ALL IN THE FAMILY

An unfortunate but not uncommon fact situation, a quarrel between siblings over their father's bounty; a brief and elliptical judgment are the reasons which prompted this exercise. The facts of the case of *Wan Nainah* v. *Mohamed Nawawi*[1] narrated below are deceptively straight forward, but as will be seen economy of words and actions do necessarily not bring with it clarity of legal consequence.

The object of this note is to bring out a point oft forgotten that particularly in family situations dealings among members of the family *inter se* in regard to property, unless accompanied by appropriate unequivocal acts and statements, could lead to results unforeseen and probably unintended by the parties involved. It is felt that if the issues and law were clarified it might leave less to chance the fulfillment of a man's intentions. In the case of *Wan Nainah* v. *Mohamed Nawawi*[2] a father bought a piece of land which was registered in his brother-in-law's name. Whilst negotiating for the purchase, the father was heard to have said that he wanted his son to have half of the land. The brother-in-law did not appear to have been aware of this statement. One year later, presumably at the request of the father, the brother-in-law transferred the registered title to the father's married daughter. Then the father built a house on the land and lived in the house for a few months before leasing it to a tenant. At about the same time, that is after the house was completed, the daughter signed a deed in which she stated that she agreed to renounce her half share of the land in favour of her younger brother and she also agreed to transfer the half share to him upon "approval by the government". This deed was signed by the married daughter, the father and two witnesses.

In 1968 the father died and the son then sued his sister, he claimed that his sister held the land in trust as to half of the beneficial interest for him.

The Court at first instance decided in the son's favour and on appeal to the Federal Court of Appeal the decision was affirmed. The end result then was that the registered owner, the daughter held land in trust as to half share for her younger brother and the other half share for herself. What could be more fair or just than that in as much as their father's bounty is concerned the children should share it equally?

It is not my intention to carp at the decision itself. But it appears that the decision was arrived at on the basis of an express trust which was valid although there was no evidence in writing. That this is so is not disputed, in the absence of local legislation, the Statute of Frauds

1. [1974] 1 M.L.J. 41.
2. [1974] 1 M.L.J. 41.

1677 not being applicable[3] there seem to be no formalities required in Malaya for the creation of any trust whether of land or of chattels. However, what is troubling is that on reading the judgment again there is no evidence that the married daughter had created a trust with herself as trustee; the father could not have declared the trust as he was not the registered holder. Nothing is said in the Federal Court's judgment as to how, when or why the married daughter became a trustee for her brother as to half of the beneficial interest. So it is my intention to ascertain and examine the possible bases for the daughter being a trustee.

It is intended to deal with the situation in three stages, pausing at each stage to discuss the legal relationship of the four persons concerned, *vis-a-vis* the land in question.

Purchase of Land by Father

Since the land was paid for by the father, although the registered title was in his brother-in-law's name, the brother-in-law held the land on a resulting trust for the father. That the law in Malaya does recognise the existence of resulting trusts in such situations was acknowledged in decisions like *Chang Lin* v. *Chong Swee Sang*[4] and *Dharmaratna* v. *Dharmaratna.*[5] In the circumstances there was no evidence of any intention on the father's part to give the land to his brother-in-law and their relationship does not give rise to the operation of the presumption of advancement.

Declaration of Trust by Father?

The next question that could be asked at this juncture is the effect of the father's oral utterances of intention that he would like to give his son a half share in the land. According to the evidence given by the vendor's brother,[6] the father made such indications during the negotiations for the purchase. Could these statements then amount to a declaration of trust by the father of half of his beneficial interest in favour of his son? It is submitted that this legal conclusion cannot be arrived at for the reasons that (1) the trust property — the beneficial interest in the land — was at the time not yet in existence and (2) the evidence as given in the Federal Court's judgment indicates that the intention was to give and not to declare himself a trustee. Taking the first reason *viz.* that the trust property was not yet in existence, the statements said to have been uttered by the father at best amount only to statements of intention to declare a trust. There being no valuable consideration provided, the intention is thus unenforceable when the father was in a position to declare a trust.[7]

3. The Statute of Frauds (1677) applies in Singapore *virtute* The Second Charter of Justice 1826.

4. (1908) Inne's Report 95.

5. (1938) M.L.J. 310.

6. [1974] 1 M.L.J. 41 at p. 42.

7. *Re Plumptre's Marriage Settlement* [1910] 1 Ch. 609; *Re Kay's Settlement* [1939] Ch. 329; *Re Cook's S.T.* [1965] Ch. 902.

Furthermore the evidence so far as stated in the Court's judgment spelled out a desire in the father to give and not to declare himself a trustee. Is there any difference between giving an interest in land and a declaration of a trust of such interest? The answer according to the later English authorities is clear. Stemming from the premise that equity aids not a volunteer the decisions have laid down the principle that where a man intends to give property to another i.e. to pass the full legal and beneficial ownership of it to the other then the donor must effect all the necessary formalities laid down by the law. If the donor has not satisfied the required formalities then property will not pass and equity will not in this instance aid the donee-volunteer by reading into the facts a declaration of trust. From the earlier decisions[8] it appeared that where a donor had made statements to the effect that he wished to give property to X, then although the donor failed to take the necessary steps to transfer the legal title to him equity would regard his statements as a declaration of trust in favour of the donee. Such was the attitude of the court in *Grant* v. *Grant*[9] a case cited and adopted by the Federal Court in the instant case. However subsequent to this decision, the English Courts had taken a harder line so that where the donor had intended to give as opposed to creating or declaring a trust the court will not spell a trust out of an imperfect gift.[10] The only apparent deviation from this principle was the case of *Re Rose* [11] where a husband who wishing to give his wife some shares in a company had filled in and signed the appropriate transfer forms. Then before the wife was registered by the company as the new legal owner of the shares the husband died. In this situation the court decided that the wife was the beneficial owner of shares although the husband remained the legal owner. The court stated that the husband had done all that was required of him by the law to make his wife the owner of the shares. Thus there being nothing more that he could have done to vest in her the legal title he was simply a bare trustee of the shares for her. The court dealt with the decision of *Milroy* v. *Lord* by emphasing that in that case the donor did not do all he could to divest himself of the property there:[12] In *Milroy* v. *Lord* the procedure adopted by the donor to make one S the trustee of shares for one B was to give him a power of attorney over the shares; this was not the appropriate manner of vesting the shares ultimately in the intended trustee. That being so the court would not assist the intended beneficiary by imputing to the donor an intention to declare himself a trustee for the intended beneficiary. Whereas in the case of *Re Rose* the husband did execute documents which were apt to effect a transfer. It should be noted that although the decision in *Re Rose* was that the husband was a bare

8. See *Grant* v. *Grant* (1865) 34 Beav. 625, *Norman* v. *Malleson* (1870) L.R. 10 Eq. 475.

9. (1865) 34 Beav. 625. In this cases a husband during the subsistence of their marriage 'gave' to his wife certain chattels which were kept in their matrimonial home and were used by them both. Evidence was given that the husband had declared before their mutual friends that the chattels in question were his wife's. The Court held that in the circumstances the husband had made himself trustee of the chattels for his wife. cf. *Re Code* [1964] 1 Ch. 175.

10. *Milroy* v. *Lord* (1862) 4 Deg. F. & J. 264, *Richards* v. *Delbridge* (1874) LR 4 Eq. 11, *Jones* v. *Lock* (1865) LR 1 Ch. App. 25.

11. [1952] Ch. 499.

12. [1952] Ch. 499 at p.

trustee with the wife as beneficial owner yet the court did not state that he had declared himself trustee. It would appear then that the court imposed on him a trust by way of a remedy. The trust then is not an express trust but rather it is a constructive trust.[13]

Be that as it may could a trust be imposed upon the donor-father here in favour of the donee son? The answer appears to be in the negative simply because at the time when he made the alleged statements the donor-father did not have the property which he is supposed to give away. Thus once again we are confronted by the fact that the statements are only statements of intention. In the absence of similar statements at the time when he did have the beneficial interest, even the case of *Re Rose* is not applicable.[14]

The father's statement made at the time of the negotiations could not be used to rebut the presumption of a resulting trust as it does not show that the father wanted the registered owner to have the beneficial interest. In view of the discussion above such statement is sufficient neither to pass the beneficial interest from father to son nor to make the father a trustee for the son of the beneficial interest.

Was the brother-in-law an express trustee?

Taking the oral statements by the father at the time of the negotiations could these give rise to the creation of a trust with the brother-in-law as the express trustee? Again the answer would be negative for there was no evidence that such statements were made to the brother-in-law and that he accepted the obligation.

Thus so far, it is submitted, there is nothing on the facts as given to indicate the existence of a trust of half the beneficial interest in the son's favour. The brother-in-law as registered owner, not having paid the purchase money held it on a resulting trust for the father.

Transfer of the title to Purchaser's Married daughter

One possible legal connotation of such a transfer is that the married daughter holds on a resulting trust for her father since the transferor only had the bare legal title.[15] Alternatively it could be said that the transferee being the purchaser's daughter, there is a presumption of advancement in her favour.

Presumption of advancement

The first question that seems relevant here is whether such a presumption exists in favour of a married daughter.

13. *Hussey* v. *Palmer* [1972] 3 All E.R. 744, *Binions* v. *Evans* [1972] 2 All E.R. 70.

14. Had there had been such statements it might be argued that the donor-father had done all he could to divest himself of half the beneficial interest in his son's favour since no formalities are required by the law in Malaysia for assignments of equitable interests.

15. *Supra.*

Whilst there is no doubt that the presumption which would operate where a father purchases property which is put in the name of his child — for here the presumption of a resulting trust gives way to the presumption that the father intended by this act to benefit the child — is the presumption of advancement.[16] The presumption is the result of equity's lending her weight to the view that a father has an obligation to provide for his child,[17] so it might be thought that where the father is not under any obligation to so provide, as when the child is financially independent, or in the case of a daughter after she is married when her husband is under obligation to provide for her[18] the presumption does not apply. Again early authorities[19] support this view which was discarded in later cases.[20] Thus the position at present seems to be that whenever a father purchases property in the name of his child the presumption of gift applies unless there is other evidence rebutting such.

In the normal situations where the presumption is applied the father has the property which he has paid for, put in the name of the child at the outset. Thus the child is vested with the legal and beneficial interest by the vendor.[21] However in this case the transferor had at time of the transfer only the bare legal title[22] thus it was not within his power to vest in the daughter the beneficial interest which he did not possess. The problem now is to ascertain how the beneficial interest could have passed from the father to the daughter.

It was said in the case of *Vandervell* v. *Inland Revenue Commissioners*[23] that where the beneficial owner directed a bare trustee to transfer the legal title to another with the intention that that person is also to take the benefit of it, then notwithstanding the absence of a written assignment by the beneficial owner of the beneficial interest,[24] the beneficial interest passes.

In the case under discussion there does not seem to be any evidence (express statements or otherwise) showing that the father intended to vest the beneficial interest in the daughter. However in *Vandervell's* case the beneficial interest passed simply on the basis that the beneficial owner intended that it should pass so it could be argued here that it

16. *Sidmouth* v. *Sidmouth* (1840) 2 Beav. 445, *Bennett* v. *Bennett* (1876) LR 10 Ch. 474.

17. *Bennett* v. *Bennett* (1876) LR 10 Ch. 474.

18. *Moate* v. *Moate* [1948] 2 All E.R. 486 cf. *Pettit* v. *Pettit* [1970] A.C. 777, *Gissing* v. *Gissing* [1971] A.C. 886.

19. *Elliott* v. *Elliott* (1677) 2 Chan. Gas. 229.

20. *Sidmouth* v. *Sidmouth* (1840) 2 Beav. 445, *Hepworth* v. *Hepworth* (1870) 2 LR. 11 Eq.

21. Where the person in whose name the property is put is not a child he takes the legal title from the vendor but he holds the beneficial interest for the purchaser.

22. *Supra.*

23. [1967] 2 A.C. 291 at 311.

24. This requirement set out in s.53(1)(c) Law of Property Act replaces s.9 Statute of Frauds. The Statute of Frauds 1677 applies in Singapore but not in Malaya in absence of other legislation, no writing is required for assignments of equitable interests in property in Malaya.

was the implied intention that the daughter should have the benefit. The basis of such implication would be the presumption of gift or advancement by the father.

The next point for consideration would be whether such presumption of advancement was rebutted by the available evidence.

In the leading case on the subject, *Shepherd* v. *Cartwright*[25] it was stated that only "acts or declarations before or at the time of the purchase or immediately after it as to constitute a part of the transaction are admissible in evidence either for or against the party who did the act or made the declaration. But subsequent declarations are admissible as evidence only against the party who made them and not in his favour."[26] Turning to the available evidence in the instant case there are the statements by the father at the time of the negotiations for the purchase indicating his intentions of benefitting his son. Secondly after the transfer of the title to his daughter the purchaser-father went into possession of the land, and expended his own money on the building of a shop-house which he subsequently let to a tenant. Thirdly on the daughter's part there was the deed in which she declared that she "agree [d] to renounce half share of the said land..." and "to make formal transfer of the said land. . . in favour of [her] said brother. ..."

Applying the ratio of *Shepherd* v. *Cartwright* to the available evidence it does appear that only the declaration made by the father during negotiations may be used in his favour. His act of going into possession and building a house on the land being one year subsequent to the transfer cannot be resorted to in his favour. Although time is relative, one year after the event could not be considered as "so immediately after it (the time of transfer) as to constitute a part of the transaction."

The deed signed by the daughter could be taken against her but her statement there was not to confirm that her brother had a half share in the land. On the contrary as she stated her agreement to renounce a part of her interest presumably she must have had the whole of it if she was then renouncing or giving up half. Thus the deed does little to rebut the presumption of advancement. There is then admissible evidence in the father's favour only his own declarations made during the negotiations. However even in regard to this, although they were made prior to the purchase yet the time lapse between the making of them and the transfer by the brother-in-law (the registered owner) when the presumption of advancement in the daughter's favour arose was at least one year. Is this time lapse relevant? It would seem to me that such a declaration made as long as one year or more[27] prior to the date when the presumption arose, if it stood on its own, uncorroborated by other evidence would not be sufficient to rebut a presumption which in the eyes of equity is a strong one and one which should not "give

25. [1955] A.C. 431.

26. [1955] A.C. 431 at p. 445.

27. Negotiations could have started months before the actual purchase was concluded, and the purchase took place one year before the presumption of advancement arose.

way to slight circumstances".[28] It would appear in the instant case there is no corroborative evidence; there is no evidence of any statements contemporaneous with the transfer indicating that the daughter was not to have the beneficial interest.

Thus on balance it would appear that the daughter took the land beneficially on the basis of the presumption of advancement.

Assuming however that the declaration in the son's favour is taken as having rebutted the presumption of advancement *vis-a-vis* the daughter the consequence then is that the daughter holds the land on a resulting trust for the purchaser. Unless it could be proved that a trust in favour of her brother was communicated to and accepted by her she cannot be said to be a trustee for her brother. Again for reasons set out above [29] the purchaser could not have transferred his beneficial interest to his son on the strength of such declarations at the time. Therefore the other possible conclusion is that the daughter held the land on a resulting trust for the father, the purchaser.

Deed of 1st January 1961

What is the legal significance of this deed?

On the assumption that the daughter was vested with the beneficial interest as well as the legal one the "deed" could amount to no more that a voluntary agreement to renounce half a share to her brother and to transfer the title in due course, that is, a promise to give that could not be specifically enforced, there being no consideration for the promise. If this were accepted then her brother has no rights at all in the land.

An alternative approach to construe the deed as a declaration of trust by the daughter of half share of the land for the brother, could not be seriously entertained. No such declaration was made in the document and no such intention could possibly be inferred.[40]

Then again could the deed be regarded as a step taken by the daughter to transfer the beneficial interest to the brother with immediate effect?

The words actually used in the deed are *"I agree* to renounce. .."; could one fairly interprete these to mean I hereby renounce? Pertinent to the answering of this question would be to ascertain whether the document was drafted by a lawyer or whether it was a document drawn up by the parties themselves. In the event of the latter possibility it might be argued that what the document meant was this: that the daughter being in agreement with her father's suggestion that she give half share to her brother was now stating this in a formal deed; the deed is simply evidence of an earlier valid oral renunciation or assignment of her beneficial interest.[31] If the document were prepared by a

28. Per Lord Eldon in *Finch v. Finch* (1808) 15 Ves. 43 and approved of in *Shepherd* v. *Cartwright* [1955] A.C. 431 cf. *Warren* v. *Gurney* [1944] 2 All E.R. 472.

29. *Supra* p.

30. *Milroy* v. *Lord* (1962) 4 Deg. F. & J. 264, *Richards* v. *Delbridge* (1874) LR 18 Eq.

31. *Supra* footnote 24.

lawyer, however, this interpretation could not be so plausible as it might be assumed that the lawyer would have been more precise and would have chosen his words with more care.

The facts as given in the judgment imply that the document was drafted by a layman — a petition writer.[32] This coupled with the statement by the father "...agree to accept *the above renunciation*"[33] — lends weight to the conclusion that the document was intended to be a deed of renunciation and not merely an agreement to renounce.

Having established the plausibility that the deed of 1st January 1961 was a deed of renunciation inspite of the wording, what she has renounced has to be clarified. From the context of the deed the impression is given that she renounced the legal as well as the beneficial title. In the context of the Torrens system of land registration[34] such a renunciation is ineffective to pass title. But as the land was not at the time subdivided and as her brother was still an infant a direct transfer could not be effected. So although a deed such as that signed would not have been effective normally to vest the legal interest in the brother, in the circumstances it could be argued on the strength of *Re Rose*[35] that the daughter had done all that could be done by her at that time to vest the property in the intended transferee. In short upon the signing of the deed she became, probably unwittingly, a constructive trustee for her brother.

Thus it is only in this circuitous and contorted way that the daughter could be said to be a trustee for her brother. If the view earlier given as a possibility that the presumption of advancement in the daughter's favour was rebutted,[36] then even if the deed were construed as a "deed of renunciation" it would have no effect, indeed no meaning, for she would then have had nothing but a bare legal title to renounce. If the deed was construed as simply an agreement to renounce and to transfer, there could certainly be no trust for the brother.

Conclusion

The above discussion might recall the comment that the law is an ass; with all its technicalities, a man's intentions could easily and perhaps unreasonably be frustrated. Especially in the context of transactions between parent and child, or husband and wife, *inter se,* property is generally dealt with without too much regard for the law. What then does it matter, in the family context, whether a trust is an express trust or constructive trust so long as it is a trust? Why should the law thwart a man's intentions by adhering so strictly to its principle that it would not perfect imperfect gifts? Is the principle inherently sound or valid?

32. at p. 41.

33. my italics.

34. The Land Enactment 1938 of Kelantan is based on the Torrens System.

35. [1952] Ch. 499. See *supra* p.

36. *Supra* p.

By way of an answer to the first question, it is true that in the context of the existing laws in Malaya it is of little consequence whether a trust is express, resulting or constructive. The practical importance in distinguishing between the various kinds of trust lies in the formalities[37] required for express trusts of land and the absence of similar formalities for resulting or constructive trusts. Since the Statute of Frauds is not applicable in Malaya and there is as yet no local legislation laying down any equivalent formalities, the practical need to distinguish between the categories of trust is non existent. Even so it is my view that one owes it to clarity of thinking which in turn aids the development of local legal learning to define the issues and state the law that is applicable accordingly.

In regard to the second and more justifiable criticism it should be noted that this principle of not perfecting imperfect gifts is in turn derived from the basic stance of the Court of Equity when dealing with volunteers. Although there have been in recent years attempts towards the relaxation of the principle in defined situations,[38] it would be going too far to conclude from this that there is unhappiness over the principle generally. But rather it could indicate that while the general principle is accepted, nevertheless in certain situations a modification of the rule would be more in line with justice between the parties. Thus it would be a policy decision as to whether in the context of the family, the premise of not perfecting imperfect gifts should not be relaxed, and if so within what constraints.

In the light of the forgoing it would appear that the Federal Court's decision apparently based on the existence of an express trust is wrong. Such a decision can only be explained on the basis of a constructive trust and this requires a line of reasoning which is too tortuous to be acceptable. Thus it would appear that on the facts as given the daughter should hold the land either on a resulting trust for her deceased father's estate or for herself wholly and beneficially, depending on whether one subscribes to the view that the presumption of advancement has or has not been rebutted.

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37. In Singapore, S7 Statute of Frauds 1677 an express trust of land must be evidenced in writing, while S8 Statute of Frauds dispenses with such writing for resulting or constructive trusts. cf. s.53 Law of Property Act 1925 England.

38. *Beswick* v. *Beswick* [1967] AC. in relation to third party rights in contract cf. *Re Cooks* S.T. [1964] 3 All E.R. 898. Also in *Dillyn* v. *Lwellyn* (1862) 4 Deg. F. & J. 517 but in these cases on equitable estoppel the person favoured by Equity has to show detriment.

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