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*Judgment: approved by the Court for handing down  
(subject to editorial corrections)*

Delivered: 2-12-08

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND  
CHANCERY DIVISION

BETWEEN:

DEBORAH McKENNA

Plaintiff;

and

RITA McDONNELL AS ADMINISTRATRIX OF THE ESTATE OF  
THOMAS McDONNELL (DECEASED)

Defendant.

STEPHENS J

**Introduction**

[1] The plaintiff, Deborah McKenna, brings this action seeking a declaration that the defendant, Rita McDonnell, as the sole administratrix of the estate of Thomas McDonnell holds the legal title to 314 Mullacreevie Park, Armagh ("the property") upon trust for the benefit of the plaintiff absolutely. The plaintiff also seeks an order requiring the defendant to transfer the legal title of the property to her.

[2] The plaintiff is the daughter of Rita and Thomas McDonnell. Her father, Thomas McDonnell ("the deceased") died on 13 September 2005.

**Conflict of Evidence**

[3] There was an unfortunate conflict of evidence in this case between a daughter, the plaintiff and her mother, the defendant. I resolve that conflict in favour of the plaintiff. I accept the plaintiff's evidence and reject the evidence of the defendant where there is any significant conflict. I had the opportunity of assessing the demeanour of the plaintiff in the witness box. She appeared to me to be an entirely honest, reliable and accurate witness. In arriving at that assessment I gave careful scrutiny to her evidence bearing in mind that her father, the other party to the agreement that she alleges that she

entered into had died. That accordingly there could be an opportunity to alter or embellish what had in fact taken place between her and her deceased father. A number of matters were brought to my attention on behalf of the defendant attacking the plaintiff's credibility. I have considered those individually and cumulatively. Having given the matter careful consideration I accept her evidence. In contrast in respect of the defendant a number of matters in respect of which the defendant gave evidence were not put to the plaintiff during the course of cross-examination either at all or in proper detail. The defendant's demeanour was that of an unreliable witness. I gave consideration as to whether the frailties in her evidence were due to a lack of understanding or insight on her part but I conclude that she was manipulative and untruthful.

### **Legal Professional Privilege**

[4] Before turning to the facts I will deal with an issue which arose during the trial in respect of legal professional privilege. The defendant's case is that the deceased was either the sole client or joint client with the plaintiff of Kevin R Winters, Solicitors. Accordingly on either of these cases the file of Kevin R Winters is within the defendant's possession, custody or power and communications between the deceased and Kevin R Winters are privileged. The defendant objected to the evidence of Mr Fields, a solicitor's clerk in the firm of Kevin R Winters, being admitted in evidence. Mr Fields was called by the plaintiff to establish the intention of the deceased in relation to the transaction in issue in these proceedings. With the consent of the parties I heard that evidence but reserved to the defendant the right to exclude the evidence if in the event it transpired to be privileged. I have determined the factual issues in this case without reference to that evidence and accordingly it is not necessary to rule in relation to the claim for privilege. I make it clear that in arriving at any conclusion in this case I entirely rule out the evidence of Mr Fields. However the defendant's claim for privilege highlights the fact that she did not make proper discovery in this case of the non privileged parts of the file of papers held by Kevin R Winters which file of papers would have been in her possession, custody or power as the sole administratrix of the estate of the deceased.

### **The Facts**

[5] The deceased and the defendant married in 1963 but separated in 1982 or 1984. They had 6 children. The majority of the children moved to England. The plaintiff and her sister, Linda, continued to live in Armagh as did the deceased. He lived on his own in the property which was a bungalow which he rented from the Northern Ireland Housing Executive. The plaintiff and Linda were both solicitous for the deceased's welfare, getting his groceries, giving him lifts, cleaning his house and visiting him regularly; mutually enjoying each other's company.

[6] The deceased had no job and no real source of income apart from the benefits that he received. He had no capital except that when shortly before he died he made a further benefits claim. There was a delay in processing that claim and accordingly a delay in payment. When the benefits were approved it not only resulted in weekly payments but it was also backdated resulting in a payment to him of approximately £2,000. The deceased put that money into an ISA account in his and the plaintiff's name. In the event the plaintiff used the entire sum in that account together with £1,000 of her own money to discharge the various costs of the deceased's funeral.

[7] The plaintiff stated that after the defendant moved to England there was no contact between her parents and that the defendant had never been in the property. That evidence was contested by the defendant but I accept the plaintiff's evidence which was that the defendant never visited the deceased when she was in Northern Ireland and further that the deceased did not want her over the door and would not have let her in. The defendant however did keep up contact with the plaintiff and Linda coming across to Northern Ireland to stay with one or other of them once or twice a year. Visits were also made by another family member but with far less frequency than those of the defendant.

[8] Under the Northern Ireland Housing Executive's right to buy scheme the deceased, as a sitting tenant of the Northern Ireland Housing Executive, was entitled, to purchase the property at a discount. The deceased was aware of this scheme but could not avail of it because he was unable to afford the discounted purchase price and was unable to obtain a mortgage. As he could not buy the property he could not obtain the benefit of the discount available to him as a sitting tenant. However he considered that if his daughter, the plaintiff, was in a position to buy the property and he was able to live in the house for the rest of his life, then at least she would get the financial benefit of the discount on the purchase price. Accordingly the deceased devised a plan whereby the plaintiff would purchase the property with her money and that she would pay all the expenses in connection with the purchase. The property would thereafter be hers subject only to his right to remain in exclusive possession rent free for the rest of his life. He suggested this plan to the plaintiff. The plaintiff discussed this with her sister, Linda, who lived in Armagh. Linda was asked whether she would like to help in the purchase and obtain some of the benefits. She was not in a financial position to do so. Indeed if she benefited financially this would have had an adverse effect on the benefits that she receives. The plaintiff also told her mother, the defendant of the plan. That she would be buying her father's house. The defendant's reply was that "it was a great idea". The plaintiff accordingly agreed with the deceased's plan. The objective behind the Northern Ireland Housing Executive's right to buy scheme is to secure for a tenant the dwelling in which he lives, not to permit the property to be immediately resold at a

profit. Accordingly the transfer contains a covenant to repay the discount or a proportion of it, if there is "a disposal" of the property within 3 years. Accordingly it was agreed between the plaintiff and her father that initially the legal title would be transferred into his name but that when the 3 years had elapsed the legal title would be transferred into the plaintiff's name subject at all times to the deceased's right to remain in exclusive possession of the property rent free for life.

[9] That was the agreement that was made by the deceased with the plaintiff. Under that agreement the plaintiff was to acquire the entire property after a period of 3 years subject only to the deceased's right to remain in exclusive possession of the property rent free for life. If the deceased died within 3 years then she was to have the entire legal and beneficial interest in the property. The plaintiff was perfectly open about the agreement with other members of her family. Her mother and sister had been informed at the time that the plan was put to her by the deceased and prior to it being put into effect. They expressed no criticism of it. They agreed to it. Furthermore they were perfectly aware of the nature of the agreement that if for any unfortunate reason the deceased died sooner rather than later, then the benefit to the plaintiff would be increased in that she would obtain possession of the property.

[10] By letter dated 25 April 2003 the Northern Ireland Housing Executive stated that the value of the property was £31,500. The tenancy discount of 60% amounted to £18,900 leaving a balance of £12,600 as the purchase price. The plaintiff paid that amount together with the expenses of the solicitors, Kevin R Winters & Co, of £529.53. Accordingly her total payment was £13,129.53. The plaintiff had to borrow that money and the loan was secured by way of a mortgage on her own house. She has paid interest on that loan and continues to do so. The deceased thereafter lived in the property rent free for one year before he died. The figure as to the initial financial contribution of the plaintiff is £13,129.53 and the deceased's contribution by virtue of his right to a discount is £18,900. I find that the plaintiff acted to her detriment on the basis of the agreement that had been entered into between herself and the deceased by expending money on the purchase of the property.

[11] The plaintiff's evidence, which I accept, was to the effect that her father, who had had a difficult life, though some of the difficulties were self-inflicted, took satisfaction in being able to assist a member of his family in this way. For the plaintiff's part she had a sense of family and I accept that she was motivated by the idea that when her father died there would be a house available for "the English members of the family" to stay in if they came across to Northern Ireland and that ultimately in turn her children would benefit financially. I emphasise however that this plan as to the use of the house was not a part of any agreement with the deceased but was rather what the plaintiff herself privately wished for the future use of the property.

[12] The deceased died on 13 September 2005. After the deceased died the defendant phoned the plaintiff asking her for the fare so that the family could come to Northern Ireland for the funeral. The plaintiff had access to the amount of approximately £2,000 which was in the ISA account and this was the money which the defendant wished to use. The defendant stated that she had heard of the existence to the money when she met the deceased by chance when she was across in Northern Ireland staying with Linda approximately 3 months before the deceased's death. The plaintiff refused to make the money available to pay for travel to Northern Ireland stating instead that she wanted to save the money so that it could be spent on proper funeral arrangements for her father. That is exactly how she used the money together with an additional £1,000 of her own money. I consider that the defendant was disappointed by the plaintiff's reaction and I also consider that there was a degree of conflict between the plaintiff and the defendant in relation to the arrangements for the wake and the funeral. Unfortunately the deceased had had a longstanding problem with alcohol. In those circumstances the plaintiff and her husband were of the view that alcohol should not be offered at the wake and that after the funeral there should not be a reception in a pub. No matter what the rights and wrongs of that disagreement were I consider that the defendant was motivated by them against the plaintiff and her husband.

[13] During cross-examination of the plaintiff it was put to her forcibly that the defendant did not know about the agreement that had been entered into between the plaintiff and the deceased in respect of the property. That the first time that the defendant found out about any agreement was at the wake when the plaintiff's husband is alleged to have put his foot on a table and said that it was now their house. That would have been a most insensitive and vulgar remark to have made. Mr McKenna, the plaintiff's husband, gave evidence that he had no recollection of saying that it was his or indeed the plaintiff's house and furthermore that saying something of that nature would be completely out of character and he would not have said it. I accept his evidence. When the defendant came to give evidence she stated that she did in fact know about some arrangement in respect of the house prior to the deceased's death. She stated that the deceased told her about 2 years before he died that the plaintiff was going to "lend him" the money to purchase the house. That he subsequently found out from Linda or the plaintiff, she could not remember which, that it had been bought. By virtue of the deceased's financial circumstances I conclude that she then knew that the property could only have been purchased with the plaintiff's money. Furthermore I have no doubt that if she had then been given this information for the first time that she would have inquired further and have been given all the details. She did not inquire further and I conclude that was because she had already been told about the transaction by the plaintiff and had stated that she thought it was "a great idea". I consider that the case put in cross-examination to the plaintiff was different from the defendant's evidence.

[14] I also reject the suggestion that the first occasion on which the defendant knew about the agreement in respect of the property was at the wake on the grounds of her reaction and the reaction of the rest of the family at that time. No inquiry was made at the wake by the defendant or by any other member of the family to the plaintiff or to the plaintiff's husband. Without any explanation the plaintiff removed her bags from the plaintiff's house and did not stay there. The defendant and the other members of the plaintiff's family did not speak to her at the funeral the next day. Later after the funeral no attempt was made by the defendant, the plaintiff's mother, to inquire from her as to what had occurred. The plaintiff was shunned without any opportunity of knowing what it was alleged that she had done and without any opportunity of responding. That was not the response of someone learning for the first time about a transaction. Such a person would wish to know, if not at the wake or the funeral, then at some more suitable time, as to how the property came to be the plaintiffs. Was it a lifetime gift? Had the deceased made a will in her favour? Had the property been purchased with the plaintiff's money or with the deceased's and the plaintiff's money? What financial contribution had the plaintiff made? What was the level of discount provided by the Northern Ireland Housing Executive? Was there any agreement? Could that be verified in any independent manner? Rather I find that it was the reaction of the defendant seeing the house and its potential value and wishing to obtain it or part of it and to exploit what she saw as the plaintiff's vulnerability, that is her attachment to her family. That reaction taking place against the background that the plaintiff and her husband were reluctant, against the defendant's wishes, to have alcohol at the wake or after the funeral by virtue of the deceased's unfortunate history. The reaction also being seen in the context of the disagreement as to the use of the money in the ISA account. I reject the defendant's evidence. I consider that she manipulates and continues to manipulate the plaintiff and other members of her own family.

[15] Insight into the defendant can be gained from the defence served on 29 September 2006. It alleged, inter alia, that:

"If the plaintiff paid any monies ... such monies were gifts or loans were *recouped* directly or indirectly by the plaintiff from the deceased during his lifetime". (emphasis added)

This allegation of recoupment was persisted in and added to in the defendant's replies dated 28 August 2007 to the plaintiff's Notice for Particulars. The defendant alleged the plaintiff had control of the finances of the deceased and recouped monies as a result of her position of control. The deceased was on benefits. He had unfortunately a longstanding problem with alcohol. At the time that the allegation of "recoupment" was made by

the defendant against the plaintiff the defendant had not made any enquiry of the plaintiff as to the finances of the deceased. The defendant could have obtained all the records in relation to the ISA account. There was no evidence to support the allegation of recoupment. The suggestion that the deceased could have or did repay £13,127.53 plus interest was palpable nonsense and I consider that this would have been known to the defendant at the time that she made this allegation and at the time that she persisted in it in the replies to the Notice for Particulars. It should never have been made.

[16] During the course of the plaintiff's cross-examination it was suggested to her on the defendant's instructions that the payments she had made in connection with the property were gifts to her father. That is that she would receive nothing back and would have the continuing obligation to pay interest on the loan that she had taken out to make this "gift". The suggestion was intrinsically implausible and I entirely accept the plaintiff's denial. It is another example of the defendant's willingness to put forward any case against the plaintiff no matter how implausible.

[17] I reject the suggestion that the payments made by the plaintiff for the house were a loan by her to her father. In so far as this suggestion was based on a conversation which the defendant says that she had with the deceased approximately 2 years before he died I reject the defendant's evidence that any conversation between the defendant and the deceased took place let alone a conversation about the property.

### **Legal Principles.**

[18] The plaintiff's claim is based upon the proposition that her direct substantial monetary contribution to the purchase of the property combined with the agreement or arrangement with her father resulted in her acquiring the entire beneficial interest in the property subject to her father's ability to live in the house rent free for life. The plaintiff's claim can be analysed under a number of different legal concepts, namely a resulting trust, a proprietary estoppel or a constructive trust. A resulting trust might only result in the plaintiff establishing an entitlement to a proportion of rather than the entire beneficial interest in the property. The extent of the plaintiff's potential beneficial interest under the resulting trust arising from her direct financial contribution being broadly in proportion to the respective contributions of herself and her father. Thus account would be given to the deceased's contribution which was his entitlement to purchase the property at a discount through his tenancy of the property and the rental payments that he had made over a number of years. Alternatively the plaintiff can seek to rely on the agreement between herself and her father as giving rise to a proprietary estoppel in respect of that part of the beneficial interest in the property which is not subject to a resulting trust in her favour. For the basis of a proprietary estoppel see *Gillett v Holt & Anor* [2000] 2 All ER 289 and the summary of

those principles at paragraphs [16] to [25] of *McDermott & Anor v McDermott* [2008] NICH 5.

[19] Finally the plaintiff could seek to rely on a constructive trust. The relevant principles in relation to a constructive trust were set out by Sir Nicolas Browne-Wilkinson VC in *Grant v Edwards & another* [1986] Ch. 638 as follows

"In my judgment, there has been a tendency over the years to distort the principles as laid down in the speech of Lord Diplock in *Gissing v. Gissing* [1971] A.C. 886 by concentrating on only part of his reasoning. For present purposes, his speech can be treated as falling into three sections: the first deals with the nature of the substantive right; the second with the proof of the existence of that right; the third with the quantification of that right. 1. The nature of the substantive right: [1971] A.C. 886, 905B-G. If the legal estate in the joint home is vested in only one of the parties ('the legal owner') the other party ('the claimant'), in order to establish a beneficial interest, has to establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership. This requires two matters to be demonstrated: (a) that there was a common intention that both should have a beneficial interest; (b) that the claimant has acted to his or her detriment on the basis of that common intention. 2. The proof of the common intention. (a) Direct evidence (p. 905H). It is clear that mere agreement between the parties that both are to have beneficial interests is sufficient to prove the necessary common intention. Other passages in the speech point to the admissibility and relevance of other possible forms of direct evidence of such intention: see pp. 907C and 908C. (b) Inferred common intention (pp. 906A-908D). Lord Diplock points out that, even where parties have not used express words to communicate their intention (and therefore there is no direct evidence), the court can infer from their actions an intention that they shall both have an interest in the house. This part of his speech concentrates on the types of evidence from which the courts are most often asked to infer such intention viz. contributions (direct and indirect) to the deposit, the mortgage instalments or general housekeeping expenses. In this section of the speech, he analyses what types of expenditure are capable of constituting evidence of such common intention: he does not say that if the intention is proved in some other way such contributions are essential to establish the trust. 3. The quantification of the right (pp.



908D-909). Once it has been established that the parties had a common intention that both should have a beneficial interest *and* that the claimant has acted to his detriment, the question may still remain 'what is the extent of the claimant's beneficial interest?' This last section of Lord Diplock's speech shows that here again the direct and indirect contributions made by the parties to the cost of acquisition may be crucially important."

[20] A claimant under a constructive trust is entitled to the agreed beneficial interest (see *Snell's Equity* 31<sup>st</sup> Edition at paragraph 22-39) whereas the remedy in respect of a proprietary estoppel is discretionary. Accordingly if the plaintiff relied on a proprietary estoppel then in assessing the extent of the plaintiff's beneficial interest I would look at the circumstances to decide in what way the equity can be satisfied but to approach the task with caution in order to achieve the minimum equity to do justice to the plaintiff. In approaching that task in this case I would take a range of factors into account including the other claims legal and moral on the estate of the deceased. I would bear in mind that satisfying the equity is different from satisfying the expectation. However if as here I find that there was an agreement giving rise to a constructive trust then I am obliged to give effect to that agreement.

#### **The Defendant's Allegation of Unconscionable Conduct on the Part of the Plaintiff.**

[21] The defendant alleges that the agreement or arrangement entered into between the plaintiff and the deceased was unconscionable in respect of the Northern Ireland Housing Executive in that her beneficial interest was not disclosed to them. That accordingly she comes to equity with unclean hands.

[22] No unconscionable conduct by the plaintiff in respect of the deceased was alleged. Indeed none could be alleged. The deceased gained tangible benefits. He was no longer dependant on the State for the payment of his rent. He could live in the property which belonged to his daughter. He had brought about a situation whereby he was able to make some repayment to a valued family member who had looked after him for many years. He took pride in his ability to help at least one of his daughters who had cared for him.

[23] I have considered the question of unconscionable conduct in relation to the Northern Ireland Housing Executive both from the perspective of the underlying purpose of the right to buy scheme and also the terms of the transfer by the Northern Ireland Housing Executive to the deceased. I consider that the purpose of the right to buy scheme is to allow tenants to secure for themselves, and after they have died, for their family, the dwelling

in which they have lived so that they can continue to live in that dwelling and after they die either a member of their family can live there or alternatively the family will benefit financially. The right to buy is not a tool for a tenant to make a quick profit by an immediate resale. The arrangement that was entered into between the plaintiff and the deceased was entirely consistent with that purpose. The property was being secured for the plaintiff's father to live in. It was only if he died that it would be available to the plaintiff, a member of his family. This position can be contrasted with the position where an individual or a company, that has no connection with a tenant sets about purchasing property in the name of the tenant for the individual or company's financial benefit. In effect a commercial enterprise being carried on with the commercial undertaking hiding behind the tenant's name. The arrangement here was a family arrangement securing the property for the tenant.

[24] I then turn to the terms of transfer to consider whether there has been any breach of the covenant to repay the discount. That covenant envisages that the financial benefit of the discount can be disposed of within the three year period on death by will or an intestacy without any recoupment. The arrangement here between the plaintiff and deceased was analogous to that exclusion from the definition of a disposal. In addition there are many dispositions that do not amount to a disposal within the terms of the covenant. For instance a deposit of title documents or the creation of a charge. I do not consider that the creation of this beneficial interest in the plaintiff subject to the deceased's right to remain in the property for the rest of his life amounts to a disposal within the terms of the covenant. Accordingly structuring the transfer in the way that it was did not amount to any unconscionable conduct on the part of the plaintiff.

## **Conclusion**

[25] I hold that the plaintiff has established a constructive trust in respect of the property in her favour. There was an agreement and she acted to her detriment. The quantification of her entitlement is that she is now in the events that have occurred entitled to the entire property.

[27] I order the estate to transfer the property to the plaintiff. The outworking of the order that I have made may require the parties to return to court and accordingly I give liberty to apply.

[28] I will hear counsel in relation to the question of costs.