2010 WL 6575164 (Conn.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Connecticut,
J.D. of Middlesex at Middletown.
Middlesex County

Carol MITCHELL, et al,

v.

Trevor REDVERS, et al.

No. MMX-CV09-5006960-S.
March 29, 2010.

Memorandum of Law in Support of Defendant's Motion for Summary Judgment

Defendant, Frank Koba, William J. O'Sullivan, Esq., Baker O'Sullivan & Bliss PC, 100 Great Meadow Road, Wethersfield, CT 06109, Tel. (860) 258-1993, Fax. (860) 258-1991, o'sullivan@boblawyers.com, Juris No. 407344, His Attorneys.

MARCH 29, 2010

The defendant, Frank Koba, submits this memorandum of law in support of his motion of even date for summary judgment in this matter. Mr. Koba seeks summary judgment as to (i) the plaintiffs' complaint and (ii) the defendant Maryann Parker's cross-complaint, in which she asserts claims identical to those asserted by the plaintiffs in the complaint.

For ease of reference, in this memorandum Mr. Koba shall refer to the plaintiffs and Ms. Parker, the cross-claim plaintiff, collectively as the plaintiffs.

I. Background, generally.

This is a suit by some people who are mad because they thought they would end up with shares of their grandfather's farm, but didn't realize their parents had disclaimed their interests in it. Now the plaintiff-grandchildren are trying to rewrite history, almost 50 years after their grandfather died.

More specifically, the plaintiffs are trying in effect to rewrite a 46-year-old probate certificate (the functional equivalent of a deed), by which their grandfather's homestead was granted to their bachelor uncle, the youngest of nine (9) siblings. That certificate is perfectly consistent with not one but two agreements signed by the plaintiffs' parents in 1963, shortly before the certificate was executed and recorded in the land records. In those two agreements, the eight older heirs gave their respective 1/9 interests in the property to their youngest brother, who still lived there in his late 30's, subject to a right of first refusal held by the siblings if he decided to sell.

The uncle resided continuously on the premises until he died, in 2008. He was the last of the nine siblings to die. In his will, he bequeathed the property to his nephew, Mr. Koba.

Certain of Mr. Koba's cousins, the plaintiffs herein, don't like this, and don't like the agreements that their parents signed in 1963. Accordingly, they seek to rewrite the probate certificate, claiming that the two agreements implemented by the certificate didn't mean what they said. More particularly, despite clear and unambiguous contract language to the contrary, the plaintiffs claim that their parents meant for their uncle to have only a life estate in the property.

The absurdity of this claim can be exposed by posing a couple of simple questions: if the uncle was supposed to take only a life estate, then who was supposed to take the fee estate? Nobody? Or, if his eight siblings, then why does there not exist a single document that says so? The plaintiffs do not say.

The plaintiffs apparently realize that a frontal assault on the probate certificate would take them straight into the minefield of the Statute of Frauds and/or the parol evidence rule. They therefore seek to outflank those obstacles by styling this action as one for the imposition of a constructive trust. Specifically, they ask this court to decree that their uncle held title to the property in trust for his siblings, their parents.

But there is no basis for the court to impose a constructive trust in this case. Constructive trust is a drastic remedy, reserved for egregious cases in which the court must intervene to avoid the perpetration of a gross injustice. It can't be applied every time someone claims that a deed says one thing but the parties intended something else. If that were so, the Statute of Frauds and parol evidence rule would be eviscerated. The exceptions would swallow up the rules.

In the present case, the facts do not support such a radical departure from the clear intent manifested in the documents signed by the plaintiffs' parents. The plaintiffs apparently didn't know about, or misunderstood, the documents that their parents signed almost 50 years ago. The plaintiffs thought they would get a piece of their grandfather's farm, through their uncle's estate when he died, but they were wrong. That is, they don't get something that they never had. Those are the facts, and they are facts that fall far, far short of what might justify the imposition of a constructive trust.

The plaintiffs may attempt to adduce evidence about what their deceased parents thought the written agreements, and probate certificate, recited and meant. But that would be parol evidence about a would-be oral agreement many decades ago, among people who are long deceased, pertaining to the conveyance of real estate and contrary to executed written instruments. All such evidence runs afoul of the Statute of Frauds and parol evidence rule.

The defendant submits that as to the elements of the plaintiffs' claim, there does not exist any genuine issue of material fact, and that judgment should enter for the defendant as a matter of law. The defendant submits that this is also true with respect to his special defenses that this claim is barred by the doctrine of laches, and by the Marketable Title Act.

For these reasons, elaborated below, summary judgment should enter for the defendant.

II. Facts.

The following facts are undisputed.

A. The 1962 death of Louis Specyalski; his heirs.

On December 13, 1962, Louis Specyalski of Middletown, a widower, died intestate, leaving nine (9) children: Joseph Specyalski; Edmund Specyalski; Lottie Rebot; Adolph Specyalski; Teofil Specyalski; Mary Koba; Frances Zimnewicz; Leon Specyalski; and Valentine Specyalski. (See Application for Administration of Estate of Louis Specyalski, Probate Court for the District of Middletown, dated January 28, 1963, attached as Exhibit 1 to the Affidavit of William J. O'Sullivan, Esq. (O'Sullivan Affidavit) filed herewith.) Louis Specyalski's nine children are hereinafter referred to as the Heirs.

At the time of Louis Specyalski's death, he owned a farm situated at 323 Boston Road, Middletown, Connecticut (the Farm Property). (See Inventory, Estate of Louis Specyalski, dated May 29, 1963, attached as Exhibit 2 to the O'Sullivan Affidavit.) The Farm Property, minus a portion that was subsequently conveyed out in 1975 to defendant Paul Rebot and his wife Carol (See Warranty Deed, attached as Exhibit 3 to the O'Sullivan Affidavit), is the property that is the subject of the plaintiffs' complaint.

At the time of Louis's death, the appraised value of the Farm Property was $10,000.00. See Inventory. The balance of Louis Specyalski's estate consisted of $5,500.50 in cash in two bank accounts (as initially calculated per the Inventory), and miscellaneous personal property having no value. Id.

Louis Specyalski's son Valentine Specyalski was the youngest of the Heirs, in his late 30's when Louis died, and the only one who never married and never had children. See Affidavit of Frank Koba (Koba Affidavit), filed herewith, paragraphs 4, 6. Valentine resided at the Farm Property at the time of Louis's death. Id., paragraph 5.

B. The Heirs' Agreement; the Mutual Distribution.

1.) The Agreement.

On or about October 21, 1963, the Heirs entered into an Agreement bearing that date (the Agreement). (A copy of the Agreement is attached to the plaintiffs' complaint as Exhibit B; for ease of reference, a copy is also attached to the O'Sullivan Affidavit as Exhibit 4.) The Agreement denominates Valentine as the Second Party, and the other eight Heirs as the First Parties. Id.

The Agreement recites that the Heirs were desirous of keeping the [Farm Property] in the family, and contains substantive provisions in five (5) numbered paragraphs, summarized as follows:

1. That the First Parties (the other eight Heirs) agreed to give to [Valentine] their respective shares in the [Farm Property].

2. That if Valentine wished to sell the Farm Property, he had to first offer the property to the survivors of the First Parties for the same price and terms as he shall offer it to others, and only if they demurred could Valentine then sell the Farm Property to a third party.

3. That in the event of any such sale, the net proceeds above $10,000.00 (the appraised value) would be divided equally among all nine Heirs.

4. That all cash and life insurance proceeds in Louis Specyalski's estate would be divided equally among all nine Heirs.

5. That the Heirs would execute such instruments as are necessary to effectuate the terms of this Agreement.

2.) The Mutual Distribution.

On the same day, the nine Heirs fulfilled provision #5 of the Agreement by executing an instrument necessary to effectuate the terms of [the] Agreement. They did so by mutually executing a Mutual Distribution, dated October 21, 1963, which was accepted by the Probate Court on November 5, 1963. (O'Sullivan Affidavit, Exhibit 5.) The Mutual Distribution provides as follows:

1. That Valentine Specyalski shall take and have $389.44 in cash, and the [Farm Property]; and

2. That the other eight Heirs shall take and have $389.44 each, in cash.

The $389.44 figure represents one-ninth of the net cash proceeds of the estate that were available for distribution. (See Administration Account, O'Sullivan Affidavit, Exhibit 6.)

The Mutual Distribution is thus fully consistent with the Agreement. The Agreement says the other eight Heirs shall give Valentine their interests in the Farm Property, and the Mutual Distribution says Valentine shall take the same. Both instruments provide for an equal division, among all nine Heirs, of the balance of Louis's estate.

C. The Probate Court's implementation of the Agreement and Mutual Distribution.

The Probate Court thereupon executed two (2) instruments to implement the agreement of the Heirs as evidenced by the Agreement and Mutual Distribution. First, the court executed an Allowance of Account, Ascertainment of Heirs [and] Order of Distribution, dated November 5, 1963, decreeing transfer of the Farm Property to Valentine, and distribution of the personal property to the nine Heirs as provided in the Mutual Distribution. (O'Sullivan Affidavit, Exhibit 7.) And second, the court executed a probate certificate, recorded on November 19, 1963, in Volume 334 at Page 80 of the Middletown Land Records, conveying a fee interest in the Farm Property to Valentine. (O'Sullivan Affidavit, Exhibit 8.)

Valentine thus took title to the Farm Property, where he resided continuously for the rest of his life, almost another 45 years. Koba Affidavit, paragraph 5.

D. The 2008 death of Valentine Specyalski; bequest of the Farm Property to the defendant.

Valentine Specyalski died on August 20, 2008. Complaint, paragraph 20; Amended Answer of Frank Koba, paragraph 20. In 2002, he had executed a will, which was the subject of proceedings in this court, in the matter of Mitchell v. Redvers, Administrator, CV-09-4010266-S (the Probate Appeal). The following summary of events relating to Valentine's will is drawn from this court's file in the Probate Appeal, which involved the same eight (8) plaintiffs in this case, and Mr. Koba as a defendant. [1]

Valentine Specyalski left a Will and Testament, dated October 28, 2002, in which he bequeathed his entire estate to his nephew Frank Koba, the defendant herein. Probate Appeal, Complaint, paragraphs 4, 5. On March 30, 2009, the Court of Probate, District of Middletown, admitted the will, over the objection of the plaintiffs. Id., paragraphs 6, 11. The plaintiffs appealed to this court from the probate court's order, in the Probate Appeal.

Mr. Koba filed a motion to dismiss and supporting papers in the Probate Appeal. On December 17, 2009, this court (Bear, J) granted the motion and entered a judgment of dismissal. The plaintiffs did not appeal from that judgment. It has thus been judicially established that Mr. Koba shall take the fee estate that Valentine held in the Farm Property, subject only to resolution of the issues presented in the case at bar.

III. The plaintiffs' complaint.

The plaintiffs commenced this action by a writ of summons and complaint (Complaint) dated May 15, 2009. The Complaint is in two counts: a first count seeking the impressment of a constructive trust upon the Farm Property, and a second count incorporating all the allegations of the first count, and adding a request for a declaratory judgment. Ms. Parker filed a cross-complaint, dated December 28, 2009, containing the same allegations.

The claim in the second count for declaratory judgment incorporates in whole the allegations of the first count, the claim for constructive trust, and adds no other allegations except for a request for a declaratory judgment as to the parties' rights in the Farm Property. There is thus no substantive difference between the two counts, and in this motion the defendant addresses them together.

In their Complaint, at paragraph 13, the plaintiffs acknowledged the Agreement, and as noted attached a copy to the Complaint as Exhibit B. They went on to assert that in 1963, the Middletown Probate Court accepted only part of the 10/21/63 agreement; proceeded to distribute the Farm Property to Valentine; and did so without making any provisions for the full 10/21/63 Agreement. Complaint, paragraphs 14, 16.

The defendant served the plaintiffs with written discovery seeking, among other things, clarification about what part of the Agreement the probate court supposedly overlooked in 1963. To date six (6) of the plaintiffs have responded, and their response to this interrogatory has been substantially identical: that the court did not reference that portion of the Agreement which indicated that the 'parties hereto are desirous of keeping the remainder of the Specyalski farm in the family.' (O'Sullivan Affidavit, Exhibit 9.)

The plaintiffs also claim in their discovery responses that the court failed to observe an oral agreement among the Heirs that only a life estate would be conveyed to Valentine. (This echoes their allegation, in paragraph 18 of the Complaint, that the Heirs and the issue of the Heirs (i.e. the plaintiffs) believed that Valentine had only a life estate in the Farm Property.) The defendant objects to any evidence to this effect, as violative of the Statute of Frauds and parol evidence rule, and has therefore redacted this portion of the plaintiffs' interrogatory response.

Thus the plaintiffs' claim appears to boil down to this. They assert that the probate court's 1963 conveyance of the Farm Property to Valentine was contrary to (i) the recital in the Agreement that the parties were desirous of keeping the [Farm Property] in the family, and (ii) an oral agreement, contrary to the clear and unambiguous language in the Agreement and Mutual Distribution, that only a life estate in the Farm Property be conveyed to Valentine. They therefore ask the court to declare that Valentine constructively held the Farm Property in trust for all nine Heirs, and that now that he has died, the plaintiffs should be deemed the equitable owners of the property.

This motion follows.

IV. Argument.

A. Standard of review.

Summary judgment should enter if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Practice Book, section 17-49; Lees v. Middlesex Insurance Co., 219 Conn. 644, 650 (1991). A material fact is one that will make a difference in the result of a case. Hammer v. Lumberman's Mutual Casualty Co., 214 Conn. 573, 578 (1990).

The party moving for summary judgment has the initial burden of demonstrating the absence of any genuine issue of material fact. Strada v. Connecticut Newspapers, Inc., 193 Conn. 313, 317 (1984). If the moving party carries that burden, the opposing party must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. Connell v. Colwell, 214 Conn. 242, 246 (1990). It is incumbent upon the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists. Wadia Enterprises, Inc. v. Hirschfeld, 224 Conn. 240, 247 (1992).

B. The probate certificate conveying the Farm Property outright to Valentine is consistent with the plain language of the Agreement.

The plaintiffs claim that the probate certificate did not properly implement the Agreement because the certificate is inconsistent with the recital in the Agreement that the parties are desirous of keeping the [Farm Property] in the family. They suggest that conveying a fee estate rather than a life estate to Valentine is inconsistent with this provision. However, the Agreement as a whole clearly and unambiguously expresses the intent to convey the property outright to Valentine. Accordingly, the plaintiffs' argument is unavailing.

A contract is to be construed as a whole and all relevant provisions will be considered together. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity and words do not become ambiguous simply

because lawyers or laymen contend for different meanings. Scinto v. Sosin, 51 Conn.App. 222, 239 (1998), cert. denied 247 Conn. 963 (1999) (citations and internal punctuation omitted).

As noted above, the Agreement stated, as a recital, that the parties were desirous of keeping the remainder of the Specyalski farm in the family, and then provided for Valentine's eight siblings to give to [Valentine] their respective shares in the real estate described in the inventory of the estate. Id. The Agreement further gave the eight siblings a right of first refusal in the event [Valentine] shall be desirous of selling the said real estate; in such an event, they were granted the opportunity to match the offer price. Id. The right of first refusal was personal to the survivors of the First Parties [i.e. Valentine's eight siblings]. It did not run to their heirs and assigns.

Reading the Agreement as a whole, there is no inconsistency between (i) the Heirs' stated desire to keep the property in the family and (ii) the agreement that Valentine would take outright ownership of the property, subject to a right of first refusal held by his siblings. Indeed, the provisions are perfectly consistent.

The stated desire to keep the property in the family provides a useful explanation for why the eight siblings elected to part with their respective interests therein, and vest the entirety in one person, their youngest, bachelor brother. If they had instead retained their respective 1/9 interests, that would set up the possibility that at some point, perhaps in the very near future, one or more siblings would choose or find it necessary to cash out, requiring the property to be sold and the proceeds divided up. By instead combining all of their interests and vesting them in a single family member, they took that scenario off the table.

Furthermore, the family member they chose, a bachelor in his late 30's who had never moved out of the family homestead (and never would), was a person likely to keep the property in the family. Indeed, that is how it played out: Valentine never did marry, and has bequeathed the property to his nephew, the defendant Mr. Koba. That is, Valentine has kept the property in the family, in death as he did in his life.

The Agreement's right of first refusal, which would kick in only in the unlikely event that Valentine decided to sell during the lifetime of his siblings, provided a further safeguard to keep the property in the family. Furthermore, the fact that the right of first refusal was personal only to the Heirs themselves (not their heirs and assigns) clearly signifies that the Heirs' priority was to keep the property in the family during their generation, not necessarily extending to future generations (including the next succeeding generation, that of the plaintiffs).

There is thus no inconsistency, and no ambiguity, in the Agreement's clear provision for the eight siblings to give their interests in the Farm Property to Valentine. The Agreement makes no mention of a life estate, and only the most ruthless torturing of the contract language would lead to even a hint of ambiguity in this regard.

C. The plaintiffs cannot adduce evidence that the parties to the Agreement and Mutual Distribution actually intended for Valentine to receive a life estate, because any such evidence would be contrary to the parol evidence rule.

The plaintiffs further argue that the Heirs intended for Valentine to receive only a life estate in the Farm Property. However, the Heirs entered into a fully integrated agreement, evidenced by the Agreement and Mutual Distribution, addressing the disposition of the Farm Property. Those documents make no mention of a life estate and instead provide for the property to be given to Valentine. For this reason, and because any evidence as to a contrary intent on the part of the Heirs would run afoul of the parol evidence rule, summary judgment should enter for the defendant.

The parol evidence rule prohibits the use of extrinsic evidence to vary or contradict the terms of an integrated written contract. TIE Communications, Inc. v. Kopp, 218 Conn. 281, 287-288 (1991). The rule is
not a rule of evidence, but a substantive rule of contract law...The rule is premised upon the idea that when the parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed, that the whole engagement of the parties, and the extent

and manner of their understanding, was reduced to writing. After this, to permit oral testimony, or prior or contemporaneous conversations, or circumstances, or usages [etc.], in order to learn what was intended, or to contradict what is written, would be dangerous and unjust in the extreme.

The parol evidence rule does not of itself, therefore, forbid the presentation of 'parol evidence,' that is, evidence outside the four comers of the contract concerning matters governed by an integrated contract, but forbids only the use of such evidence to vary or contradict the terms of such a contract. Parol evidence offered solely to vary or contradict the written terms of an integrated contract is, therefore, legally irrelevant. When offered for that purpose, it is inadmissible not because it is parol evidence, but because it is irrelevant.

Heyman Associates No. 1 v. Insurance Co. of Pennsylvania, 231 Conn. 756, 779-780 (1995). (Citations and internal punctuation omitted; brackets in original.) The parol evidence rule renders inoperative prior written agreements as well as prior oral agreements. Giorgio v. Nukem, Inc., 31 Conn.App. 169, 174 fn. 4 (1993), quoting 2 Restatement (Second), Contracts §213, comment a.

The rule applies only when the written agreement at issue is integrated. An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement. Giorgio, supra, 31 Conn.App. at 175. A written agreement is 'integrated' and operates to exclude evidence of the alleged extrinsic negotiation if the subject matter of the latter is mentioned, covered or dealt with in the writing ...; if it is not, then probably the writing was not intended to embody that element... Associated Catalog Merchandisers, Inc. v. Chagnon, 210 Conn. 734, 740 (1989) (citations and internal quotes omitted; ellipses in original). The burden is on the party attempting to prove the absence of integration. Neiditz v. Housing Authority, 43 Conn.Sup. 283, 239 (1994), affirmed 231 Conn. 598 (1995).

In the present case, the Heirs signed two documents on the same day, October 21, 1963, both of which were formally executed in the presence of witnesses. Those documents, the Agreement and the Mutual Distribution, squarely addressed the issue at hand: the disposition of the Farm Property. Because the subject matter was mentioned, covered [and] dealt with in the writing[s], and there is no evidence of any other contemporaneous writings executed by the Heirs addressing that subject matter, the Agreement and Mutual Distribution collectively constitute an integrated agreement. Associated Catalog, supra, 210 Conn. at 740. As such, the parol evidence rule bars evidence of any side negotiation or agreement as to a life estate, which would contradict the plain language of the writings. Id.

Application of the parol evidence rule is particularly just in the present case, given that all of the relevant communications among the Heirs took place more than 46 years ago, and all of the Heirs are deceased. That is, the plaintiffs' putative evidence of intent would rest on secondhand accounts of what some now-dead people were thinking almost a half-century ago.

As a general principle underpinning the parol evidence rule, to permit oral testimony ... in order to learn what was intended, or to contradict what is written, would be dangerous and unjust in the extreme. Heyman Associates, supra, 231 Conn. at 780. That principle is true to the nth degree in the case at bar.

It is true, as discussed below, that in the rare case calling for the imposition of a constructive trust, the court may consider parol evidence. However, this is not one of those rare cases, and accordingly the court should not consider parol evidence about what the plaintiffs' parents supposedly thought they were signing.

D. The Statute of Frauds bars the plaintiffs from adducing evidence about an alleged oral agreement for the conveyance of a life estate in the Farm Property.

The plaintiffs suggest that there existed some kind of agreement among the Heirs by which the estate would convey only a life interest, not a fee interest, in the Farm Property to Valentine. However, the plaintiffs have not pled or produced a written

agreement to this effect, suggesting that the would-be agreement was oral. Proof of any such agreement would be barred by the Statute of Frauds. For this further reason, summary judgment should enter for the defendant.

The Statute of Frauds, C.G.S. §52-550, provides, in relevant part, as follows:

> No civil action may be maintained in the following cases unless the agreement, or a memorandum of the agreement, is made in writing and signed by the party, or the agent of the party, to be charged: ... (4) upon any agreement for the sale of real property or any interest in or concerning real property ...

Id. The statute does not make agreements not made in this way invalid, but prevents their proof unless by such a writing. Scinto v. Clericuzio, 1 Conn.App. 566, 567 (1984).

To comply with the Statute of Frauds, a writing must state the contract with such certainty that its essentials can be known from the memorandum itself, without the aid of parol proof, or from a reference contained therein to some other writing or thing certain; and these essentials must at least consist of the subject of the sale, the terms of it and the parties to it, so as to furnish evidence of a complete agreement. Breen v. Phelps, 186 Conn. 86, 92 (1982) (citation and internal quotation marks omitted).

The primary purpose of the statute of frauds is to provide reliable evidence of the existence and the terms of the contract. Electrical Wholesalers, Inc. v. M.J.B. Corp., 99 Conn.App. 294, 302 (2007). The statute was enacted to prevent perjury and the enforcement of claims based upon memories made faulty by the lapse of time. Lee v. Jenkins Bros., 156 F.Supp. 858, 862 (D.Conn. 1957), affirmed 268 F.2d 357 (2nd Cir. 1959), cert. denied 361 U.S. 913, 80 S.Ct. 257, 4 L.Ed.2d 183 (1959). (Emphasis added.)

In the present case, there is no written agreement among the Heirs that the estate should convey only a life estate to Valentine. Thus the only possible evidence of such an agreement would be secondhand testimony about what the deceased Heirs supposedly said and thought, almost 50 years ago, directly contrary to their own written undertakings during the same timeframe.

This case presents an excellent example of why the Statute of Frauds was enacted, and why it remains an important part of our law. The court should hold that the Statute applies here, and bars the plaintiffs from trying to establish an oral agreement for the conveyance of the Farm Property that directly contradicts the duly executed, duly witnessed Agreement and Mutual Distribution. While the Statute of Frauds may be overridden in a proper constructive trust case; Cohen v. Cohen, 182 Conn. 193, 202 (1980); this is no such case, as argued below.

E. There is no factual basis for the imposition of a constructive trust.

The defendant respectfully submits that this case, stripped to its essence, is a garden-variety suit asserting that a clear and unambiguous written agreement for the conveyance of an interest in real property does not comport with the intent of the parties. Such cases are ordinarily dead on arrival, thanks to the parol evidence rule and Statute of Frauds.

The plaintiffs' attorneys obviously recognized this from the outset. Accordingly, they have artfully invoked the doctrine of constructive trust, which in a proper case may allow the court to consider parol evidence.

But as argued above, and elaborated herein, it is only the rare case that calls for the imposition of a constructive trust. If courts routinely imposed that remedy in cases in which a real estate agreement said A but was supposed to say B, then the parol evidence rule and Statute of Frauds would be nullified. The salutary purposes served by the latter doctrines - enforcing contracts as written, avoiding swearing contests about what people thought and said, and discouraging claims based on memories of ancient events -- would no longer be served.

The present case involves a clear, unambiguous, integrated agreement for the conveyance of real property, signed by the Heirs and duly witnessed. That agreement should be honored absent a truly compelling showing by the plaintiffs of a gross injustice warranting the intervention of a court of equity and the imposition of a constructive trust. But no such facts are present in this case. For this reason, summary judgment should enter for the defendant.

As a general rule, parol evidence may not be used to contradict the unambiguous terms of a deed purporting to convey title to real property. Jarvis v. Lieder, 117 Conn.App. 129, 141 (2009). There are situations, however, where equity, in order to work out justice between the parties, will itself raise a trust ... and such trusts do not fall within the rule stated above. Within this category fall constructive trusts. Id. at 142.

The remedy of constructive trust is not routinely available whenever the court thinks a fairer adjustment of rights would be desirable. Constructive trusts are reserved for cases that shock the conscience. A constructive trust may be based on fraud, misrepresentation, imposition, circumvention, artifice or concealment, or abuse of confidential relations.... In such cases, a trust does not arise so much by reason of the parol agreement of the parties but by operation of law. Jarvis, supra, 117 Conn.App. at 142. [A] constructive trust arises contrary to intention and in invitum, against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy. Wendell Corp. Trustee v. Thurston, 239 Conn. 109, 113 (1996).

A review of the leading Connecticut cases is instructive. In Cohen v. Cohen, 182 Conn. 193 (1980), the plaintiff mother, using funds she had inherited, purchased a condominium, and vested title in herself and the defendant son (age 14 at the time) jointly with a right of survivorship. She did so because of death threats by her husband (from whom she was separated), and upon an express understanding with the son that he would re-convey his interest in the unit back to her, upon her request. She paid all of the carrying costs of the condominium unit. When she later asked the son to quitclaim his interest in the unit back to her, he refused. On these facts, the court imposed a constructive trust on the son's half-interest in the property, and ordered him to convey it to his mother.

In Gulack v. Gulack, 30 Conn.App. 305 (1993), Max Gulack had bought a marital home for his nephew Howard and Howard's wife, Elaine, but vested title in Max's brother George (Howard's father) because Max thought Howard to be unstable and irresponsible. Id., 30 Conn.App. at 307. At the time of the purchase, Max declared that he had bought the property for Howard and Elaine. Id. After George died, his widow claimed outright ownership of the property. The court denied her claim, and imposed a constructive trust on the property in favor of Howard and Elaine.

In Schmaling v. Schmaling, 48 Conn.App. 1 (1998), the plaintiff, a widow, owned a home in which she had resided for 46 years. When the defendant, her son, announced plans to marry, she offered to allow him to add a second floor to the house, where he and his wife could live. The son agreed to this arrangement. To secure construction **financing**, the parties believed it necessary to add the son to the deed, so the mother conveyed a half-interest to him.

The construction was completed, and the son and daughter-in-law moved in. After less than ten years, the son and daughter-in-law (who by then had four children) moved out. The son claimed a continuing half-interest in the property, but the court found that that interest had been conveyed to him with no donative intent, solely to facilitate the construction **financing**, and was subject to a constructive trust in favor of his mother.

In Garrigus v. Viarengo, 112 Conn.App. 655 (2009), the plaintiff executor of a woman's estate sued the decedent's niece for, among other things, fraud and the imposition of a constructive trust. The niece had caused her aunt to add her as a joint owner of almost a half million dollars in bank accounts, certificates of deposit and savings bonds. After the aunt died, the niece claimed outright ownership of the assets in question. The plaintiff proved that the aunt had added the niece to the accounts only as a

convenience, and that the niece had defrauded the aunt. On these facts, the court imposed a constructive trust on the assets in question, for the benefit of the aunt's probate estate.

In Jarvis v. Lieder, 117 Conn.App. 129 (2009), the **elderly** plaintiff was prevailed upon to convey title to her home, bank accounts and certificates of deposit to her nieces and grandniece, for the avowed purposes of Medicare planning and convenience. When the parties had a falling out, the transferees claimed outright ownership of the assets in question. The court imposed a constructive trust on the assets, ordering the transferees of the house to deed a life estate to the plaintiff, and the transferees of the funds to return the same to the plaintiff.

All of these cases invite a sad shake of the head on the part of the reader, and wonderment about how people could treat their close relatives so horribly. All of these cases cry out for the intervention of a court of equity to prevent a gross miscarriage of justice. They vividly illustrate why the doctrine of constructive trust is a necessary and valuable judicial instrument.

But that instrument should be a scalpel, not a sledgehammer. The cases neither say nor suggest that the doctrine should be routinely invoked to ride roughshod over the parol evidence rule and Statute of Frauds. Nor do they empower courts to second-guess, and remake, people's freely made decisions about what to do with their own property - including the decision to give it away.

In the present case, the plaintiffs are attacking the circumstances of Valentine's acquiring title to the Farm Property in November of 1963. A constructive trust is the formula through with the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. Jarvis, supra, 117 Conn.App. at 143. (Citations and internal punctuation omitted.) The court should thus examine the equities as they existed at the moment of conveyance in 1963.

Valentine's eight siblings (including the plaintiffs' parents) each disclaimed a 1/9 interest in a property that had an appraised value of $10,000 -- a little over $1,000 apiece. Even in 1963, that was not a princely sum. They executed a right of first refusal agreement that gave them the right to capture their share of any profit realized by Valentine above that $10,000 value if he sold the property during their lifetime. They thus put a cap on any windfall that Valentine may realize while they were still alive. They expressly made that right of first refusal, and the right to share in surplus proceeds, personal to themselves, and not a right to which their children (the plaintiffs) would succeed. The eight siblings were all married and all had children, and thus had social capital that their recipient brother Valentine -- a bachelor who had never moved out of the family home -- did not. It was thus understandable that they may decide to forgo $1,000 apiece to take care of their younger brother. Finally, they executed two clear and unambiguous instruments, in the presence of witnesses, aimed at implementing their arrangement. The plaintiffs now seek to void those instruments on the basis of what the long-dead parties supposedly thought the documents meant when they signed them, back in the waning days of the Kennedy Administration.

There is another key point that this court should consider. Back in 1963, the Heirs knew that the Probate Court would rely on their written agreement: this is a matter of common sense; they were apparently represented by an attorney named Harry Edelberg, who witnessed both the Agreement and the Mutual Distribution; and the Mutual Distribution contains a signature blank on its second page for the probate judge, under the words Accepted for record November 5, 1963. Judge Sweet of the probate court indeed acted in reliance on the solemnly sworn Mutual Distribution, through the Order of Distribution and probate certificate conveying the Farm Property to Valentine.

Under these circumstances, where parties represented by counsel tender duly executed and witnessed documents to a court for the purpose of inducing judicial action, it is particularly important to hold the parties to the letter of what they have written. [T]here are two elements to the doctrine of judicial estoppel: First, the party against whom estoppel is asserted must have argued an inconsistent position in a prior proceeding; and second, the prior inconsistent position must have been adopted by the court in some manner. Dougan v. Dougan, 114 Conn.App. 379, 390, fn. 14 (2009). (Citation and internal punctuation omitted.) While that doctrine may not literally apply here (unless submission of the Mutual Distribution to the Probate Court constituted an

argument), similar policy concerns support holding these plaintiffs, through their forebears, to what the latter submitted to the court back in 1963. To allow these plaintiffs to repudiate that filing now would give rise to, if not a fraud on the court, something awfully close. One who seeks equity must also do equity. Lacroix v. Lacroix, 189 Conn. 685, 689 (1983).

The facts in the case at bar are not in the same category as a son claiming a 50% interest in property conveyed to him by his mother, knowing she had done so as a temporary measure to keep it away from her threatening estranged husband (Cohen, supra) or to obtain construction **financing** (Schmaling, supra). Nor does it have anything in common with cases of family members fleecing their **elderly** aunts (Garrigus, supra; Jarvis, supra).

Quite simply, this case is readily distinguishable from Connecticut's body of law on the doctrine of constructive trust, which has no application here. It is not a close call.

For these reasons, summary judgment should enter for the defendant.

F. The plaintiffs' claim is barred by the doctrine of laches.

The plaintiffs' claim should be barred for the further reason that it runs afoul of the doctrine of laches.

The defense of laches, if proven, bars a plaintiff from seeking equitable relief.... First, there must have been a delay that was inexcusable, and, second, that delay must have prejudiced the defendant. Jarvis, supra, 117 Conn.App. at 149.

In the present case, more than 45 years elapsed between recordation of the probate deed in November 1963, and the commencement of this case, in May 2009. All nine signatories to the Agreement and Mutual Distribution are now dead. The plaintiffs' forebears, signatories to the Agreement and Mutual Distribution and the people through whom the plaintiffs claim, had ample opportunity to familiarize themselves with the probate deed and commence an action to redress any perceived injustice (or at least record an instrument on the land records) during their lifetimes and that of Valentine. But they never did.

It is also clear that the plaintiffs themselves have slept on whatever rights they claim to have -- conveniently enough, until after Uncle Valentine died and was thus rendered unavailable to tell his side of the story. On six (6) different occasions over the years, an Heir who was a parent of one or more of the plaintiffs died: in 1979, Teofil Specyalski, father of plaintiff David Specyalski; in 1980, Leon Specyalski, father of plaintiffs Marty Specyalski and Doreen Zawacki; in 1991, Mary Koba, mother of plaintiff Carol Mitchell; in 1998, Edmund Specyalski, father of plaintiffs Irene Arabek and Lorraine Cieneva; in 1998, Lottie Rebot, mother of cross-claim plaintiff Maryann Parker; and in 2002, Frances Zimnewicz, mother of plaintiffs Steve Zimnewicz and Annette McMahon. [2]

As these Heirs died, their offspring -- including the plaintiffs -- had the occasion and the motive to verify exactly what the Heirs owned, including any would-be interest in the Farm Property as shown in the land records. If any of them had bothered to do so, the issue could have been raised when at least some of the Heirs, including Valentine, were alive. But either the plaintiffs never bothered to check, or they did but then refrained from filing suit until after Uncle Valentine died. Either way, their delay in bringing this action is inexcusable.

As for prejudice, that is easily demonstrated: the plaintiffs unconscionably failed to bring suit until after Valentine, the last signatory of the Agreement and Mutual Distribution, died. As a result, not a single party to the events in question is available to testify. The plaintiffs apparently hope to testify to what their parents said about the matter over the years (to the extent that such hearsay may be held admissible), but conveniently enough for the plaintiffs, Uncle Valentine had no children and thus has no comparable mouthpiece in 2010 and beyond.

If the doctrine of laches means anything, it must mean that a suit to undo a 46-year-old instrument, based on an alleged 46-year-old parol agreement among people who are now dead, is stale. Not a few days past the use-by date stale; more like hardtack in a Civil War museum stale.

For this further reason, summary judgment should enter for the defendant.

G. The plaintiffs' claim is barred by the Marketable Title Act.

As noted above, on or about November 19, 1963, the probate certificate was recorded in the Middletown Land Records, conveying the Farm Property to Valentine. More than 40 years elapsed between the recordation of that instrument and the commencement of this suit. During that timeframe, neither the Heirs nor their issue ever recorded a notice in the land records describing the claim alleged in this lawsuit. Because Valentine held clean title to the Farm Property for more than 40 years -- that is, marketable record title -- the claims asserted by the plaintiffs herein are barred by the Marketable Title Act. Accordingly, summary judgment should enter for the defendant.

The Marketable Title Act, C.G.S. sections 47-33b et seq., provides a mechanism to ensure the reliability of the land records. It does so by prescribing that once a person holds an unbroken chain of title to property for at least 40 years, he is deemed to hold such title free of all unrecorded interests in the property (subject to certain exceptions not applicable here). That is, such person holds marketable record title. We turn now to the statutory language.

Marketable record title means a title of record which operates to extinguish such interests and claims, existing prior to the effective date of the root of title, as are stated in section 47-33e. C.G.S. section 47-33b(a). The defendant asserts that Valentine had marketable record title to the Farm Property, which extinguished the plaintiffs' claims.

Let's break this down into manageable parts. The proof has the following elements:

1. As of the date of his death (August 20, 2008), Valentine had marketable record title to the Farm Property.

2. The effect of Valentine having marketable record title was to extinguish claims having two characteristics: those that (i) existed prior to the effective date of the root of title and (ii) fall within the scope of C.G.S. section 47-33e.

3. The effective date of the root of title was November 19, 1963, the date that the probate certificate was recorded in the Middletown Land Records.

4. The plaintiffs' claim, assuming it exists at all, existed prior to the effective date of the root of title.

5. The plaintiffs' claim is of the type stated in C.G.S. section 47-33e.

6. Therefore the plaintiffs' claim has been extinguished.

We now examine these components in detail.

1. As of the date of his death (August 20, 2008), Valentine had marketable record title to the Farm Property.

Section 47-33c of the Connecticut General Statutes provides as follows:

> Any person having the legal capacity to own land in this state, who has an unbroken chain of title to any interest in land for forty years or more, shall be deemed to have a marketable record title to that interest, subject only to the matters stated in section 47-33d. A person has such an unbroken chain of title when the land records of the town in which the land is located disclose a conveyance or other title transaction, of

> record not less than forty years at the time the marketability is to be determined, which conveyance or other title transaction purports to create such interest in land, or which contains language sufficient to transfer the interest, either in (1) the person claiming that interest, or (2) some other person from whom, by one or more conveyances or other title transactions of record, the purported interest has become vested in the person claiming the interest; with nothing appearing of record, in either case, purporting to divest the claimant of the purported interest.

Id. It cannot be disputed that on the date of Valentine's death, August 20, 2008, he had an unbroken chain of title to the Farm Property for more than 40 years. As required, as of that date the Middletown Land Records disclose[d] a conveyance or other title transaction, of record [more than 40 years] which conveyance or other title transaction purport[ed] to create such interest in land [and] contain[ed] language sufficient to transfer the interest. That document is the probate certificate, which was recorded in the Middletown Land Records on November 19, 1963. The probate certificate had been issued and recorded under the authority of C.G.S. 45a-450, which provides in relevant part as follows:

> (a) When the real property of any deceased person ... is legally divided by the voluntary act of all the persons interested therein ... the fiduciary of the estate of such decedent shall, within one month thereafter ... procure from the judge, clerk or assistant clerk of the court of probate having jurisdiction of the settlement of the estate of such decedent, and cause to be recorded in the land records of each of the towns in which such real property is situated, a certificate signed by such judge, clerk or assistant clerk. Such certificate shall contain the name and place of residence of each person to whom such real property, or any portion thereof or interest therein, is distributed, set out or divided or descends, and a particular description of the estate, portion or interest distributed, set out or divided or descending to each person.

Id. The probate certificate at issue in this case (O'Sullivan Affidavit, Exhibit 8) meets these requirements. The Farm Property had been legally divided among the persons interested therein through the Mutual Distribution. The probate certificate itself bears the signature of Probate Judge Stephen Sweet, identifies Valentine Specyalski of Middletown as the person to whom the property was being distributed, and contains a legal description of the Farm Property.

Returning now to C.G.S. section 47-33c, Valentine had marketable record title as of the date of his death only if nothing appear[ed] of record ... purporting to divest [him] of [his] purported interest in the property. That is indeed the case; as of the date of his death, the Middletown Land Records did not include any documents purporting to divest Valentine of his fee interest in the Farm Property (except the portion of the property he deeded to his nephew Paul Rebot and Paul's wife, as noted above). O'Sullivan Affidavit, paragraph 6 and Exhibit 3 thereto.

Finally, C.G.S. section 47-33c provides that marketable record title is subject only to the matters stated in section 47-33d. However, it is apparent from even a cursory review of that statute, [3] which deals primarily with interests evidenced within the land records or by continuance possession of the property, that the plaintiffs' claimed interest in the Farm Property is not one stated in section 47-33d.

Accordingly, as of the date of his death, Valentine had marketable record title to the Farm Property, and that interest was not subject to the plaintiffs' claim pursuant to C.G.S. section 47-33d.

2. The effect of Valentine having marketable record title was to extinguish claims having two characteristics: those that (i) existed prior to the effective date of the root of title and (ii) fall within the scope of C.G.S. section 47-33e.

This is pursuant to the definition of marketable record title set forth in C.G.S. section 47-33b(a).

3. The effective date of the root of title was November 19, 1963, the date that the probate certificate was recorded in the Middletown Land Records.

Section 47-33b(e) of the Connecticut General Statutes defines root of title as follows:

> (e) Root of title means that conveyance or other title transaction in the chain of title of a person, purporting to create or containing language sufficient to transfer the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined. The effective date of the root of title is the date on which it is recorded.

As discussed above, the probate certificate had precisely this purpose and effect.

4. The plaintiffs' claim, assuming it exists at all, existed prior to the effective date of the root of title.

In paragraph 17 of their complaint, the plaintiffs assert that the Middletown Probate Court's distribution of the Farm Property to Valentine on November 6, 1963 did not take into consideration the full 10/21/63 Agreement. That is, their theory is that the Heirs had an agreement or understanding, developed on or before October 21, 1963, with respect to ownership of the Farm Property. The plaintiffs now seek to enforce that alleged agreement or understanding via this lawsuit.

Thus the plaintiffs' claim, such as it is, existed for at least four weeks before the probate certificate, the root of title, was recorded in the Middletown Land Records.

5. The plaintiffs' claim is of the type stated in C.G.S. section 47-33e.

Section 47-33e of the Connecticut General Statutes provides as follows:
§ 47-33e. Prior interests void

Subject to the matters stated in section 47-33d, such marketable record title shall be held by its owner and shall be taken by any person dealing with the land free and clear of all interests, claims or charges whatsoever, the existence of which depends upon any act, transaction, event or omission that occurred prior to the effective date of the root of title. All such interests, claims or charges, however denominated, whether legal or equitable, present or future, whether those interests, claims or charges are asserted by a person sui juris or under a disability, whether that person is within or without the state, whether that person is natural or corporate, or is private or governmental, are hereby declared to be null and void.

Id. As noted above, the existence of the plaintiffs' claim against the Farm Property depends upon [an] act, transaction, event or omission that occurred prior to the effective date of the root of title. For this reason, it is null and void in light of Valentine's marketable record title.

6. Therefore the plaintiffs' claim has been extinguished.

We now connect the dots:
• Valentine had marketable record title to the Farm Property, as defined by C.G.S. sections 47-33b(a) and 47-33c, as of the date he died, August 20, 2008.

• The effective date of his root of title was November 19, 1963.

• Valentine had an unbroken chain of title for more than 40 years.

• The plaintiffs never recorded an instrument in the land records stating their claim.

• The plaintiffs' claim, such as it is, predates the root of title, and fits within the scope of C.G.S. section 47-33e.

• Valentine's marketable record title extinguished the plaintiffs' claim.

For this further reason, summary judgment should enter for the defendant.

V. Conclusion and statement of relief requested.

For all of these reasons, the defendant, Frank Koba, respectfully requests that his motion for summary judgment be granted.

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Footnotes

1 This court can take judicial notice of the court file in the Probate Appeal. State v. Carey, 228 Conn. 487, 497 (1994). Because the Probate Appeal and the present case have the same plaintiffs, the court's decision in the former is res judicata for purposes of this case. Linden Condominium Association, Inc. v. McKenna, 247 Conn. 575, 594 (1999).

2 Except for Mary Koba, the years of death are set forth in the Complaint and thus judicially admitted by the plaintiffs. The plaintiffs alleged in their complaint that Mary Koba died in 1994, but the defendant submits that the correct year was 1991. This discrepancy is not material for the purposes of this motion. The year of death for Mary Koba, and a description of the relationships between the plaintiffs and the Heirs, are set forth in the Koba Affidavit, at paragraph 7.

3 The complete text of C.G.S. 47-33d is as follows:
§ 47-33d. Interests to which title is subject

Such marketable record title is subject to: (1) All interests and defects which are created by or arise out of the muniments of which the chain of record title is formed; provided a general reference in the muniments, or any of them, to easements, use restrictions or other interests created prior to the root of title are not sufficient to preserve them, unless specific identification is made therein of a recorded title transaction which creates the easement, use restriction or other interest; (2) all interests preserved by the recording of proper notice or by possession by the same owner continuously for a period of forty years or more, in accordance with section 47-33f; (3) the rights of any person arising from a period of adverse possession or use, which was in whole or in part subsequent to the effective date of the root of title; (4) any interest arising out of a title transaction which has been recorded subsequent to the effective date of the root of title from which the unbroken chain of title of record is started; provided such recording shall not revive or give validity to any interest which has been extinguished prior to the time of the recording by the operation of section 47-33e; (5) the exceptions stated in section 47-33h as to rights of reversioners in leases, as to apparent easements and interests in the nature of easements, and as to interests of the United States, this state and political subdivisions thereof, public service companies and natural gas companies.

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