the formation of a Company in whose name the title would be issued. All this is clearly inconsistent with the Defendant's final assertion that the \$500,000.00 was an outright gift by the deceased to him.

The sole witness, Attorney-at-Law David Wong Ken, called by the Defendant is clearly in conflict with him on issues of fundamental importance. The Defendant insisted that prior to the \$500,000.00 transaction Wong Ken had not acted as his Attorney-at-Law. The five cheques in issue had been deposited with Wong Ken when the Defendant answered the call of the deceased for him to come to Canada. Wong Ken's evidence was that he Wong Ken had acted for the Defendant on previous occasions. Wong Ken's evidence was that the Defendant instructed him to take instructions from his two Co-executors in relation to these five cheques proceeds of which he (Wong Ken) was allegedly to hold on Samms behalf. If these funds were not then regarded by the Defendant as belonging to the deceased estate and were in fact the Defendant's property why the necessity for any such instructions? It is also a matter of some significance that neither of the Co-executors were made aware by the Defendant of the existence of these funds. Brenda Robinson on the other hand had testified that the deceased and herself had intended to live in Jamaica and that as part of the plan funds were being transferred here from time to time. It is also not without significance that the relevant file and account in Wong Ken's office were in the name of the deceased though Samms is claiming that it was his money. Even the relevant receipts were issued in the name of the deceased, and this in my view, points in one direction and one direction only, and that is that the \$500,000.00 was at all times part of the deceased estate.

The Defendant Samms put his credibility on the line when he said that he regarded Wong as having appointed him an executor "in order to look after Brenda Robinson." Surely by renouncing his Executorship and abandoning his claim in respect to the shares in Medi-Centre Limited he was putting himself in a position to which he would be least likely to be able to assist her. Remember that it was Samms' evidence that in discussions with the deceased it was his wish that Medi-Centre Limited should continue as it was and she was to work at Medi-Centre and his (deceased) shares in Medi-centre would look after her for the rest of her life."

One final comment on my perceived weakness in Samms' case. His mother Dorothy was present at the handing over of the cheques to him. Indeed she received five other cheques at the same time and under similar circumstances. Not only were these five cheques given to his mother to lodge but their total would bring the amount remitted to Jamaica up to the one million Canadian dollars which the witness Samms had admitted to knowing about as the proceeds of an investment in Canada that had matured shortly before the deceased and Brenda Robinson came to Jamaica. Brenda herself gave evidence as to the maturing of an investment two weeks before their departure for Jamaica and of their intention to live in Jamaica and to transfer money here for that purpose.

I have embarked upon and completed a detailed and critical analysis of the evidence produced by the affidavits on both sides and also in the cross examination at the hearing. In view of my findings above I do not find it necessary to deal with the principle of donatio mortis causa simply because there never was any gift of this \$500,000.00 to the Defendant. In Smell's Principles of Equity 28th Edition the learned Author has made it quite clear that there are certain types of property not capable of passing by donatio mortis causa. Among such items are included cheques drawn by a deceased on his banker. The author is at pains to explain that a cheque is only a revocable authority given to a banker to pay money, so that a delivery or handing over of a cheque is neither a delivery of property or of a document of title to property.

He cites on the point Re Beaumont [1902] 1 Chancery 889 approved in Re Swinburne (1926) Ch 38. Put another way a cheque is no assignment or delivery of any money in the drawer's account for it is "but an order to pay and not an absolute assignment of anything." Here the unchallenged evidence is that the money was put into Dr. Wong's account. I find absolutely no merit in the Defendant's claim that this was his money.

For the reasons above I grant the Declaration sought at paragraph 2 of the originating summons dated the 26th day of September, 1994 that "the sum of \$500,000.00 Canadian withdrawn from account number 3300911 in Toronto Dominion Bank forms part of the estate of Walter Wong" and make consequential orders:

- (1) That the Defendant transfer to the 5th and 6th Plaintiffs the said sum of Five hundred thousand dollars (CA\$500,000.00) plus interest at 10% per annum from May 4, 1994 until the date of payment.
- (2) That the Defendant furnish accounts to the 5th and 6th Plaintiffs regarding all assets of the estate which have come into his hands since May 3, 1994 and any assets of Walter Rudolph Wong which he had any control over or access to prior to that date.
- (3) That the Defendant pay the costs of this action.

An Injunction is also granted to restrain the Defendant except so far as may be necessary to comply with the above Orders, from transferring, converting or dealing in any way with the said shares in Medi-Centac Limited, the said funds or any of the assets of the estate of Walter Rudolph Wong.