

SUPREME COURT OF QUEENSLAND

CITATION: *Hayes v Hayes* [2015] QSC 88

PARTIES: **RICHARD NEIL HAYES**
(Plaintiff)
v
SUSAN WENDA HAYES as Executor of the Estate of the
late ERNEST HAYES
(First Defendant)
SUSAN WENDA HAYES
(Second Defendant)

FILE NO/S: No 12260 of 2015

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 21 April 2015

DELIVERED AT: Brisbane

HEARING DATE: 27 March 2015

JUDGE: Boddice J

ORDERS:

- 1. The plaintiff's claim for declaratory relief is dismissed.**
- 2. I shall hear the parties as to the form of orders and costs.**

CATCHWORDS: SUCCESSION – ADMINISTRATION OF ESTATES – ASSETS – whether, at the date of his death, the deceased had an interest in property – whether the deceased and his wife had advanced monies to their daughter by way of gift as part of a joint venture such that the deceased did not have an equitable interest in the property – whether the deceased and his wife had advanced monies to their daughter by way of loan such that the deceased had an equitable interest in the property

COUNSEL: The plaintiff appeared on his own behalf
G J Robinson for the Defendant

SOLICITORS: The plaintiff appeared on his own behalf
Peter Chappel Solicitors for the Defendants

- [1] The plaintiff claims provision out of the estate of his late father, pursuant to s 41 of the *Succession Act* 1981. He also seeks a declaration that at the date of his father's death, his father had an interest in real property being the whole or part of land situated at Chuwar in the State of Queensland ("the property"). The second defendant is the plaintiff's sister and the registered proprietor of the property. She is sued both in her capacity as executor of her father's estate, and in her personal capacity.
- [2] On 19 December 2014, pursuant to r 483 of the *Uniform Civil Procedure Rules* 1999 it was ordered there be a separate trial of the plaintiff's claim for declaratory relief. The present hearing is the determination of that issue.
- [3] The plaintiff's parents contributed significant sums of money towards the building of a house on the property. At issue is whether those monies were advanced by way of gift, on the common understanding the second defendant would care for her parents at the property for the rest of their lives, or constituted loans such that the plaintiff's late father had an equitable interest in the property at the time of his death.

Background

- [4] The plaintiff and the second defendant are the only children of the late Ernest Hayes ("the deceased"), who died on 23 March 2013. They are twins, having been born on 29 August 1955 in England. They emigrated to Australia with their parents in around 1964. Their mother died in early 2013.
- [5] In about 1967, the deceased and his late wife purchased a house in Bardon. It remained the family home until it was sold in 1985. The parents used part of the proceeds from its sale to meet an outstanding sum owed by the plaintiff as a consequence of a failed business venture, which his parents had guaranteed. The balance was used to fund in part the construction of a house on the property.
- [6] In May 1984, the second defendant had purchased the property, then vacant land, in her own name. The balance of the building cost of the house was met by the second defendant, who borrowed approximately \$40,000.00 from her bank using the property as security. The second defendant also used the proceeds of the sale of her caravan towards building the house.
- [7] The plaintiff's parents lived with the second defendant at the property, in the house constructed on the property in 1985, until their deaths within months of each other in 2013. As their health deteriorated, the second defendant cared for them at home. In the case of her mother, this arrangement lasted until her death. In the case of the father, his health deteriorated to a point where he required admission to an aged care facility. It is not disputed the defendant thereafter continued to regularly assist her father in relation to his needs until his death.
- [8] It was common ground between the parties that the house on the property was built on the basis it would be occupied by both the second defendant and their parents.

However, the plaintiff gave evidence it was two complete, separate dwellings, which allowed his parents to live independently. The second defendant accepted the house was designed in that way but said from the time her parents moved in, all three of them lived as if they were in one residence.

Evidence

- [9] The plaintiff commenced his working life in about 1970, after leaving school at the age of 15. Initially, he lived at the family home in Bardon. During this period, he paid board and undertook renovation projects on the family home in conjunction with his father.
- [10] The second defendant attended Teachers Training College for three years after completing Grade 12. After graduating in 1976, she was posted to various schools in and around Brisbane. On some postings she was only in Brisbane for weekends. During this period, when she was in Brisbane, she resided at the family home.
- [11] In 1980, the second defendant undertook further educational studies. When she returned to full-time teaching she was posted to Mt Isa. Her parents purchased a second-hand caravan for her to reside in at Mt Isa. In 1982, the second defendant purchased a new caravan. Part of the purchase price was met by trading in the caravan provided by her parents. The second defendant met the balance of the purchase price.
- [12] In about 1982, the plaintiff commenced working part-time for a boat builder. He was also working as a film cameraman and technician. He subsequently entered into a business venture with the boat builder. The agreement was formalised in writing, and business registration was obtained, as was finance. The plaintiff's parents guaranteed a business loan, supported by a mortgage on the family home.
- [13] The business venture failed around 1984, and the plaintiff was left with substantial debts. As a consequence, he was unable to meet the loan guaranteed by the parents. The parents paid out that loan, in the sum of about \$11,000.00. The plaintiff said that payment was made prior to the sale of the family home. The second defendant said it was met by the parents obtaining a bridging loan, the funds from which were also used to commence building the house on the property. The second defendant said the bridging loan was repaid when their parents sold the family home.
- [14] In 1984, the second defendant was transferred back to Brisbane. She resumed living with her parents at the family home in Bardon. Her parents offered to allow her to build a flat under the family home. However, the second defendant considered the site unsuitable. Instead, she purchased the property. The second defendant paid the total purchase price from her own monies.
- [15] Whilst the property was purchased by the second defendant, the second defendant said she had agreed with her parents that they would live with her in a house to be built on the land. The parents agreed to contribute to part of construction of the house, on the

basis the second defendant would look after them for the rest of their lives. The second defendant said this arrangement was on the basis the house would be “her house”.¹

- [16] The second defendant and her parents looked at a number of display homes after purchasing the land. A “builder” was engaged to construct a house on the land. That builder did not hold a builder’s licence. The second defendant obtained an owner builder’s certificate. The house was built on the basis the “builder” was effectively the project manager. The “builder” sourced subcontractors.
- [17] The family home was sold in about September 1985 for \$75,000.00. The second defendant said the net proceeds were used firstly to meet the sum owed by the plaintiff as a consequence of a failed business venture. The remaining net funds were used in the construction of the house. Initially, all of the bills for construction of the house were paid by her parents. When the remaining funds from the sale of the family home were exhausted, the second defendant took out a loan to finish completion of the building work. By that time, the “builder” had parted company with them. The plaintiff and a friend undertook some of the remaining works. They were paid for their time.
- [18] The second defendant and her parents moved onto the property after the family home was sold. Initially, they lived in a caravan that had been transported to the site. They moved into the house when it had been partially completed. The second defendant estimated this occurred sometime in 1986. The second defendant then sold the caravan and used the proceeds toward completion of the house.
- [19] The plaintiff said when the arrangement with the builder broke down his parents successfully brought a Court action against the builder and obtained a judgment in their names. Thereafter, the parents undertook, at their own cost, substantial improvements and ongoing maintenance work, including rebuilding the roof. The total cost of the latter was in the vicinity of \$44,000, of which the second defendant only paid approximately \$8,000. The second defendant agreed she had only paid approximately \$8,000, but said the initial quote for the rebuilding of the roof from an independent contractor was for \$17,592. The plaintiff subsequently undertook the project and charged about \$30,000 for his labour. The second defendant accepted the plaintiff undertook different work to that the subject of the earlier quote.
- [20] On 24 October 1986, at a time when the deceased and his wife had commenced living in the house built on the property, the deceased and his wife made Wills. Relevantly, each provided that if the other predeceased them, the second defendant was to receive the proceeds of the estate for her sole use and benefit absolutely. The plaintiff gave evidence that the failure to include any benefit to him in these Wills was as a consequence of his significant financial difficulties following the failed business venture. The plaintiff ultimately filed for bankruptcy. He was only discharged from this bankruptcy in 1993.
- [21] On 21 July 2008, the deceased and his wife each executed another Will. This Will was the deceased’s last Will and Testament. It again provided that in the event of his wife predeceasing him, the second defendant was to receive the whole of his estate. The

¹ T1-31/5.

plaintiff accepted that by the time of the execution of this Will, his pre-existing financial difficulties no longer existed; he had been discharged from his earlier bankruptcy some 15 years earlier. However, he said the circumstances existing at the time of the earlier Will were relevant to the making of this Will.

[22] The 2008 Will included a further provision in the following terms:

“6. I DECLARE that all monies given to my daughter during my lifetime were gifts. If any monies were given as loans, then I forgive all loans and all interest owing thereon to me at the date of my death.”

[23] The plaintiff asserted in evidence that the inclusion of this provision in the Will was consistent with the monies advanced by his parents, to construct the house on the second defendant’s land, being loans, not gifts. The plaintiff said he had undertaken various works on the property at the request of his parents, who at all times made relevant decisions in relation to that work. Further, his parents had paid significant amounts for improvements to the house. The second defendant accepted her parents met these expenses but said she also contributed to the cost by giving her parents money.²

[24] In 2009, owing to the increasing frailty of the deceased and his wife, alterations were undertaken to the bathroom they used in the house. These works, undertaken at the suggestion of professionals, were assessed by the relevant city council, and partly funded by a government assistance programme. The funding was advanced pursuant to an application signed by the deceased. Eligibility for such funding was dependent upon the deceased being an owner of the property (it was not in dispute the parents never rented the property). However, the second defendant said the relevant organisations knew she owned the property. Further, the building work was undertaken under a policy of insurance issued in the name of the second defendant.

[25] After the mother’s death, the second defendant withdrew money from her parents’ account to pay for the cost of new guttering on the house. The plaintiff said when he challenged the second defendant about this payment, the second defendant replied her parents paid because she did not own the house, and it was not hers until their father passed away. The second defendant maintained in evidence that her parents had always said the house was “her home”.

Submissions

[26] The plaintiff submitted that on the whole of the evidence, it should be accepted the monies paid by his parents for the construction of the house on the second defendant’s property were advanced by way of loan. Consequently, his father had an equitable interest in the property. The plaintiff submitted equity will recognise his parents acquired rights to the property, and grant an equitable interest in proportion to the contributions towards the property.

² T1-44/35.

- [27] The plaintiff submitted the second defendant's demeanour in the witness box was such that she should not be accepted when she asserts her parents advanced the monies by way of gift. Aspects of her evidence were inconsistent, and there was no material to support her assertion that her parents obtained a bridging loan prior to the sale of the family home. The plaintiff also submitted in cross-examination that the second defendant had initially accepted her parents had an interest in the house but shortly thereafter denied such an interest.
- [28] The plaintiff submitted the conduct of his parents after completion of the house, in paying for substantial improvements to the house and in meeting the cost of ongoing maintenance, was consistent with his parents having an equitable interest in the property. Similarly, the grant of government funds to modify the bathroom in 2009 was consistent with his parents having an equitable interest in the property. His parents were not eligible for that funding unless his father was an owner of the property.
- [29] The defendants submit the Court will be satisfied the monies paid by the deceased and his late wife were advanced by way of a gift in contemplation of an arrangement whereby the second defendant would care for them for the rest of their lives. The evidence establishes that common endeavour was met such that the monies have been effectively gifted to the second defendant. There is nothing unconscionable in the second defendant's conduct as to deny the second defendant the benefit of those gifts.
- [30] The defendants further submit the terms of the deceased's last Will support the conclusion that monies advanced during his lifetime were gifts. Alternatively, if the monies were not advanced by way of gift, they were advanced by way of a loan, and all loans were expressly forgiven by the deceased's last Will. Accordingly, there is no basis for a finding that any part of the property formed part of the estate of the deceased.

Applicable principles

- [31] The advancing of funds by a parent to a child, in respect of the construction of a house property to be owned by that child, gives rise to equitable considerations. As was observed in *Swettenham v Wild*³, such circumstances give rise to the interplay of three equitable principles. First, the presumption of a resulting trust in favour of the parent who provides the purchase price. Second, the presumption of advancement in favour of the child who receives property from a parent. Third, the doctrine of constructive trust, arising where it would be unconscionable for one party to retain the benefit of the equity as well as the legal interest in the property where the common endeavour between the parties failed without attributable fault. In respect of the latter factor, equity will intervene where it would be unconscionable for the child to retain the beneficial interest in the whole property where the joint endeavour has failed.⁴

Findings

³ [2005] QCA 264 at [31].

⁴ *Marlow v Boyd* [2012] QSC 331 at [88].

- [32] It is common ground the deceased and his late wife paid approximately \$62,000, of the total construction cost of in excess of \$100,000, for the building of a house on the second defendant's property. It is also common ground they thereafter paid significant sums in respect of further improvements to the property, and for its ongoing maintenance.
- [33] The dispute is as to the characterisation of those payments by the parents. On that aspect, I accept the evidence of the second defendant. She impressed me as a careful witness who did not seek to embellish her evidence so as to improve her position. She candidly accepted there were no formal discussions with her parents in respect of the advance of funds by the parents. Her evidence was that there was a level of trust between her and her parents.
- [34] I accept the second defendant's evidence that these monies were advanced on the basis the house constructed on the property would be her home, in the common expectation she would care for her parents in their old age. That evidence is entirely consistent with what in fact happened in relation to each of her parents. The second defendant cared for each of her parents at home including reducing her work days to four days per week as their health deteriorated further.
- [35] None of the matters raised by the plaintiff, either individually or collectively, cause me to doubt the credibility of the second defendant, or the reliability of her evidence. The second defendant was materially consistent throughout her evidence. Contrary to the plaintiff's submissions, the second defendant did not initially claim her parents had an interest in the house. Relevantly, the evidence given by the second defendant was in the following terms:
- “Q. ... but you claim mum and dad had no interest in the house.
- A. I don't think I've ever claimed that.
- Q. Well they have an interest in the house or they had an interest in the house.
- A. I claimed that they put money into the building of the house.”

The second defendant thereafter confirmed her parents did not have a claim to ownership of part of the house because “they always told me it was my house”.⁵ There is no inconsistency in the answers given by the second defendant in respect of that issue.

- [36] The fact the deceased and his wife paid for improvements and repairs to the house is unsurprising in the circumstances. The relationship between the second defendant and her parents was, as the second defendant said, a trusting relationship. The second defendant gave evidence that where her parents paid monies, she paid monies to her parents by way of contribution. I accept that evidence.
- [37] Finally, it was hardly surprising the application for modification to the bathroom was in the father's name. He was the client in need of services. Whether he met the eligibility

⁵ T1-55/40.

requirements for the government funded programme was a matter for the provider of those funds. The provider was aware the second defendant owned the property.

- [38] I am satisfied the funds advanced by the deceased and his late wife to the second defendant for construction of the house and its ongoing costs, were advanced by way of gift subject to a common endeavour. There has been no failure of the common endeavour. It has been met in its entirety. That being so, there is nothing unconscionable in finding the second defendant benefits by way of advancement in respect of the monies advanced to her by her parents in their lifetimes. All such monies are properly to be characterised as gifts. The property is owned by the second defendant, legally and beneficially, in its entirety.
- [39] This conclusion is consistent with the terms of the deceased's Wills in 1986 and 2008. The plaintiff's explanation for the terms of the 1986 Will has no relevance when consideration is given to the circumstances prevailing at the time of execution of the 2008 Will. The fact the 2008 Will contained a specific provision in respect of loans does not alter that conclusion.
- [40] If I be wrong in the conclusion that the monies paid by her parents were advanced to the second defendant by way of gift, and instead they were advanced by way of loan, clause 6 of the 2008 Will operated so as to forgive those loans. Accordingly, the property would remain wholly the property of the second defendant, legally and beneficially, in that event.

Conclusions

- [41] As at the date of his death, Ernest Hayes did not have an interest in land described as Lot 87 Registered Plan 116097 County of Stanley Parish of Chuwar Certificate of Title No 707394736 also known as 21-23 Allawah Road, Chuwar in the State of Queensland.
- [42] The plaintiff's claim for declaratory relief is dismissed.
- [43] I shall hear the parties as to the form of orders and costs.