STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: February 10, 2015)

DIANA NOBERT, Executrix of the ESTATE OF SALLY NOBERT	:	
V.	:	**C.A. No. WP-2008-0499**
MARK S. NOBERT and DIANNE MANFREDI	:	

DECISION

K. RODGERS, J. This matter comes before this Court, sitting without a jury, on a de novo appeal from a June 13, 2008 decision of the Westerly Probate Court. Appellant herein is Diana Nobert (Diana[1] or Appellant), in her capacity as the Executrix of the Estate of Sally Nobert (Sally), following Sally's death during the pendency of this probate appeal. Sally had appealed to this Court from the decision issued by the Westerly Probate Court in the administration of the estate of her late husband, Norman S. Nobert, Jr. (Nobby), for which Sally had served as Executrix of Nobby's estate (the Estate). The decision on appeal imposed a constructive trust in favor of Nobby's two siblings, Mark S. Nobert (Mark) and Dianne Manfredi (Dianne, and collectively, Claimants or Appellees).

Jurisdiction is pursuant to G.L. 1956 §§ 33-23-1, et seq. For the reasons set forth herein, judgment shall enter for Claimants.

[1] Because numerous parties and/or witnesses share the surname Nobert, this Court will refer to each such family member by his or her first name. No disrespect is intended.

I

Findings of Fact

Having reviewed the evidence presented by both parties, this Court makes the following findings of fact.

The focus of this probate appeal is certain real estate located at 35 Breach Drive in Westerly (the Cottage). Normand S. Nobert, Sr. (Dewey) and Elaine Nobert (Elaine) purchased the Cottage in or about 1961. Dewey and Elaine were married and had three children, Nobby, Mark and Dianne. Dewey and Elaine raised their family in Meriden, Connecticut and used the Cottage on weekends and during the summers. Dewey and Elaine's three children also used the Cottage from 1961 through 1986.

Nobby and Sally married in 1961 and had two children, Diana and Wendy. At all relevant times, Nobby and Sally lived in Haddam, Connecticut, with the exception of one year in which they resided full-time at the Cottage.

Dianne married Joseph Manfredi in or around 1968 and retained that surname after her divorce. Dianne had four sons, Michael Roberts, Keith Roberts (Keith), Kyle Roberts (Kyle) and Paul Rocca (Paul). Keith died in 1983 as a result of a motorcycle accident. Paul died in 1996.

Mark never married and has no children. Mark had significant legal problems originating with an arrest on August 19, 1985, on a charge of risk of injury to a minor, to which he pled nolo contendere on December 18, 1985, and received an eighteen-month suspended sentence and three years' probation. Mark lived with his parents in Meriden at the time of his arrest and plea, and for a period of time thereafter.

It was during the time that Mark faced those criminal charges, in approximately the fall of 1985, that a discussion took place concerning the transfer in the title to the Cottage. This discussion took place at Dewey and Elaine's house in Meriden. The only credible evidence of the substance of that discussion was offered by Mark, the only living person who was present at that meeting.[2] Mark suggested that his parents place the Cottage in Nobby's name in order to protect it from creditors should Dewey and/or Elaine fall ill so that it could remain in the family for the family to use. Mark further suggested that his own name should not be on the deed to the Cottage because of his pending legal troubles. Additionally, it was discussed that Dianne's name should also not be on the deed due to the emotionally fragile state she was in following the passing of one of her sons and because of the rough lifestyle that her sons led. Mark explained to his parents that by placing the Cottage in Nobby's name, Dewey and Elaine could continue to use it as they had been and that it could either be sold by Nobby in the event that they needed money or passed on to the three siblings. According to Mark, Nobby was trustworthy and it was the "safest place" to put the Cottage, in his name exclusively, and leave it to Nobby's discretion when it should be sold. Dewey and Elaine reacted favorably to Mark's suggestion in light of their desire to pass the Cottage onto their children. There was no evidence presented that Dewey and Elaine intended to gift the Cottage to Nobby or that anyone else considered it to be such a gift.

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[2] Although Mark referenced that Sally was present at the meeting in Dewey and Elaine's Meriden home at the time of this discussion, Sally's sworn trial testimony before the Westerly Probate Court and deposition testimony, both of which were introduced as evidence herein, reveals that she was not present during that discussion. The basis of Sally's knowledge of that discussion arose from her subsequent conversations with Nobby.

Several months after that discussion in Meriden, Dewey and Elaine engaged the services of Richard Panciera, Esq., who prepared a Warranty Deed (the Deed) conveying Dewey and Elaine's interest in the Cottage to Nobby. The Deed was executed on April 11, 1986 and recorded on the same day. Although Nobby did not pay Dewey and Elaine for their interest in the Cottage, the tax stamps on the Deed were $165.00, which corresponded to $75,000 in consideration for the transfer of the Cottage.

After the transfer to Nobby in 1986, Dewey and Elaine continued to use the Cottage in much the same way as they had under their ownership. Nobby and Sally continued to use the Cottage and began to expend funds to repair and replace items as needed. No one else contributed to the expenses of maintaining the Cottage, nor did Nobby share in any rental income derived from the Cottage. Mark used the Cottage several times until he moved to New York in 1988, a six hour drive. Dianne's son, Kyle, regularly visited the Cottage and maintained a close relationship with his grandparents, Dewey and Elaine, and with his uncle and aunt, Nobby and Sally. Kyle also brought his own family to the Cottage and considered it a great place for the entire family to spend time together. From time to time during Kyle's visits with his grandparents, Dewey mentioned to Kyle that Nobby was the owner of the Cottage and that he should be consulted if there were questions about the maintenance or the use of the property.

A month or two after the conveyance, Dianne discovered that her parents had transferred ownership in the Cottage to Nobby and that she had been left out of the family discussion. Dianne learned of the conveyance through a neighbor, who stated that the transaction appeared in the newspaper. Nobby was called to the Cottage where Dianne was found to be upset from the news. Nobby and Dianne took a boat ride together,

during which time he explained what had transpired. According to Dianne, Nobby said the Cottage was placed in his name to protect it in the event their parents became ill, that it would still be used as it always was, and that Dianne would get one-third of her share of their parents' estate. Dianne expressed relief over Nobby's explanation, but nonetheless remained upset that she had not been advised in advance. Dianne thereafter stopped using the Cottage and her relationship with Nobby became strained.

Elaine passed away in April 1996, at the age of eighty. At that time, Dewey was suffering from cancer. Sally served as Dewey's primary caregiver after Elaine's death. Although his Meriden house remained in his name, Dewey moved in with Nobby and Sally. In September 1996, Dianne and her boyfriend, David Lowe (Lowe), visited Dewey at Nobby's house. Dianne and Lowe drove Dewey to the cemetery to visit Elaine's grave and to check on his house in Meriden. On the drive, Dewey told Dianne that she should not worry about the Cottage because Nobby was taking care of it and that if Nobby ever decided to sell it, Dianne and Mark would both receive their fair share of its value. Dianne visited Dewey again in November 1996, at Nobby's house, during which visit Dewey asked to speak to Dianne privately. At that time, Dewey told her that he wanted his estate to be split equally between Dianne and her two brothers, and he reiterated the same comments about the Cottage as he and Nobby had made to Dianne previously; namely, that when Nobby was ready to sell the Cottage, she would get a one-third share of its value, as would Mark and Nobby. Dewey passed away in December 1996.

Dewey's Last Will and Testament named Nobby as the Executor of his estate and left his estate to his three children in equal shares. Dewey's estate included the family

home in Meriden. Nobby duly divided Dewey's estate among the three siblings without issue. The Cottage remained in Nobby's name and was not distributed as part of Dewey's estate.

Prior to their death, Dewey and Elaine never forced or requested Nobby to sell the Cottage. After his parents' deaths in 1996, Nobby and Sally continued to maintain and improve the Cottage and use it on weekends and in the summer. Included in the work performed by Nobby was installing an enclosed porch, upgrading the heating system to include radiant heat, renovating a bathroom, improving bedrooms and a hallway, and installing new lighting fixtures. Nobby also did the landscaping and purchased new kitchen appliances. Mark rarely used the Cottage but frequently checked with Nobby about what would happen if it was sold; Dianne did not use the Cottage at all and continued to be estranged from Nobby and Sally. Neither Mark nor Dianne contributed to the expenses nor paid real estate taxes on the Cottage. Similarly, Nobby did not share any rental income with his siblings. Nobby did, however, keep records of income and expenses associated with the Cottage from 1989 until May 2005.

In or about December 2001, Dianne sent Nobby a Christmas card in which she hand wrote what appears to be an expression of how she intended to structure her will. She expressly stated to Nobby: "To our concern: . . . Kyle who loves the ocean and friends (sic) from Weekapaug RI will be willed my promised 1/3rd of the cottage on Breach Drive + thenced (sic) to my grandson Keith." Joint Ex. 5. Nobby did not respond. Several years later, in or about 2003 or 2004, while Dianne was visiting her son Kyle in Maine, Nobby telephoned and Nobby and Dianne had a chance to speak. During

that telephone conversation, Nobby mentioned that he was getting close to selling the Cottage and that she would be getting her one-third share.

For some time after his parents passed away in 1996, Sally pressed Nobby to put her name on the deed; each time Nobby refused. Sally initiated one such conversation with Nobby after she heard from a friend that Mark claimed to be a one-third owner of the Cottage. Nobby responded to Sally that if he ever sold the Cottage, he would make sure to give Mark and Dianne their fair share. Sometime in or around 2003, Nobby made comments to Sally that he was considering selling the Cottage, but she asked him not to. Nobby did not go through with his plan to sell and instead, at Sally's request, allowed her the opportunity to try to turn it around and make it more profitable to own and maintain.

In 2004 and 2005, Mark experienced further legal problems that caused an immediate need for financial support for mounting legal fees. Initially, Mark asked Nobby for help, but Nobby told him he could not give him financial assistance. Mark turned to his longtime friend, Gerald Randall (Randall), and requested a loan. Randall hired an attorney without hesitation and gave Mark some cash for support in the meantime. Soon after Randall hired a lawyer, Nobby and Sally travelled to New York to talk to Mark; Mark, in turn, asked Randall to come to his house and meet his brother and sister-in-law. At first, the conversation focused on Nobby and Randall talking to Mark about his legal situation, trying to calm him down because he was very upset. Nobby and Randall moved the conversation outside, at which point Nobby brought up the issue of finances, apologizing for not being able to support Mark. Nobby indicated to Randall that there was a piece of property in which Mark had a one-third interest, and stated that if Mark continued to need more money for legal fees, money might be available from the

property. Randall and Nobby had several other conversations after that initial meeting, most of which included Randall's update to Nobby on the status of Mark's legal issues and emotional stability. During these conversations, Nobby continually apologized to Randall for not providing Mark with any financial support. Additionally, Nobby stated to Randall during some of these conversations that Mark had an expectancy interest in the Cottage that would be realized upon its sale within a couple of years.

At all times material hereto, Mark believed the Cottage was entrusted to Nobby by their parents and it would be for Nobby to decide if and when the Cottage would be sold. Dianne similarly so believed, as she was assured by Nobby on multiple occasions not to worry about the Cottage. Both Mark and Dianne had been told—and believed—that they would each receive a one-third share of the Cottage. Unfortunately, before Nobby ever decided to sell, he died in 2005. Nobby's Estate, including his interest in the Cottage, was left entirely to his wife, Sally.

Tensions continued between Claimants and Sally after Nobby's death. Dianne refused to attend Nobby's funeral, claiming that she had been to too many funerals in the last several years, including both her parents and two of her sons, and she was not emotionally prepared to also attend her brother's funeral. However, after the funeral, Dianne attempted to contact Sally to request that they meet. When Sally returned Dianne's call, she declined to meet but inquired into Dianne's purpose for meeting. Dianne asked if Sally intended to sell the Cottage and keep Nobby's promise to Dewey to give Mark and Dianne their fair share. Sally informed Dianne that she was not going to sell the Cottage.

During the probate of Nobby's Estate in Westerly Probate Court, Mark and Dianne each claimed a one-third ownership in the Cottage, on which they were successful. Sally, as executor of Nobby's Estate, appealed to this Court. Sally has subsequently died and her daughter, Diana Nobert, was appointed as the executrix of Sally's estate.

II

Presentation of Witnesses

Mark, Dianne, Lowe, Randall, Kyle, Diana and Diana's husband, Michael Bavasso, testified before this Court. Sally's sworn deposition testimony and testimony before the Westerly Probate Court were also introduced as evidence at trial.

At the outset, this Court notes that the single most impartial person, with no stake in the outcome of this probate appeal, strikes this Court as the most credible. Although a lifelong friend of Mark's, Randall had been paid back in full and in a timely manner from monies he loaned to Mark, and he would reap no benefit were this Court to find for or against Claimants. By contrast, every other witness stands to gain or lose an interest in the Cottage, whether an ownership interest or an interest in using the Cottage.

It is also striking that the testimony offered by Claimants and on behalf of the Estate was largely consistent. No one disputed that Nobby was trustworthy and responsible, or that placing the Cottage in his name was the safest place to have it. Sally even acknowledged that Nobby had stated to her that "if he ever sold the [C]ottage, that he would make sure that Mark and Dianne got their fair share." Probate Tr. at 78, Nov. 20, 2007. Sally's statements are consistent with Mark and Dianne's testimony concerning discussions they had with their father, as well as with Nobby. There was no

evidence presented that would lead this Court to conclude that Nobby did <u>not</u> share with his siblings his expectation that he would be selling the Cottage and they would each be given their fair share.

What is disputed by the various witnesses are statements and inferred reasons for such statements that are inconsequential to the outcome of this case. For instance, Mark testified that in or about the mid-2000's, Mark inquired of the status of the Cottage and was informed by Nobby that he had contemplated selling it but instead had given Sally two years to make it profitable. According to Mark, Nobby also stated at the time, "Be sure to tell our sister that she will be getting her third of the Cottage." In response to that statement, Mark immediately bought a new pickup truck because he was "jubilant" that something would be happening with the Cottage. Mark's reaction to Nobby's statement in purchasing a new truck makes little sense in light of the unspecified time period and vague commitment to sell the Cottage. Nonetheless, Mark's reaction has little bearing on whether a constructive trust should be imposed.

Mark also testified why he believed in 1985 that Dianne should not hold title to the Cottage. He maintained that in addition to being emotionally fragile due to her son's recent death, her sons and their friends led a "rough lifestyle," and he expressed concern that they would drink, party and speed in and around the Cottage. In his words, Dianne's sons' friends led to "guilt by association." Whether and to what extent Dianne's sons' friends would infringe on the tranquil, family atmosphere at the Cottage is inconsequential to the issues before this Court.

Similarly, Sally's stated reasons why Dewey and Elaine considered selling the Cottage prior to deeding it to Nobby are of no consequence to the issues before this

Court, but instead serve to demonstrate Sally's general disapproval of her brother-in-law. Sally testified in her deposition that Dewey considered selling the Cottage because he was "mentally emotionally defeated by Mark's lawsuit, his arrest" and "basically humiliated and didn't want anybody down [in Westerly] to find out what happened." Dep. Tr. at 26, Apr. 23, 2007. Sally's suggested rationale for Dewey's state of mind is inconsistent with Dewey and Elaine's actions thereafter in deeding the Cottage to Nobby so that they could continue to use it and it would remain in the family. Indeed, had Dewey actually been humiliated and unwilling to face neighbors and friends in the area, the Cottage would have been sold to a non-family member and the Noberts would never have returned to Weekapaug.

Each family member who testified before this Court has a stake in the case. Mark and Dianne, as well as Dianne's paramour, Lowe, obviously support the imposition of a constructive trust. Diana and her husband, Bavasso, are beneficiaries of Sally's estate and therefore seek to retain the Cottage as their own along with Diana's sister, Wendy, or, in the alternative, seek reimbursement for all the expenses Nobby, Sally and/or Sally's estate has paid to improve and maintain the Cottage. Dianne's son, Kyle, places himself in the camp of his cousin Diana inasmuch as he desires that the Cottage remain available for his own family's use rather than be sold. Sally, now deceased, testified under oath on two occasions and clearly desired to hold onto ownership of the Cottage exclusively, or otherwise be reimbursed for all the expenses she and Nobby paid in improving, maintaining and owning the Cottage since 1986. Further to her benefit, Sally urges that Nobby had always intended that Mark and Dianne's "fair share" would be determined based upon the Cottage's value in 1986 and the expenses Nobby had paid. Tr. at 97-98,

Nov. 20, 2007. Such testimony is wholly self-serving and unsupported by any other credible evidence.

In sum, the testimony of all witnesses, save for Randall, is suspect and serves to minimize each witness's own credibility.

III

Standard of Review

Section 33-23-1 of the Rhode Island General Laws authorizes a person aggrieved by an order or decree of a probate court to appeal to the Superior Court in the county in which the probate court is located. In hearing a probate appeal, "the Superior Court is not a court of review of assigned errors of the probate judge, but is rather a court for retrial of the case de novo." In re Estate of Paroda, 845 A.2d 1012, 1017 (R.I. 2004) (citing Malinou v. McCarthy, 98 R.I. 189, 192, 200 A.2d 578, 579 (1964)); see § 33-23-1(d). Further, "the findings of fact and/or decisions of the [P]robate [C]ourt may be given as much weight and deference as the [S]uperior [C]ourt deems appropriate . . . [, however,] the [S]uperior [C]ourt shall not be bound by any such findings or decisions." See id.

Appellant is entitled to de novo review of Appellees' claim seeking the imposition of a constructive trust. In a non-jury trial such as this, the standard of review is governed by Rule 52(a) of the Superior Court Rules of Civil Procedure which provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon." Super. R. Civ. P. 52(a). In a non-jury trial, "'[t]he trial justice sits as a trier of fact as well as of law.'" Parella v. Montalbano, 899 A.2d 1226, 1239 (R.I. 2006) (quoting Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984)). "'Consequently, he [or she] weighs and considers the evidence, passes upon the

credibility of the witnesses, and draws proper inferences.'" Id. (quoting Hood, 478 A.2d at 184). It is well established that "assigning credibility to witnesses presented at trial is the function of the trial justice, who has the advantage of seeing and hearing the witnesses testify in court." McBurney v. Roszkowski, 875 A.2d 428, 436 (R.I. 2005) (citations omitted). The trial justice may also "'draw inferences from the testimony of witnesses, and such inferences, if reasonable, are entitled on review to the same weight as other factual determinations.'" DeSimone Elec., Inc. v. CMG, Inc., 901 A.2d 613, 621 (R.I. 2006) (quoting Walton v. Baird, 433 A.2d 963, 964 (R.I. 1981)).

Furthermore, "[w]hen rendering a decision in a non-jury trial, a trial justice 'need not engage in extensive analysis and discussion of all the evidence. Even brief findings and conclusions are sufficient if they address and resolve the controlling and essential factual issues in the case.'" Parella, 899 A.2d at 1239 (quoting Donnelly v. Cowsill, 716 A.2d 742, 747 (R.I. 1998) (citation omitted)). The trial justice need not "'categorically accept or reject each piece of evidence in his [or her] decision for [the Supreme] Court to uphold it because implicit in the trial justices [sic] decision are sufficient findings of fact to support his [or her] rulings.'" Notarantonio v. Notarantonio, 941 A.2d 138, 147 (R.I. 2008) (quoting Narragansett Elec. Co. v. Carbone, 898 A.2d 87, 102 (R.I. 2006)).

IV

Analysis

Claimants assert that a constructive trust was created by the close relationship between the parties, that Nobby on many occasions acknowledged a promise to hold the Cottage in his name for the benefit of himself and his two siblings, and that the continued ownership of the Cottage violates the fiduciary duty created by their close familial

relationship. The Estate urges this Court to find that no constructive trust was created when Dewey and Elaine agreed to convey the Cottage to Nobby, and further, that no fraud was committed by Nobby because he did not intend to defraud Claimants when he made certain promises to give them their fair share if the Cottage was ever sold. The Estate also argues that the claim for constructive trust is barred by the doctrine of laches because Claimants waited eight years, and after Nobby's death, to bring legal action asserting their interest in the Cottage and that the Estate is prejudiced by the delay because it no longer has the benefit of Nobby's own testimony. Finally, the Estate contends that Dewey was not reliant upon Nobby or anyone else for advice, and therefore, there was no confidential relationship that existed between Dewey and Nobby at the time of the conveyance.

A

Constructive Trust

"It is well settled that '[t]he underlying principle of a constructive trust is the equitable prevention of unjust enrichment of one party at the expense of another in situations in which legal title to property was obtained by fraud or in violation of a fiduciary or confidential relationship.'" Dellagrotta v. Dellagrotta, 873 A.2d 101, 111 (R.I. 2005) (quoting Renaud v. Ewart, 712 A.2d 884, 885 (R.I. 1998) (mem.)); see also Simpson v. Dailey, 496 A.2d 126, 128 (R.I. 1985). It is unnecessary that there be actual fraud, which has not been alleged by Claimants here; a constructive trust can be established upon proper proof that legal title to property was obtained in violation of a fiduciary or confidential relationship. Dellagrotta, 873 A.2d at 111; Simpson, 496 A.2d at 128; Cahill v. Antonelli, 120 R.I. 879, 882-83, 390 A.2d 936, 938 (1978) (citing

Matarese v. Calise, 111 R.I. 551, 305 A.2d 112 (1973)). The party seeking imposition of a constructive trust must prove by clear and convincing evidence the existence of a fiduciary or confidential relationship between the parties and a breach of that fiduciary duty resulting from the parties' confidential association. Dellagrotta, 873 A.2d at 111; Renaud, 712 A.2d at 885; Clark v. Bowler, 623 A.2d 27, 29 (R.I. 1993); Cahill, 120 R.I. at 882-83, 390 A.2d at 938. In determining if a confidential relationship between the parties exists, this Court "may consider a variety of factors, including the reliance of one party upon the other, the relationship of the parties prior to the incidents complained of, the relative business capacities or lack thereof between the parties, and the readiness of one party to follow the other's guidance in complicated transactions." Simpson, 496 A.2d at 129 (citing Bogert, Trusts and Trustees § 482 at 280-336 (2d rev. ed. 1978)). It is not required that one party occupy a position of dominance over another. Id.

Our Supreme Court has considered numerous instances in which a constructive trust was sought to be imposed on a family member. In DelGreco v. DelGreco, 87 R.I. 435, 142 A.2d 714 (1958), the Court affirmed the trial court and granted relief to an infirm, elderly woman who had conveyed her home to a son and daughter-in-law in exchange for their promise to take care of her and pay the expenses of maintaining the household as long as she lived. Several years after conveying the real estate, the daughter-in-law became abusive and cruel and forcibly ejected the woman from her home, leaving her destitute. Id. at 438, 142 A.2d at 715. The son had lived with his mother in the subject property for twenty-three years prior to the conveyance, and all the parties, as well as several other family members, attended a family meeting in which the complainant stated she was willing to convey the property to the respondents provided

they would care for her in every way during her lifetime, to which the respondents agreed. Id. The Court found,

> "It is clear that in the instant case complainant was a woman of advanced years and in poor health and that she placed trust and confidence in her son and his wife for her care and support during the remaining years of her life. It cannot be disputed that a fiduciary relationship existed between these parties." Id. at 442, 142 A.2d at 717.

In Cahill, supra, the Supreme Court upheld the trial court's finding that a constructive trust was created as between a brother and sister. The Supreme Court noted the trial court's express findings that the brother stood in a relationship of trust and confidence with his sister and abused this trust and confidence by persuading her to convey property to him in order that he may clear up certain liens on the property. 120 R.I. at 883, 390 A.2d at 939. Further, the evidence demonstrated that the sister "always looked to her brother for advice and considered him to be the nominal head of the family before she was married," and that the brother had "promised to reconvey the property and never kept his promise." Id.

In Simpson, supra, the Court also considered a relationship between a brother and sister and held that there was ample evidence establishing a fiduciary relationship. In that case, a brother and sister purchased identical annuity contracts and named each other as primary beneficiary rather than their respective spouses. 496 A.2d at 127. Each promised the other that the proceeds upon one's death would be used for the benefit of the decedent's children, and, in the case of the brother predeceasing his sister and his wife, the proceeds from the annuity would also be applied for the benefit of his wife. Id. Upon the brother's passing, the sister claimed the proceeds from her brother's annuity as her own; the brother's wife and children sued in equity, seeking the imposition of a

constructive trust. Id. at 127-28. The Court reflected on the evidence which demonstrated a mutual trust and confidence shared between the brother and sister:

> "In this case there was ample evidence that [the sister] shared a close familial relationship with her brother. She admitted at trial that she relied on him a great deal for advice and counseling. On more than one occasion she followed his guidance with respect to investing certain other of her funds in stock purchases. She further attested to her brother's complete trust and confidence in her. The confidence that the brother reposed in his sister had its origin in their relationship, and that relation was a moving cause in influencing the brother to name his sister as primary beneficiary to ensure the future well-being of his family." Id. at 129.

Thus, the Court upheld the jury's finding that a fiduciary relationship existed and that the sister breached her obligations created by that relationship by claiming the annuity as her own. Id.

In Renaud, supra, a mother entrusted her daughter and son-in-law with the real estate and home in which she resided so that the daughter and son-in-law could obtain the financing necessary to repair the home. The mother testified that all the parties understood the conveyance to be temporary, that she would repay the monies used to fix the home in the form of monthly rental payments to the defendants, and that the property would revert back to her once the home repair loans were paid off. 712 A.2d at 885-86. At the time of the conveyance, the mother was in a state of desperation—trying to preserve her home for herself and her then-dependent minor children, and she turned to her daughter and son-in-law whom she trusted. Id. at 885. The defendants knowingly accepted this trust, which trust served as the basis for inducing the mother to convey her family home to the defendants. Id. Ultimately, the defendants divorced, the property was wholly placed in the former son-in-law's name, and the mother was served with an

eviction notice. Id. The Supreme Court affirmed the trial court's imposition of the constructive trust, issuance of a permanent injunction preventing the eviction action from going forward, and order directed to the former son-in-law to reconvey the property to his former mother-in-law. Id.

Not all cases considered by our Supreme Court, however, have resulted in the imposition of a constructive trust as between family members. In Dellagrotta, supra, the Court held there was insufficient evidence of a confidential relationship between the plaintiffs, a husband and wife, and the defendant, the former wife of the plaintiffs' son. The plaintiffs had purchased a home for their son and the defendant and retained title thereto. 873 A.2d at 104. After considerable improvements were made at the expense of the plaintiffs, the defendant and the plaintiffs' son, the marriage broke down after just three years. Id. The defendant continued to live in the house owned by the plaintiffs, who ultimately sought to evict her. Id. The defendant counterclaimed and sought to impose a constructive trust on the property for her benefit. Id. The trial judge declined to impose a constructive trust, finding that there was no evidence that the plaintiffs purchased the home in a fiduciary capacity or that they breached a fiduciary duty owed to the defendant. Id. at 107. The Supreme Court affirmed, holding as follows:

> "Our review of the record reveals no evidence of a fiduciary or confidential relationship between plaintiffs and defendant at the time plaintiffs purchased the house. Unlike in Simpson and Cahill, defendant's familial relationship with plaintiffs was prospective—at the time [the plaintiffs] purchased the property, [the defendant] was merely their son's fiancée. More crucial to our analysis, in contrast with Simpson and Cahill, there is no evidence establishing a pattern of defendant's reposing trust and confidence in plaintiffs." Id. at 111-12.

The Supreme Court also upheld a trial court's holding that no fiduciary relationship existed between a father and son when the father persuaded his son and daughter-in-law to sell their home and live with the former in exchange for conveying the parents' real estate to the latter. Graziano v. Graziano, 81 R.I. 215, 218, 101 A.2d 243, 244-45 (1953). Specifically finding that the father was the dominant figure in the transaction, was not at all dependent on his son or daughter-in-law for advice or direction, and had full knowledge of what he was doing at the time he conveyed the property, the trial judge concluded that there was no fiduciary relationship established through which the son and daughter-in-law could be liable for constructive fraud. Id. at 220-21, 101 A.2d at 245-46.

Although the Supreme Court "has held that the relationship between a parent and child may be fiduciary in character when property is conveyed by a parent to a child in consideration of a promise on the part of the child to maintain and support the parent," the evidence may demonstrate that no such promise to support one's parent was ever made. See Passarelli v. Passarelli, 94 R.I. 157, 161, 179 A.2d 330, 333 (1962) (in action to cancel deed, affirming trial court's finding that no such promise to support mother had been made). Similarly, where a trusting relationship existed between a husband and a wife, but there was no clear and convincing evidence of a breach of a specific promise made between them, then no constructive trust may be imposed. See Clark v. Bowler, 623 A.2d 27, 30 (R.I. 1993) (affirming trial judge's denial of relief where no clear articulation of manner in which husband promised to grant ownership interest in home to his wife).

In the instant case, this Court is mindful that it is not necessary that there be evidence that one party exercises dominance over the other, or that there be actual fraud. See Simpson, 496 A.2d at 128. By all accounts, Dewey was a private man who enjoyed spending time with his family but was not dependent upon anyone for advice. Thus, this is not the case where Dewey and/or Elaine were taken advantage of by an unscrupulous family member as in DelGreco, Cahill, Simpson and Renaud. Rather, the evidence here demonstrates that Dewey and Elaine made an informed decision, at the urging of two of their three children, to protect the Cottage for their benefit and the benefit of their entire family by placing title in the name of their most responsible, stable and trustworthy son, Nobby. For the reasons that follow, Claimants have adequately proven by clear and convincing evidence that a fiduciary relationship existed between Dewey, Elaine and Nobby at the time they conveyed the Cottage to him.

It is undisputed that it was Mark's original suggestion that his parents convey the Cottage to Nobby. Only Mark, Nobby, Dewey and Elaine were present. Faced with some legal difficulties, Mark acknowledged that it would be unwise for title to the Cottage to be in his own name. Whether accurate or relevant, Mark also suggested to his parents that it would be unwise to have Dianne's name on the deed. The evidence of record clearly establishes that Nobby was a trusted member of the family—he was the named executor of Dewey's estate; he and Sally cared for Dewey and Elaine during their final illnesses; he and Sally remained in close proximity to Dewey and Elaine's house in Meriden as compared to Mark and Dianne who lived intermittently in New York and New Hampshire, respectively; he was the go-to person when Mark faced legal and financial troubles; and he had a close relationship with Dianne's son, Kyle, even when

Dianne did not. Although such evidence primarily demonstrates the leadership role Nobby held in the family after his parents died, a reasonable inference can be drawn that Dewey and Elaine also held him in high regard during their lifetime. Indeed, Nobby would not have been named executor of Dewey's estate if Dewey did not have trust and confidence in his ability to carry out Dewey's testamentary wishes.

Further, it is important to note the context in which the decision was made to transfer the Cottage to Nobby. Dewey and Elaine were eighty- and seventy-years old, respectively, at the time. The express purpose was to protect the Cottage from creditors in the event Dewey and/or Elaine were to fall ill and face mounting medical expenses, in order that the Cottage could be passed on to their children. However, they also discussed that should they need any financial support, then Nobby would be able to sell the Cottage and give them the proceeds. In any event, Dewey and Elaine would continue to use the Cottage as they always had. It was a proverbial "win-win" for Dewey and Elaine, and they were encouraged by Mark to enter into this transaction. There is no evidence that Nobby took an active role in persuading his parents to deed him the Cottage. In sum, this Court concludes that there was a fiduciary relationship between Dewey, Elaine and Nobby at the time that the Cottage was deeded to Nobby.

Turning now to whether there was a breach of some promise that constitutes a breach of fiduciary duty, it is important to identify what that promise was. In transferring title in the Cottage to Nobby, Nobby was entrusted to keep and maintain the Cottage for the use of Dewey and Elaine during their lifetime, to sell it if Dewey and Elaine needed the financial support, and to otherwise keep it for Dewey and Elaine's children. Further, Dewey's statements to Dianne and Nobby's own repeated statements to Mark, Dianne

and Randall demonstrate that Nobby further promised to Dewey and Elaine that Mark and Dianne would get their one-third interest in the Cottage. The Christmas card Dianne sent to Nobby in 2001 clearly supports the existence of a promise that the Cottage would be split equally as between Nobby, Mark and Dianne, whereas Dianne would have no other reason to disclose to Nobby her intent to give her one-third share in the Cottage to her son Kyle had there been no express promise that she would be entitled to that share. Finally, Nobby's resistance to placing his wife's name on the deed to the Cottage is further evidence that the Cottage was not a gift to him nor his to share with his wife to the exclusion of his siblings.

Unlike the evidence before the Court in Clark, supra, wherein there was no clear articulation of the manner in which the interest in the property at issue was to be conveyed, here there was ample evidence that ultimately the Claimants would receive their one-third share in the Cottage. Cf. Clark, 623 A.2d at 30. It is inconsequential that there was no set timeframe for the Cottage to be sold or that the timing of such sale was left to Nobby's discretion. What is important, however, is that the clear evidence of record demonstrates that the Cottage was not conveyed to him so that he may, in turn, convey it to his heirs to the exclusion of the Claimants. Nobby was obligated to provide Mark and Dianne each with a one-third interest in the Cottage.

By failing to sell the Cottage or to dispose of it through his Will in a way that conveyed a one-third interest therein to Mark and Dianne, Nobby breached the promise he made to Dewey and Elaine. The clear and convincing evidence establishes this breach of a promise which, under these circumstances, constitutes a breach of his fiduciary duty. Considering that "[t]he underlying principle of a constructive trust is the equitable

prevention of unjust enrichment of one party at the expense of another," Dellagrotta, 873 A.2d at 111, this Court concludes that it would be unjust to allow the Cottage to pass only to Nobby's children after he repeatedly told his sister and brother that he would make sure they got their fair share of the property.

Therefore, Claimants have proven by clear and convincing evidence that a constructive trust in the Cottage was created by the close familial relationship between Dewey, Elaine and Nobby, and that Nobby's failure to carry out his promise to afford Mark and Dianne their equal interest in the Cottage violated his fiduciary duty.

B

Doctrine of Laches

The Estate also argues that Claimants' lawsuit should be barred pursuant to the doctrine of laches because they waited for eight years after their parents' death to bring this cause of action, and, due to their delay, the Estate was prejudiced by Nobby's death.

"Laches is an equitable defense that precludes a lawsuit by a plaintiff who has negligently sat on his or her rights to the detriment of a defendant." O'Reilly v. Town of Glocester, 621 A.2d 697, 702 (R.I. 1993). "When confronted with a defense of laches, a trial justice must apply a two-part test: 'First, there must be negligence on the part of the plaintiff that leads to a delay in the prosecution of the case. . . . Second, this delay must prejudice the defendant.'" Hazard v. E. Hills, Inc., 45 A.3d 1262, 1270 (R.I. 2012) (quoting Sch. Comm. of Cranston v. Bergin-Andrews, 984 A.2d 629, 644 (R.I. 2009)). The Rhode Island Supreme Court has elaborated on the doctrine, stating:

> "'Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no steps to enforce

> them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities and other causes; but when a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief.'" O'Reilly, 621 A.2d at 702 (quoting Chase v. Chase, 20 R.I. 202, 203–04, 37 A. 804, 805 (1897)).

However, "[a] delay is excusable where it is induced or caused by the adverse party, as by acknowledging the justness of the claim and promising to make good thereon." Fitzgerald v. O'Connell, 120 R.I. 240, 246, 386 A.2d 1384, 1387 (1978). In Fitzgerald, the Rhode Island Supreme Court noted these facts as excusable delay induced by the party claiming prejudice: "[t]hroughout [the delay] period the Fitzgeralds and their attorney made repeated requests of the O'Connells to complete performance of the agreement. Each time they were assured that performance would be forthcoming and were asked to wait until the estate of Gertrude O'Connell was settled." Id.

Here, while there is some evidence that the Estate is prejudiced by Nobby's death, there is sufficient evidence to show that Mark and Dianne were each induced to delay making any legal claim on the Cottage by Nobby's own statements. In addition to each having been advised by Dewey during his lifetime that Nobby would take care of them and give them their fair share of the Cottage, Dianne and Mark each were told by Nobby that their shares in the Cottage would be forthcoming. Dianne and Nobby spoke by telephone in or about 2003 or 2004, in which he stated that he was getting close to selling the Cottage and she would be getting her one-third share. Nobby expressed to Randall in late 2004 or early 2005 that Mark had an expectancy interest in the Cottage that would be realized within a couple years. Nobby made a similar statement to Mark, at or about the time that Sally had requested in 2003 the opportunity to be able to make the Cottage

profitable; Nobby advised Mark that he would allow Sally two years to try to make it profitable.

Whether Nobby had a set time frame in which he intended to sell the Cottage or relayed such information to Dianne, Mark or anyone else is of no consequence. Nobby, the trusted, financially-sound brother, had maintained the Cottage in accordance with his parents' wishes, considered selling it, allowed an opportunity to make it more profitable before selling it, and, to some extent, kept Dianne and Mark apprised of his general plan. Mark and Dianne trusted Nobby to sell it when he determined it to be appropriate. Based upon Nobby's assurances to each of them that he intended to sell the Cottage and split the proceeds equally between the three of them, Mark and Dianne had no reason to bring a claim against him to enforce his promise. Mark specifically testified that he went many years without talking to Nobby about selling the Cottage because, "I trusted my brother that much that I didn't think there would be an issue."

Because Nobby never did sell the Cottage before he died, Mark and Dianne could not have known that he would fail to fulfill the promise until they learned that his Last Will and Testament failed to carve out the Cottage, and instead, all of his interest in the Cottage was bequeathed to Sally. As in Fitzgerald, the Claimants' reliance on Nobby's own acts to induce the delay cannot operate to bar an action under the doctrine of laches.

The executor of Nobby's Estate has not demonstrated any negligence or unexplained delay on behalf of Claimants. In fact, the evidence demonstrates otherwise, as Nobby's own statements induced Mark and Dianne to delay any legal claims they may have had. Holding that their claim is barred after they were induced into the delay would

pose an injustice to Claimants. Therefore, this Court concludes that the doctrine of laches does not operate to bar their claim for constructive trust.

C

Remedy

Having concluded that a constructive trust shall be imposed for the benefit of Claimants and that their claim is not barred by the doctrine of laches, it is necessary to turn now to the remedy to which Claimants are entitled. Nobby promised his parents that his siblings would get their "fair share" of the Cottage, and Nobby intended to sell the property and distribute the proceeds evenly. This Court is unpersuaded that Nobby intended to base that "fair share" on the 1986 value of the Cottage, as Sally testified. Additionally, this Court is not persuaded that the expenses and improvements paid for by Nobby, Sally and/or Sally's estate should be reimbursed. It is important to consider what Dewey, Elaine and Nobby had agreed upon at the time of the conveyance. In the ten years from the time they deeded the Cottage to Nobby until their deaths, there was no evidence presented that Dewey or Elaine reimbursed Nobby for any improvements or expenses he paid out of pocket. From this lack of evidence, a reasonable inference can be drawn that Dewey and Elaine recognized that such improvements and expenses were part and parcel of owning real estate and would be the responsibility of Nobby. Likewise, Nobby never shared in the rental income from the Cottage with Dewey and Elaine during their lifetime or with his siblings. Again, a reasonable inference can be drawn that Dewey and Elaine intended that the owner of the Cottage would also reap the benefits of ownership.

In this case, in fashioning an equitable remedy as this Court must, it would be unjust to require Mark and Dianne to share the expenses in and improvements to the Cottage when they had little or no use of the Cottage since 1986 and when they did not share in any rental income derived therefrom. The fact that it was their individual choices to absent themselves from the Cottage is of no import.

Pursuant to his promise to Dewey and Elaine, Nobby was obligated to provide Mark and Dianne each with a one-third share of the Cottage. It would be unjust to permit Nobby's heirs to escape this obligation and keep the Cottage for themselves. Rather than order title be held as cotenants in equal shares as between Mark, Dianne and the beneficiaries of Sally's estate, and pursuant to G.L. 1956 § 34-15-16, this Court hereby orders the immediate sale of the Cottage[3] with the proceeds thereof to be split evenly, three ways, as between Mark, Dianne and the beneficiaries of Sally's estate. The proceeds shall be net after deduction for all listing and brokerage fees, commissioner fees, and any other fees associated with the sale. Importantly, however, the labor and materials expended by Nobby, Sally and/or their children to improve the Cottage, and the real estate taxes and the utilities paid by Nobby, Sally and/or their children shall not be deducted from the proceeds. Such expenses are part and parcel of ownership and maintenance, and Nobby agreed to own and maintain the Cottage for his parents and for the family. Likewise, Nobby, Sally and/or their children benefitted from any and all rental income over the years since the Cottage was conveyed to Nobby, and no such income was shared with his siblings, nor shall Claimants be entitled to any such income.

[3] This Decision in no way bars any interested party—Claimants, any beneficiary of Sally's estate, or any other family member—from purchasing the Cottage at the fair market value and in accordance with the commissioner's faithful discharge of his obligations to this Court pursuant to § 34-15-24.

For these reasons, then, the Cottage is hereby ordered to be sold with the proceeds to be split evenly three ways as between Mark, Dianne and the beneficiaries of Sally's estate. The Court hereby appoints Neil Philbin, Esq. to serve as commissioner to oversee the sale of the Cottage pursuant to this Court's Decision herein and in accordance with § 34-15-24.

V

Conclusion

For all these reasons, judgment shall enter for Claimants for the imposition of a constructive trust, and Neil Philbin, Esq. shall be appointed as commissioner to sell the real estate at 35 Breach Drive, Westerly, and distribute the proceeds in accordance with this Decision. Counsel for Claimants shall prepare a judgment consistent with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Diana Nobert v. Mark S. Nobert, et al.**
CASE NO:	**WP-2008-0499**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**February 10, 2015**
JUSTICE/MAGISTRATE:	**Kristin E. Rodgers**
ATTORNEYS:	
For Plaintiff:	**Samuel D. Zurier, Esq.**
For Defendant:	**Steven T. Hartford, Esq.**