SUPREME COURT OF QUEENSLAND

CITATION:	*Swettenham v Wild* [2004] QSC 420
PARTIES:	**LEONARD THOMAS GEORGE SWETTENHAM (plaintiff)** **v** **ROSE-MARIE BEVERLY WILD (defendant)**
FILE NO:	BS6780 of 2003
DIVISION:	Trial Division
PROCEEDING	Trial
DELIVERED ON:	29 November 2004
DELIVERED AT:	Brisbane
HEARING DATE:	22 and 23 November 2004
JUDGE:	Mullins J
ORDER:	**1. That the defendant pay the plaintiff equitable compensation of $45,000 for the plaintiff's entitlement to reside in the self contained flat in the house on the real property described as Lot 413 on RP 223343 County of Ward Parish of Gilston ("the property") for the remainder of the plaintiff's life.** 2. **It is declared that the defendant holds the property subject to an equitable charge in favour of the plaintiff to secure the payment by the defendant to the plaintiff of the equitable compensation of $45,000.**
CATCHWORDS:	EQUITY – GENERAL PRINCIPLES – EQUITABLE ESTATES AND INTERESTS – GENERALLY – NATURE OF EQUITABLE ESTATES AND INTERESTS – plaintiff entered into arrangement with his daughter that he would contribute the majority of purchase price for a house with granny flat on condition that he could reside in granny flat for remainder of his life – where property purchased in plaintiff's name but daughter and husband made mortgage payments into plaintiff's account – where plaintiff subsequently transferred property to daughter – where family dispute led to irretrievable breakdown in relationship – where plaintiff moved out of granny flat – whether presumption of advancement applied to transfer of property to daughter – whether plaintiff's equitable interest in the property was limited to a right to reside in granny flat for the rest of his life – whether it would be unconscionable for daughter to deny plaintiff his equitable interest in the property – whether

plaintiff entitled to an equitable charge to secure payment of equitable compensation equal to the value of the entitlement to reside in granny flat for life

Charles Marshall Pty Ltd v Grimsley (1956) 95 CLR 353
Lawrence v Branch [2002] WASCA 292
Muschinski v Dodds (1985) 160 CLR 583

COUNSEL: KF Boulton for the plaintiff
ME Pope for the defendant

SOLICITORS: Hunter Solicitors for the plaintiff
Michael McMillan for the defendant

[1] **MULLINS J:** The plaintiff claims a declaration that he holds an equitable interest in real property situated at 2 Rob Roy Court, Nerang in the State of Queensland ("the property"), being Lot 413 on RP 223343, County of Ward, Parish of Gilston and a determination of the extent of his interest. A house which incorporates a self contained flat referred to as the "granny flat" is situated on the property. The defendant acknowledges that the plaintiff has an interest in the property which is enforceable in equity to the extent only of the right to reside in the granny flat for the remainder of his life. The defendant submits that the plaintiff is entitled to equitable compensation for the present value of the cost for the plaintiff to rent similar accommodation to the granny flat for the remainder of his life. The defendant estimates that the compensation should be somewhere between the sum of $40,000 and the sum of $43,000. The interest which the plaintiff seeks in the property is greater in value and extent than that acknowledged by the defendant. The plaintiff submits that the property should be sold, each party's capital contribution should be paid out of the proceeds of sale and any surplus should be divided in an equitable way between the parties that reflects the significant contribution to the purchase price of the property that was made by the plaintiff.

Witnesses

[2] The plaintiff who was born in October 1923 is the father of the defendant. The plaintiff relied on his own evidence and that of his son Barry and granddaughter Emma. Barry is the brother of the defendant and Emma is the daughter of the defendant.

[3] The defendant gave evidence and called evidence from her husband, her husband's mother Mrs Wild, her son Robert and accountant Mr Peter Green.

[4] This litigation arose after the relationship between the plaintiff and the defendant broke down. The recollection of each of the plaintiff and the defendant about the events prior to the breakdown seems to have been affected or coloured by the deep resentment each of these parties bears the other, as a result of the breakdown. I have therefore endeavoured throughout these reasons to explain, when it has been necessary, why I have preferred some evidence over other evidence.

Facts

[5] The plaintiff lived in Victoria with his wife. By 1998 he formed the intention of coming to Queensland to live after his wife who was dying at that stage passed away. The defendant and her family had been living in a rented house at Nerang for some time, when the plaintiff expressed the intention to the defendant and her husband in 1998 of buying a house property on the Gold Coast which had a self contained flat, so that the defendant and her family could live in the house and he could live in the self contained accommodation.

[6] The plaintiff's wife died in 1999. He sold his house in Victoria. The plaintiff gave to his other son Alan the sum of $100,000 and a car, a caravan and some whitegoods and gave the sum of $170,000 to Barry.

[7] Both the plaintiff and the defendant located the property as suitable for purchase. The plaintiff entered into a contract to purchase it for the sum of $232,000. The plaintiff decided he would put in the sum of $190,000 towards the purchase of the property. The plaintiff organised for a home loan from the Australia and New Zealand Banking Group Limited ("ANZ") for the sum of $55,000 to enable the balance of the purchase price to be paid, some expenses to be paid and for a car to be purchased for the defendant's husband. The intention of the plaintiff, the defendant and the defendant's husband was that the defendant and her husband would meet the repayments under the mortgage. The transfer of the title of the property to the plaintiff was registered on 20 June 2000.

[8] There was a conflict in the evidence between the plaintiff and the defendant and her husband, as to why the property was purchased in the plaintiff's name. I am satisfied, having regard to the evidence of the plaintiff's distribution of some of his assets to his sons and the arrangements that were made for the defendant and her husband to make the payments under the mortgage given by the plaintiff over the property, that it was the plaintiff's intention at the time of purchasing the property to benefit the defendant ultimately by giving the property to her, whether under his will or by way of gift in his lifetime. It was apparent from the plaintiff's actions in selling up his assets in Victoria and re-locating to Queensland that he was intent on benefiting his children during his lifetime, rather than having them wait until he passed away, before they obtained their inheritance. The intent to benefit the defendant by giving her the property was confirmed by the terms of the will which the plaintiff made on 26 November 2000 whereby he gave the property to the defendant.

[9] The plaintiff arranged with the ANZ that the payments under the mortgage of the property would be taken directly from his ANZ access account. He gave the defendant a deposit book, so that the defendant could deposit $100 per week on account of the mortgage payments.

[10] After the parties had moved into the property, the plaintiff reached an arrangement with the defendant that he would pay her $40 per week in return for the defendant providing him with an evening meal and cleaning his bathroom. The plaintiff

otherwise organised his own meals and looked after himself. At one stage the parties varied the arrangement in respect of the payment of $40 per week. Instead of the plaintiff giving that money weekly to the defendant, the plaintiff undertook the responsibility of paying the rates and insurance for the property which worked out to about $2,000 per year.

[11] The parties lived harmoniously in their respective living areas. There was a common foyer area onto which opened the respective doors for the living areas of the house and the living areas of the granny flat. As the front door to that foyer area could be locked, the parties were in the habit of leaving the doors to their respective living areas unlocked. This enabled the plaintiff to move freely into the house for the evening meal and to seek out the company of the defendant and her family, if he desired.

[12] The plaintiff was able to work out from the monthly statement of account for his access account, when the defendant had missed making a deposit for the purpose of meeting the mortgage payment. There was a conflict in the evidence given by the plaintiff and on behalf of the defendant, as to whether the plaintiff drew the attention of the defendant to the occasions when there was such a payment missed. The defendant and her husband could recall only one occasion on which they had a discussion with the plaintiff about arrears of their contributions to the mortgage payments. It was apparent from the plaintiff's evidence that it was a matter of some irritation to him, when the defendant and her husband fell behind in making the deposits to his access account. The defendant and her husband acknowledged that there was a period of time, when they had difficulty in making those payments. The fact that there was a mutually agreed change to the arrangement confirms the plaintiff's annoyance about the missed payments. It is likely that the plaintiff had conveyed his concern about missed payments to the defendant and her husband on more than one occasion. The change to the arrangement was that the defendant and her husband were to give the sum of $100 to the plaintiff each week and that the plaintiff would then attend to banking those moneys to the access account. The plaintiff considered that arrangement worked better, although he still noted that there were a couple of occasions when the defendant and her husband failed to give him the money.

[13] Again there was a conflict between the parties, as to how the suggestion that the transfer of the property from the plaintiff to the defendant came about. The plaintiff stated that towards the end of 2002, the defendant suggested to him that as he was going to leave the property to her, he should transfer it to her and the defendant and her husband would take over the mortgage and there would be no further problems between them about paying the mortgage. The defendant stated that she was approached by the plaintiff who told her that he wanted to put the property into her name and have the defendant and her husband take over the mortgage. The defendant's husband had a similar recollection. This conflict does not need to be resolved. Whether or not the suggestion first came from the defendant or not, the proposal appealed to the plaintiff, as it would rid him of the worry of ensuring there were funds contributed by the defendant and her husband to meet the mortgage payments. It is clear from the evidence of Mr Green, the accountant who was consulted by the plaintiff, the defendant and her husband, that the plaintiff was

happy to embrace the proposal that he transfer the property to his daughter and free himself of the mortgage. An attempt was made by counsel on behalf of the plaintiff to incorporate the arrangement between the parties for the provision to the plaintiff of the evening meal and the cleaning of his bathroom as a condition of the transfer proceeding. It was apparent from the evidence that this arrangement was a convenient family arrangement and separate from the dealings involving the transfer of the property and the entitlement of the plaintiff to reside in the granny flat.

[14] Mr Green had been the accountant for Barry and knew both the plaintiff and the defendant. He was told by the plaintiff that he wished to make a settlement of the property upon the defendant, similar to what he had already done for his sons, and that there was a condition that he was to have a perpetual occupancy of the granny flat. Mr Green suggested to the plaintiff, the defendant and her husband that they should document the arrangement about the plaintiff's right to reside in the granny flat. Mr Green stated that their response was that it was unnecessary to do so, because they were all part of a family. Mr Green referred them to a solicitor, Mr McGinley, of Hoolihan's Lawyers.

[15] Mr McGinley came to the property and took instructions from the plaintiff, the defendant and her husband in respect of the transfer of the property. He gave a letter of advice dated 16 December 2002 about stamp duty implications. Mr McGinley also took instructions from the plaintiff, the defendant and her husband for new wills. Although the plaintiff does not recall what those instructions were, I accept the evidence of the defendant and her husband that the plaintiff did give instructions to the effect that he wanted a clause in the will to state that he was not providing for any of his children under his will, as he had provided for them adequately in his lifetime.

[16] Because of the plaintiff's need to obtain a mortgage to pay out what was secured on the property to the ANZ, the plaintiff and the defendant entered into a contract dated 19 December 2002 which showed the purchase price for the property as $325,000. It was common ground at the trial of this proceeding that the market value of the property in January 2003 was $310,000. The transfer that was signed by the plaintiff on 14 January 2003 expressed the consideration as the natural love and affection borne by the transferor for the transferee. The amount owing to the ANZ that was paid out by the defendant and her husband was $51,280.73. The settlement of the purchase took place on 17 January 2003 and registration of the transfer of the property in favour of the defendant was effected soon after. The total amount of payments which had otherwise been made under the mortgage before the transfer took place was $12,175.65, of which the defendant and her husband had contributed $8,304.45. I accept that the plaintiff did not raise that shortfall with the defendant at the time of the transfer, because, as the plaintiff explained, he was giving the defendant the property in any case.

[17] Much of the evidence was directed at the events that occurred during Barry's stay with the plaintiff in February 2003 that culminated in the fracas late in the evening of 23 February 2003. Barry was visiting with his fiancée. They had arranged to go out with Emma and her boyfriend in the afternoon of 23 February 2003. The plaintiff was accompanying them. The defendant and her husband were not invited,

because of some friction in their relationship with Emma. The defendant was very angry that she and her husband were excluded from the outing. They went somewhere else.

[18] The plaintiff and Barry and his fiancée returned to the property later that evening and had retired before the defendant and her husband returned to the property. After the defendant came home, she was so angry with Barry that she burst into the main bedroom of the granny flat where Barry and his fiancée were in bed, screamed and swore at him and told him to leave immediately. The defendant behaved hysterically and irrationally. Barry woke up the plaintiff who was asleep in the other bedroom of the granny flat and sought his assistance in dealing with the defendant. The plaintiff got up and a scuffle ensued between the plaintiff and the defendant, as the plaintiff tried to steer her out of his flat. Although the defendant alleged that the plaintiff pushed her into the wardrobe and the wall, it is more likely that the defendant fell against them in the course of struggling with the plaintiff, as he attempted to push her out. In view of the way in which the defendant was behaving, I accept that it was likely, as the plaintiff related, that as the plaintiff attempted to grab the defendant's arms, she hit him. The plaintiff conceded that he responded by slapping her face. Robert entered the flat as this struggle was occurring. I accept Robert's evidence that he saw the plaintiff punch the defendant twice in the head, and I therefore find that, in the heat of the moment, the plaintiff had done more than slap the defendant. The defendant exaggerated her account of this confrontation. I reject her description that she was dragged through the unit by the plaintiff. Eventually the fracas which also involved Barry and the defendant's husband concluded with the family members retiring to the respective living areas.

[19] The fracas commenced with the defendant endeavouring to say Barry could not visit the plaintiff in the flat which he was entitled to occupy under their mutual arrangement.

[20] The plaintiff and the defendant have not spoken or socialised in any real way since the events of 23 February 2003 and it was common ground that their relationship had irretrievably broken down from that time. The plaintiff locked the door to his flat as from 23 February 2003. The defendant and her husband then kept the door to their living areas locked. The defendant no longer provided the plaintiff with an evening meal or cleaned his bathroom. The plaintiff did not pay the rates and insurance for the property.

[21] Although the plaintiff did hit the defendant during the fracas, it was acknowledged at the trial of this proceeding on behalf of the defendant that was not conduct which disentitled the plaintiff to relief in support of his interest in the property. That was a proper acknowledgment in view of the defendant's own conduct in precipitating the fracas and during the fracas.

[22] The plaintiff lodged caveat number 706302788 against the title of the property on 2 May 2003 which did not lapse because this proceeding was commenced on 1 August 2003.

[23] The plaintiff purchased a unit in a retirement village to which he relocated on 1 October 2004.

Plaintiff's submissions

[24] Central to the submissions made on behalf of the plaintiff is that, unless the harmonious family living arrangements were to continue, the plaintiff would not have transferred the property to the defendant in January 2003. As the events of February 2003 destroyed the living arrangements between the plaintiff and the defendant and those arrangements cannot now be restored, it is therefore submitted that the court "needs to find an equitable resolution permitting the parties to this arrangement to go their own ways". The plaintiff therefore seeks a declaration that the plaintiff's ownership of the property is subject to a constructive trust for the repayment to the plaintiff of his capital contribution to the acquisition of the property and an equitable share of the surplus that would remain after both the plaintiff's and the defendant's capital contributions had been repaid. The plaintiff relies on the imposition of a constructive trust in accordance with the principle set out by Deane J in *Muschinski v Dodds* (1985) 160 CLR 583, 612-614.

[25] Mr Boulton of counsel submitted that the plaintiff's position was analogous to that of Mrs Branch in *Lawrence v Branch* [2002] WASCA 292 ("*Lawrence*"). Mrs Branch and her daughter and son-in-law ("the Lawrences") agreed and formed the common intention that Mrs Branch would give money to the Lawrences to assist them in purchasing certain land and building a house on it and that in return they would allow her to reside in a granny flat to be erected on the land rent free, for as long as she liked. In reliance on that agreement and expectation, Mrs Branch paid to the Lawrences the total sum of $79,310. Shortly before the house was ready for occupation, the parties who were living in the same rented house fell out and Mrs Branch made it clear that she did not wish to live under the same roof with the Lawrences. It was found that the breakdown of the relationship between the parties was not the result of any fault on the part of any particular person. Templeman J found that the substratum of the joint relationship was removed without attributable blame and that, in accordance with the principle enunciated in *Muschinski v Dodds*, it would be unconscionable for the Lawrences to retain the benefit of the payments and it was ordered that the return of the moneys to Mrs Branch be secured by an equitable charge over the relevant property. The appeal was dismissed by the Full Court.

Joint endeavour

[26] The difference between the respective positions taken in this matter by the plaintiff and the defendant is the characterisation of what was the joint endeavour between the parties. Relying on *Lawrence*, the plaintiff's submission is that the joint endeavour involved both the transfer of the property by the plaintiff to the defendant and the agreement between the parties that the plaintiff would have an entitlement to reside in the granny flat for the rest of his life. The defendant treats the transfer of the property to her as a discrete transaction and relies on the agreement about the right to reside in the granny flat as the joint endeavour.

[27] The relationship between the plaintiff and the defendant of father and daughter falls within the limited category of relationships to which the presumption of advancement applies. Where a father transfers a property to his child, the presumption arises from their relationship that the father intended the transfer to advance the child and to make the child not only the legal, but also the beneficial owner of the property: *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353, 364. The presumption of advancement may be rebutted by evidence of intention at the time of the transfer that shows that it was the father's intention that the child take the transfer of the property as a trustee rather than as beneficial owner.

[28] It is common ground that at the time the property was transferred by the plaintiff to the defendant, it was their common intention that the plaintiff would be entitled to reside in the granny flat for the rest of his life. The issue is whether that intention is inconsistent with an intention of the plaintiff to confer the beneficial ownership of the property otherwise on the defendant.

[29] The plaintiff was residing in the granny flat prior to the transfer of the property to the defendant. The transfer was done because it suited the plaintiff to be rid of the mortgage in his name and completed the disposal of the assets which he had earmarked for his children. The agreement between the parties about the continuance of the plaintiff's right to reside in the granny flat did not, in the circumstances, rebut the presumption of advancement in respect of the transfer of the property to the defendant.

[30] The plaintiff's position is not analogous to that of Mrs Branch in *Lawrence*, as Mrs Branch made the payments in return for the right to reside and was not intending to give her daughter an early inheritance.

[31] The joint endeavour in this case was the conferral by the defendant on the plaintiff of the right to reside in the granny flat for the rest of his life. That joint venture has failed. The defendant conceded that it would be unconscionable of her not to acknowledge the existence of that right. Her ownership of the property is subject to that right. The relief to which the plaintiff is entitled to reflect that right has to take into account that the relationship between the parties has irretrievably broken down.

Relief

[32] Because of the basis on which the plaintiff conducted his case, no evidence was adduced on behalf of the plaintiff to value his right to reside in the property. The defendant obtained an opinion from a real estate agent that the current weekly rental of the granny flat was between $110 and $130. The defendant relied on the 5% tables to calculate that the value of compensation for the present value of the cost of renting similar accommodation as the granny flat for the remainder of the life of the plaintiff was $40,222. The defendant relied on s 16 of the *Supreme Court Act* 1995 in choosing to use the 5% tables. Section 16 of the *Supreme Court Act* is not applicable, as this is not a calculation of an award of damages and is not "referable to deprivation or impairment of earning capacity or to a liability to incur expenditure in the future". The defendant's calculation of the present value, using

the 3% tables, of renting similar accommodation to the granny flat for the rest of the plaintiff's life was $42,900. No other method of calculating the equitable compensation for the right to reside was advanced by either the plaintiff or the defendant. I therefore will adopt the defendant's method of calculation and will round the figure for the equitable compensation for the present value of the right to reside to $45,000.

[33] At the conclusion of the trial of the proceeding, the defendant indicated her consent to grant a mortgage to secure the payment to the plaintiff of the equitable compensation for the right to reside. That will not be necessary, if the caveat remains on the title of the property, until the payment of the equitable compensation has been made. It is appropriate in the circumstances to charge the property with the payment of the equitable compensation.

[34] I will make the following orders:

1. That the defendant pay the plaintiff equitable compensation of $45,000 for the plaintiff's entitlement to reside in the self contained flat in the house on the real property described as Lot 413 on RP 223343 County of Ward Parish of Gilston ("the property") for the remainder of the plaintiff's life.
2. It is declared that the defendant holds the property subject to an equitable charge in favour of the plaintiff to secure the payment by the defendant to the plaintiff of the equitable compensation of $45,000.

[35] I will hear submissions from the parties on the question of costs.