The Supreme Court of South Carolina

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November 13, 2015

The Honorable Patricia C. Grant
PO Box 620
Walterboro SC 29488-0028

REMITTITUR

Re: Roger Walker v. Catherine Brooks
Lower Court Case No. 2009CP1501148
Appellate Case No. 2013-001377

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc: Benjamin Allen Dunn, II, Esquire
Everett H. Garner, Esquire
Gregory Samuel Forman, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Roger Wendell Walker, as the Personal Representative of the Estate of Kenneth Ray Walker and individually as a surviving child and Devisee of the Decedent, Kenneth Ray Walker (d/o/d 09/20/2008), Jimmy Ray Walker, and Wilson Whitney Walker as surviving children and Devisees of the Decedent, Kenneth Ray Walker, who died testate on 09/20/2008, Petitioners,

v.

Catherine W. Brooks, Respondent.

Appellate Case No. 2013-001377

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Colleton County
R. Thayer Rivers, Jr., Special Referee

Opinion No. 27583
Heard May 5, 2015 – Filed October 28, 2015

AFFIRMED IN PART AND REMANDED

Gregory S. Forman, of Gregory S. Forman, PC, of Charleston, for Petitioners.

Everett H. Garner and Benjamin A. Dunn, II, both of Holler, Garner, Corbett, Ormond, Plante & Dunn, of Columbia, for Respondent.

JUSTICE HEARN: In this familial dispute over property, it is uncontradicted that Kenneth Walker (Decedent) deeded to his sister, Catherine Brooks, approximately forty acres of property in two separate transfers before his death. The question is whether the property was deeded to Brooks freely, or subject to an equitable mortgage which would require her now to return it to Decedent's estate. We hold no equitable mortgage exists; accordingly, we remand.

FACTUAL/PROCEDURAL HISTORY

Decedent owned and lived on a 200-acre farm in Colleton County. In 1996, Decedent conveyed 26.52 acres of the farm to Brooks for the purported amount of $13,250.00.[1] In 2002, Decedent conveyed an additional 15.16 acres to Brooks for $5.00.

Brooks was Decedent's older sister, and the two had a close relationship. Beginning in 1993, Brooks helped Decedent with his outstanding debts, paid his electric and telephone bills, bought groceries, and gave him cash for living expenses. Additionally, Brooks helped Decedent receive social security benefits and served as trustee for those benefits.

According to Brooks, Decedent gifted the property to her in exchange for this considerable emotional and financial assistance; however, Brooks did not exercise dominion or control over the property after the conveyances. Not only did Decedent continue to live and work on the farm, but he often cashed the rent checks from a commercial tenant occupying a building there, only periodically giving money to Brooks.

In 2004, at Decedent's request, Brooks handwrote a note stating the following:

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[1] Brooks testified this amount was inserted by Decedent at the request of the closing attorney, but admitted she did not pay anything for the property.

> [Decedent] would like for all the money from Larry Herndon[2] to be paid to [Brooks] until she is paid sixty thousand dollars, at that time she is to release to [Decedent] all the property off Cooks Hill Road at Walterboro, S.C. Any money [Decedent] pays [Brooks] will be toward the sixty thousand dollars.

The parties also generated a ledger documenting payments purportedly made from Decedent to Brooks. The ledger begins at $60,000 and the last entry shows $27,400 remaining to be paid. Brooks' initials appear next to many of the entries.

Before Decedent's death, his attorney sent a letter to Brooks citing the above agreement, and requesting her to tender the deed in exchange for $2,893.87.[3] Brooks refused. After Decedent's death, his son and personal representative, Roger Walker, offered to pay Brooks $27,400 in exchange for her returning title to the farm. After Brooks denied his offer, this dispute arose.

Initially, Brooks filed a complaint against Walker for converting funds and resources related to the property she alleged rightfully belonged to her. Walker then filed a separate complaint for specific performance of a contract for sale of land and a declaratory judgment action based on an express, constructive, or resulting trust theory. The cases were consolidated and tried before a special referee.

The special referee held that although testimony from both parties was inconsistent, the handwritten note and ledger showed Decedent was indebted to Brooks at the time of his death, and thus the conveyance was intended as security for this debt. Accordingly, the special referee held that "while this is equally susceptible of being a resulting trust, I am more of the opinion that it so closely tracks the facts of [*F. Gregorie & Son v. Hamlin*, 273 S.C. 412, 257 S.E.2d 699 (1979)] that it is more properly an equitable mortgage." The special referee held the estate was entitled to the property upon payment to Brooks of $27,400, and did not reach Walker's specific performance argument.

Brooks appealed to the court of appeals, and Walker raised specific

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[2] Herndon paid for the right to remove sand from Decedent's property and discharge soil and waste water onto the property deeded to Brooks.

[3] Inexplicably, this is the amount Decedent's attorney calculated was still owed to Brooks.

performance as an additional ground to sustain the special referee's order. The court of appeals reversed the special referee's equitable mortgage finding, but did not address Walker's specific performance argument. *Walker v. Brooks*, 403 S.C. 212, 742 S.E.2d 869 (2013). This Court granted certiorari to review the opinion of the court of appeals.

ISSUE PRESENTED

Did the court of appeals err in reversing the special referee's finding that an equitable mortgage existed?

STANDARD OF REVIEW

On appeal from an action in equity, this Court may find facts in accordance with its view of the preponderance of the evidence. *Townes Assoc., Ltd. v. City of Greeneville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, we need not disregard the findings of the special referee, who was in a better position to weigh the credibility of witnesses. *Tiger, Inc. v. Fisher Argo, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989).

LAW/ANALYSIS

Walker argues the court of appeals erred in reversing the special referee's finding that an equitable mortgage existed. We disagree.

"[A]n equitable mortgage is a transaction that has the intent but not the form of a mortgage which a court will enforce in equity to the same extent as a mortgage." 59 C.J.S. *Mortgages* § 36. Stated simply, where one party conveys a deed to another, but the evidence surrounding the transaction indicates the land transfer was intended only to secure a debt, a court may refuse to treat the conveyance as a sale and instead equitably impose on the parties the mortgage they intended to create. *Id.*

"The essential feature or essence of an equitable mortgage is the intent of the parties." *Id.* The intent of the parties is to be evaluated at the time of conveyance. 59 C.J.S *Mortgages* § 71. As explained in § 71:

> The character of the transaction is fixed at its inception, and as a general rule, the only facts and circumstances that may be considered in determining whether a mortgage was intended are those which

> existed at the time the instrument was executed. Subsequent developments may throw a light on the original meaning of the parties, however.

Id.; *see Gregorie*, 273 S.C. at 417, 257 S.E.2d at 701 ("[A court] must search for the intention of the parties at the time of the transaction and not as any of them may interpret their intentions at this time."); *see also Williams v. Griffith*, 35 N.E.2d 95, 97 (Ill. App. Ct. 1941) ("The conveyance, in such instance, takes effect when delivered, and its character is fixed at that time, and the intention of the parties at that time is controlling."). The existence of an equitable mortgage must be shown by clear and convincing evidence. *Gregorie*, 273 S.C. at 434, 257 S.E.2d at 709 (Ness, J., dissenting).

This Court recognized the existence of an equitable mortgage in *Gregorie*, a case relied on heavily by the special referee. There, the Gregorie family owned a 600-acre piece of property in Mount Pleasant called "Oakland Plantation." *Id.* at 415, 257 S.E.2d at 700. The family also owned an oil distributorship, known as F. Gregorie & Son, which was experiencing financial difficulty. *Id.* Osgood F. Hamlin, neighbor and friend to the Gregorie family, had loaned money to the business in the past. *Id.* Facing heavy debt and possible foreclosure of its business from major creditors, F. Gregorie & Son entered into a transaction which had the effect of borrowing $35,000 from Hamlin. *Id.* at 416–17, 257 S.E.2d at 701. The Gregorie family in turn deeded to Hamlin its 600-acre tract in Mount Pleasant. *Id.* Contemporaneously with this loan, the parties entered into an agreement which provided "the aforesaid tract of land would simultaneously be conveyed by Ferdinand Gregorie to O.D. Hamlin as security for his additional financial assistance," and provided the Gregorie family could repurchase the property from Hamlin for $79,000. *Id.* at 418, 421, 257 S.E.2d at 702–03.

Analyzing the transaction to determine whether the conveyance to Hamlin was an outright sale or an equitable mortgage, the court found it important that prior to the conveyance, there was an existing debt between F. Gregorie & Son and Hamlin. *Id.* at 419, 257 S.E.2d at 702. The Court also noted that because the parties entered into the separate agreement contemporaneously with the conveyance, it evidenced the parties' intentions for the property to act as security. *Id.* at 422, 257 S.E.2d at 703. Additionally, the Court considered that the discussions and dealings between the parties prior to the conveyance never indicated that an outright sale was contemplated. *Id.* at 423, 257 S.E.2d at 704. Finally, the Court found it crucial that although the debt between the parties was

only $35,000, the property was valued at approximately $600,000. Such a great disparity, according to the Court, indicated the conveyance of the property to Hamlin was intended only as security, and not a sale. *Id.* at 424–25, 257 S.E.2d at 705.

We find the facts of the instant case inapposite to the facts of *Gregorie*. Walker offers no evidence—apart from his own self-serving testimony and the fact Brooks did not exercise control over the property—that the parties intended to establish an equitable mortgage *at the time* the property was conveyed to Brooks. While Walker's argument seemingly depends on the efficacy of the handwritten note and ledger, his own testimony indicates these were conceived and completed at a later time:

> Q: Tell us what your understanding of [the ledger] was, or your knowledge of it.
>
> A: How this got started is shortly after 2002, when the last deeds were done . . . my dad wanted to -- when he gave her money, he wanted to -- he wanted a ledger to show the balance of what he owed her.
>
> Q: Okay.
>
> A: He asked her what he owed her. He told her to write down a figure. Whatever he owed her, he wanted to pay her. So she picked up a pad and wrote down $60,000 is where daddy had to start from paying her back the loan in order to get his land back.

While the ledger and handwritten note may be an indication the parties entered into a subsequent contract that required Brooks to reconvey the property to Decedent for the sum of $60,000, of which Decedent paid $32,600 before his death, these are facts which are more relevant to Walker's specific performance claim than to his attempt to establish an equitable mortgage.

Further, many of the characteristics of the relationship the Court found were indicative of a debtor-creditor relationship in *Gregorie* are not present here. Most importantly, there is no contemporaneous writing indicating the property was to serve as security for any debt Decedent owed to Brooks. Additionally, while the Court in *Gregorie* found it significant that discussions between the parties prior to the conveyance never indicated that an outright sale was contemplated, this was so

because the parties were involved in business together and Hamlin had loaned money to F. Gregorie & Son before. Here, the same consideration is less significant where the parties had a close familial relationship. Moreover, the Court found that where Oakland Plantation was valued at nearly twenty times more than the purported consideration, it tended to establish the Gregorie family could not have intended to sell the land for that amount. Here, the deeds conveyed to Brooks recited the collective consideration of $13,255 and the special referee found the property was valued at approximately $120,000 at the time of conveyance. Not only is this disparity much less than in *Gregorie*, but the close familial relationship between Decedent and Brooks also ameliorates its possible significance because it is more likely a family member would sell property at a grave discount to another family member than would a business partner or past creditor.

It is well-settled that an equitable mortgage must be established by clear and convincing evidence. Based on our review of the record, we find no such evidence that an equitable mortgage was formed between Decedent and Brooks. Accordingly, we affirm the court of appeals on this issue.[4]

CONCLUSION

For the reasons stated above, we affirm the court of appeals' opinion finding no equitable mortgage exists. Because the special referee did not reach the issue of specific performance, we remand for a determination on that claim.

TOAL, C.J., PLEICONES and BEATTY, JJ., concur. KITTREDGE, J., dissenting in a separate opinion.

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[4] Contrary to the dissent's assertion, we clarify that we have established no "categorical rule" that only evidence created contemporaneous with the conveyance can be considered in support of an equitable mortgage. We recognize that subsequent events and writings may assist a factfinder in determining the intent of the parties *at the time* of the conveyance. 59 C.J.S *Mortgages* § 71. Here, the lack of a contemporaneous writing for reconveyance tends to show the parties did not intend a mortgage; however, it is but one important consideration in the fact-intensive inquiry this Court must—and has—engaged in. To the extent the dissent believes application of this analysis results in an opposite conclusion, we respectfully disagree.

JUSTICE KITTREDGE: Because I believe the court of appeals erred in reversing the special referee's finding of an equitable mortgage, I dissent. I would reinstate the trial court judgment.

I take no issue with the majority's statement of the facts. I further agree with the proposition that evidence supporting an equitable mortgage generally occurs contemporaneously with the conveyance. My concern is that the Court today has transformed this general rule into a categorical rule. These are equitable, fact intensive inquiries designed to discern the intent of the parties. Application of the majority's categorical rule may in some instances lead to a result contrary to the parties' true intentions; I believe that is precisely what today's result achieves.

I further note that the black letter law cited by the Court rejects the majority's adoption of a categorical rule, for the law speaks to the "general rule" and recognizes that "[s]ubsequent developments may throw a light on the original meaning of the parties, however." 59 C.J.S. *Mortgages* § 71; *see F. Gregorie & Son v. Hamlin*, 273 S.C. 412, 421–22, 257 S.E.2d 699, 703 (1979) (rejecting the notion that "the mere fact that a contract to reconvey was executed simultaneously with the deed creates in legal effect a mortgage" and instead finding such a fact is rather a "strong circumstance to be considered in the determination between a deed absolute and an equitable mortgage").

It is the absence of evidence contemporaneous with the conveyance that disposes of the equitable mortgage claim for the Court: "Most importantly, there is no contemporaneous writing indicating the property was to serve as security for any debt Decedent owed to Brooks." I do not view the absence of a contemporaneous writing as controlling. I concur with the special referee that notwithstanding the absence of a contemporaneous writing, the evidence overwhelmingly supports the imposition of an equitable mortgage. Following the transfer, Kenneth Walker continued to act in every respect as the owner of the property. Similarly, before Walker died, Catherine Brooks never claimed ownership or took *any* action consistent with ownership. The acknowledgement written and signed by Brooks, albeit not contemporaneously with the conveyance, leaves no doubt that the parties intended a debtor-creditor relationship, with Brooks to convey the property back to Walker once the debt was paid in full. I would find the totality of the circumstances supports by clear and convincing evidence a finding of an equitable mortgage.

Because Walker established an equitable mortgage, I would not reach Walker's alternative sustaining ground. Yet given the majority's rejection of an equitable

mortgage, the remand to consider Walker's specific performance argument is proper.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Roger Wendell Walker, as the Personal Representative of the Estate of Kenneth Ray Walker and individually as a surviving child and Devisee of the Decedent, Kenneth Ray Walker (d/o/d 09/20/2008), Jimmy Ray Walker, and Wilson Whitney Walker as surviving children and Devisees of the Decedent, Kenneth Ray Walker, who died testate on 09/20/2008, Respondents,

v.

Catherine W. Brooks, Appellant.

Appellate Case No. 2011-199991

Appeal From Colleton County
R. Thayer Rivers, Jr., Special Referee

Opinion No. 5112
Heard January 15, 2013 – Filed April 10, 2013

REVERSED

Everett H. Garner and Benjamin A. Dunn, II, both of Holler, Garner, Corbett, Ormond, Plante & Dunn, of Columbia, for Appellant.

Gregory S. Forman, of Charleston, and Everett W. Bennett, Jr., of Walterboro, for Respondents.

LOCKEMY, J.: Catherine W. Brooks appeals the Special Referee's (Referee) ruling that she held only an equitable mortgage on the subject property. We reverse.

FACTS

This case revolves around the characterization of two deeds given to Brooks by her brother, Kenneth Ray Walker (Decedent), which purportedly conveyed properties on Cooks Hill Road in Colleton County (Cooks Hill properties). Decedent owned and lived on two hundred acres of his family's farm in Colleton County, including the Cooks Hill properties. In the years prior to Decedent deeding the Cooks Hill properties to Brooks, Decedent's other sister, Jane Ballagh, helped him financially. At one point, Ballagh mortgaged some of Decedent's property in an effort to save his homestead.. The mortgage was eventually placed in her name[1] and was satisfied at a later point by Brooks, on behalf of Decedent.

Brooks financially supported Decedent during the 1990s and into the beginning of the early 2000s. Her financial support included but was not limited to providing Decedent with a telephone line, paying his power and cable bill, buying him groceries, and giving him cash on at least a weekly basis. Brooks claimed she spent "everything in this world" on Decedent. During this time, she also helped him receive Social Security Disability (SSD) benefits and was made his trustee by the federal government for purposes of those SSD benefits. All parties testified she had a close familial relationship with Decedent.

In 1996, Decedent executed the first deed of the Cooks Hill properties to Brooks for $13,250.00. The property was assessed in the amount of $36,000.00. Brooks testified Decedent conveyed the land to her because she did more for him than anybody in his life, and he told her not to allow anyone to "fool her out of it" after he passed away. She stated Decedent requested only $13,250.00 for the property because she had already spent so much of her money supporting him; however, she admitted never writing him a check or giving a lump sum to him in consideration to Decedent for the deed. She then explained the sum was placed on the deed simply because the attorney required it. Decedent made a second conveyance of the Cooks Hill properties, approximately fifteen acres, to Brooks in 2003 for a nominal sum. That property was assessed at $85,000.00.

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[1] The mortgage was originally recorded in Patsy Walker's name, but was then assigned to Ballagh.

After the execution of each deed, Decedent continued negotiating leases with businesses operating on the Cooks Hill properties, collecting rent from those businesses for his own personal use, and maintaining the Cooks Hill properties. Roger Wendell Walker, one of Decedent's sons, would often pick up rent checks and cash them for his father. At times, Decedent would direct Roger to cash the check and deposit a certain amount into Brooks's bank account. Two witnesses working for companies leasing land within the Cooks Hill properties testified to the direct involvement they had with Roger and Decedent, even after the deeds were executed. Brooks admitted she never exercised any dominion or control over the Cooks Hill properties.

Several writings presented were alleged to be related to the execution of the two deeds. First, on July 16, 2004, Brooks handwrote an agreement on behalf of Decedent that provided Decedent

> would like for all the money from Larry Herndon [with Lowcountry Sand and Gravel (Lowcountry)] to be paid to Catherine W. Brooks until she is paid sixty thousand dollars at that time she is to release to Kenneth Walker all the property off Cooks Hill Road . . . Any money Kenneth pays Catherine W. Brooks will be toward the sixty thousand dollars.

(Repurchase Memorandum).

Roger explained he leased his own property, which was separate from the Cooks Hill properties, to Lowcountry for sand dredging and received all monies from that lease. There was a second lease between Lowcountry and Brooks, because the water runoff from the sand dredging ran across the Cooks Hill properties. Brooks stated Decedent had proposed sand dredging from a pond on the Cooks Hill property, which they would offer to Herndon for purchase, and the profits from that potential venture are what are referenced in the Repurchase Memorandum. She stated the venture never came to fruition. However, Brooks further conceded the Repurchase Memorandum stated she would release the land to Decedent after ***any*** payment of $60,000.00 from Decedent, even if it did not come from Lowcountry's sand dredging.

A second document consisting of Brooks's and Decedent's handwriting reflected Decedent's starting balance owed to Brooks in the amount of $60,000.00 (Ledger). Roger testified the Ledger was to account for the balance Decedent owed Brooks. After the initial $60,000.00 figure, the Ledger detailed numerous payments, of which many were initialed by Brooks to show her receipt of those payments.[2] The Repurchase Memorandum established that any monies paid to Brooks from the sand dredging were to be subtracted from the balance in the Ledger in exchange for the return of the Cooks Hill properties. Roger claimed that once the balance in the Ledger was paid, it was understood the Cooks Hill properties would be re-conveyed to Decedent. Roy Walker, Decedent's brother, confirmed that Brooks agreed to sign the property back to Decedent. Brooks asserted Decedent's payments in her ledger appearing to pay down the $60,000.00 consisted of rent that was ultimately hers, because the Cooks Hill properties were in her name. Thus, she essentially "was being paid with her own money." Brooks conceded that had Decedent paid her the $60,000.00 from profit off of Lowcountry's sand dredging business, she would have deeded the Cooks Hill properties back to Decedent.

A third document in Brooks's handwriting contained a list of costs, including but not limited to Brooks's payments to satisfy Ballagh's previous mortgage on Decedent's property, the costs of preparing the deeds for the Cooks Hill properties, a motor transmission, and light bills (Cost List). At the top of the Cost List, the document has a header stating "Money For Dredge." Roger asserted the Cost List showed how Brooks totaled the $60,000.00 debt shown on the Ledger. Brooks testified it was simply a coincidence that the figures on the Cost List with interest totaled close to $60,000.00. She claimed the $60,000.00 balance on the Ledger originated when Decedent told her Lowcountry's sand dredging was going to begin, and the profit from the sand dredging would be split between her and Decedent. She testified Decedent randomly chose a sum of $60,000.00 to pay Brooks from his profit from the sand dredging.

After Decedent's death, Brooks claimed the deeds were intended to place title of the Cooks Hill properties in her name and were absolute on their face; thus, she was the rightful owner of the properties. Brooks testified she did not have anything to leave her children without the Cooks Hill properties because she had given all her money to Decedent, and her children wanted an inheritance. She admitted attempts were made prior to and after Decedent's death to pay off the

[2] She indicated she documented some of the payments because Decedent asked her to do so, and she did anything he asked because of his intimidating nature.

balance shown on the Ledger in return for the Cooks Hill property, but she refused them. She stated because she had held the property for quite a while, its value had increased, and she would not sell it for less than it was worth.

Decedent's sons and heirs, Roger, Jimmy Ray Walker, and Wilson Whitney Walker (collectively referred to as Respondents) brought this action claiming they were the rightful owners of the Cooks Hill properties, as heirs of Decedent, and Brooks's deeds were intended to create an equitable mortgage in the properties in return for the financial assistance Brooks provided to Decedent during his lifetime.

The Referee found a longstanding fiduciary relationship existed between Brooks and Decedent, and Brooks helped to financially support Decedent several times. Further, he found Decedent deeded properties to Brooks that were valued at much greater amounts than any debt Decedent ever owed her. He also found Brooks knowingly allowed Decedent and one of his sons to totally control the premises during the time the properties were in her name, and the tenants of the properties for the most part dealt exclusively with Decedent or one of his sons. Finally, he noted Brooks admitted she wrote the note that stated Decedent owed her $60,000.00, and upon payment of that debt, she would deed the properties back to him.

The Referee stated these facts were controlled by *Gregorie & Son v. Hamlin*, 273 S.C 412, 257 S.E.2d 699 (1979), and the evidence supported a finding of an equitable mortgage. Thus, the Referee determined that upon payment of the debt found to be owed by Respondents to Brooks, Respondents were entitled to a deed conveying the properties to them. This appeal followed.

STANDARD OF REVIEW

On appeal from an action sounding in equity, "this court may view the facts in accordance with our preponderance of the evidence." *Anderson v. Buonforte*, 365 S.C. 482, 488, 617 S.E.2d 750, 753 (Ct. App. 2005). "However, we should not disregard the findings of the special referee, who was in a better position to weigh the credibility of witnesses." *Id.* (citing *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989)).

LAW/ANALYSIS

Equitable Mortgage

Brooks argues the Referee erred in determining the deeds conveying the Cooks Hill properties did not pass fee title, but rather constituted an equitable mortgage against the land. Specifically, she contends the present facts are distinguishable from *Gregorie*, and thus, the Referee erred in his application of that case. We agree.

In *Gregorie*, the subject property (Oakland Plantation) was owned by an oil distributorship, Gregorie & Son, that was experiencing financial difficulty. 273 S.C at 415, 257 S.E.2d at 700. Gregorie & Son was having particular difficulty with two of its suppliers, Arkansas Fuel Oil Corporation (Arkansas Fuel) and Carolina Fleets, Inc. (Carolina Fleets). *Id.* Hamlin was a neighbor and longtime friend of the family that owned Gregorie & Son, and he began loaning money to the business in the 1950s at the request of one of the Gregories. *Id.* Additionally, Hamlin co-signed a promissory note held by Arkansas Fuel in the principal amount of $30,000.00 and was the one financially responsible promisor. *Id.*

During that time, Gregorie & Son's operation was turned over from father, Gregorie, Sr., to son, Gregorie, Jr. *Id.* In 1960, Arkansas Fuel and Carolina Fleets began pressing for collections upon their respective debts. *Id.* The amount of money needed to pay the debts to both Arkansas Fuel and Carolina Fleet was $39,791.68. *Id.* at 416, 257 S.E.2d at 701. Attempts to sell Gregorie & Son in 1961 because of its continuing debt were unsuccessful, and Hamlin and Gregorie, Jr., approached First National Bank of South Carolina (First National) about the possibility of a loan to pay off Gregorie & Son's debts. *Id.* The loan was secured by Oakland Plantation. *Id.* As a result of discussions, First National and Gregorie, Sr. executed a note and mortgage on January 26, 1961, in the amount of $35,000.00. *Id.* The note, but not the mortgage, was guaranteed by Hamlin. *Id.* On the same date, Gregorie, Sr., executed a deed purporting to convey Oakland Plantation to Hamlin, the consideration being the assumption of the balance due on the note to First National and five dollars. *Id.* In addition to the deed, Gregorie, Jr., on behalf of Gregorie, Sr., and Hamlin executed a repurchase agreement on January 31, 1961. *Id.*

A second mortgage was executed on behalf of Gregorie & Son, Gregorie, Sr., and Gregorie, Jr., in favor of Hamlin in the amount of $35,000.00. *Id.* at 417, 257

S.E.2d at 701. Security for this mortgage was real estate and rolling stock of Gregorie & Son. *Id.* The question before the court was whether the deed conveying Oakland Plantation and the accompanying agreement was intended as a deed absolute or as security for a debt and hence a mortgage. *Id.* at 414, 257 S.E.2d at 700.

The court found an equitable mortgage did exist, and outlined eight factors it considered in its determination: (1) the existence and survival of a debt; (2) a deed plus a separate agreement; (3) previous negotiations of parties; (4) inadequacy of consideration/price; (5) dealings between parties; (6) terms of the contract for conveyance; (7) burden of proof; and (8) defenses.[3] *Id.* at 419, 257 S.E.2d at 702.

We will now examine the relevant *Gregorie* factors in the context of the present facts.

Outstanding Debt

Brooks contends the Respondents presented no evidence of an outstanding debt between her and Decedent to indicate the deeds to the Cooks Hill properties were absolute in nature. We disagree.

> A strong indicia of whether the purported conveyance was intended as security for a debt or was a sale or deed is reflected by the existence or lack thereof of a debt or liability between the parties either existing prior to the contract or rising from a loan made at the time of the contract whereby the debt is still left subsisting after the transaction in question.

Id. (citing *Hamilton v. Hamer*, 99 S.C. 31, 57-58, 82 S.E. 997, 1004 (1914)).

> The effect of [the] existing debt usually turns out to be "that the payment[] stipulated for [in] the agreement to reconvey is in reality the payment of this existing debt, [then] the whole transaction amounts to a mortgage, whatever language the parties may have used, and

[3] All parties admit the eighth factor of defenses is irrelevant under the present facts.

> whatever stipulations they may have inserted in the instrument[. . .]."

Id. at 420, 257 S.E.2d at 702 (quoting *Hamilton*, 99 S.C. at 35, 82 S.E. at 999). The *Gregorie* court noted an uncontested memorandum of agreement accurately outlined the history of the relationship between Gregorie, the debtor, and Hamlin, the creditor, and the existence of a debt between them. *Id.* at 420, 257 S.E.2d at 702-03. The court also found it compelling that the payment stipulated in the agreement to re-convey was approximately the same amount as the amount of the existing debt. *Id.* at 421, 257 S.E.2d at 703.

Here, the evidence established an existing debt between Decedent and Brooks. Brooks testified she spent all her personal money helping Decedent. She purchased groceries, gave him cash, and helped with utilities. The Cost List enumerated debts accrued from 2003 until 2008, providing an even clearer example of the amount Decedent owed Brooks. The debt was close to $60,000.00 with interest included, which was the amount enumerated in the Repurchase Memorandum for re-purchase of the Cooks Hill properties. Accordingly, Brooks presented evidence of an existing and surviving debt between the two parties.

Deed In Addition to a Separate Agreement

Brooks claims the Repurchase Memorandum was not contemporaneous with the deeds, which she argues was necessary to find an equitable mortgage. Under these facts, we agree the documents were not executed within a reasonable time frame to be construed together, but we decline to adopt the proposition that the documents must be executed contemporaneously to find an equitable mortgage.

"Where a separate instrument is executed as a part of the same transaction as the conveyance, the two instruments are construed together if the writing is in the nature of a conditional sale or a re-purchase agreement." *Id.* (citing 54a Am. Jur. 2d *Mortgages* § 86 (2009)). The *Gregorie* court found "a conveyance accompanied by a re-purchase agreement is a strong circumstance to be considered in the determination between a deed absolute and equitable mortgage." *Id.* at 422, 257 S.E.2d 703.

Here, the first deed was executed on March 19, 1996. The second deed was executed on February 5, 2002. The Repurchase Memorandum was executed on July 16, 2004. Unlike the repurchase agreement in *Gregorie*, the Repurchase

Memorandum here did not accompany the deeds because it was written more than a year after the execution of the second conveyance. *See* 59 C.J.S. *Mortgages* § 71 (2009) (stating "the character of the transaction is fixed at its inception, and as a general rule, the only facts and circumstances that may be considered in determining whether a mortgage was intended are those which existed at the time the instrument was executed"). The Ledger has costs beginning in 2003, but the actual origin date of the Ledger is unknown. These documents are insufficient to support a finding of an equitable mortgage. We believe it would undermine public policy to allow such vague documentation to support a change in the nature of a document, which on its face is an absolute deed, to an equitable mortgage, particularly in this instance, in which the Repurchase Memorandum was written nearly a year after the execution of the final deed. This factor is a strong indicator the conveyances were not intended to be an equitable mortgage.

Previous Negotiations of Parties

Brooks argues Respondents presented no evidence of prior negotiations between the parties because their interactions were the result of being siblings and were not business related. Thus, no hallmarks of a lender and borrower relationship existed as they did in *Gregorie*. We agree.

Addressing this factor, the *Gregorie* court stated "'[o]n the question whether a deed absolute in form was intended as a mortgage, it is proper to consider the previous negotiations of the parties, their agreements and conversations[, conduct,] and the course of dealings between them prior to and leading up to the deed in question.'" *Id.* (quoting 59 C.J.S. *Mortgages* § 76 (2009)). The *Gregorie* court listed five indicators used to determine whether or not a sale was in fact intended:

> 1. That there was no evidence that the owner desired to sell or that the lender desired to purchase.
> 2. That during the negotiations nothing was said about a sale of that property.
> 3. That no price was fixed as a selling value of the property and no discussion along that line was had.
> 4. That no attempt was made to ascertain the real value of the property upon which a sale would reasonably be based, greater liberality being exercised when a loan was intended.

> 5. That the grantees made no inquiry as to the value of the land.

Id. at 422, 257 S.E.2d at 703-04.

In *Gregorie*, the "circumstances . . . indicate[d] overwhelmingly that no outright sale was ever contemplated by either party." *Id.* at 422, 257 S.E.2d at 704. The court found there was neither an agreement to sell nor a contract of sale. *Id.* at 423, 257 S.E.2d at 704. Further, it found significant the party claiming title established absolutely no evidence he took any of the normal and customary steps that would indicate he was buying the property. *Id.*

The circumstances in *Gregorie* that overwhelmingly established a sale was not contemplated by either party are not present here. The Repurchase Memorandum was written nearly a year after the final conveyance, and thus, it was not evidence of any prior negotiations between the parties. The close relationships and familial transactions resulted in informal and inadequately documented transactions, unlike in *Gregorie*, in which a business entity was involved. The price of Decedent's first conveyance was discussed, and Decedent indicated he was selling the land at a lower price due to the financial support Brooks had given him. The second conveyance was for a nominal amount of money, but it was conveyed approximately eight years later, and during that time, Brooks had continued to help Decedent financially. We note Decedent was familiar with the process of mortgaging his property, because he previously mortgaged his property to Ballagh, yet he chose to deed the land in question to Brooks. Accordingly, we do not find the previous negotiations of the party support the argument that a mortgage was intended instead of the absolute deed that was executed.

Inadequacy of Consideration/Price

Brooks maintains the vastly different relationship of the parties in this case negates this factor of any real probative value. We agree.

> "[I]f the consideration passing between the parties, or the amount to be paid by the grantor on exercising his right to repurchase, would be fairly proportioned to the value of the property, if considered as a debt or loan secured by a mortgage thereon, but grossly inadequate if regarded as the price of the land on an absolute sale, this will tend

> strongly to show that a sale could not have been intended, but that the transaction should rather be treated as a mortgage."

Id. at 424-25, 257 S.E.2d at 705 (quoting 59 C.J.S. *Mortgages* § 77 (2009)).

This factor weighs in favor of Decedent. A review of the record establishes the deeds reflect a lower price than the assessed value of the land. The first conveyance was given for a relatively more reasonable price than the second, which was simply a nominal value. However, Brooks admitted never paying a lump sum amount for consideration of the first conveyance.

Dealings Between the Parties

Brooks argues that as with prior negotiations between her and Decedent, her dealings with Decedent were not business related, and as such, no evidence substantiated the existence of an equitable mortgage. We agree.

The *Gregorie* court noted that "another indicia of customary and normal course of dealings which gives aid in determining the intention of the parties is how the contact between the parties to the transaction originated, and if the grantor attempted to borrow money at the inception of the transaction." *Id.* at 426, 257 S.E.2d at 706.

Here, Brooks helped Decedent financially throughout the last years of his life. The record does not contain evidence the conveyances arose out of Decedent's specific need for any further money, other than his continuing and ongoing need for financial help to live. In *Gregorie*, the transaction in question "was a direct result of Gregorie[, Sr.,] making application for a loan to both First National Bank and to Hamlin," whereas here, no specific transaction occurred for which Decedent would intend to mortgage the property. Again, Decedent and Brooks had an ongoing relationship in which she provided financial aid to him, and it appears Decedent deeded these properties on his own accord. This factor weighs in favor of Brooks.

Terms of Contract for Conveyance

Brooks contends neither the terms of the deeds nor the Repurchase Memorandum contained any evidence to show Decedent retained an interest in the property. We agree.

The terms of the contract must be examined, and significantly, the court must find whether the repurchase agreement sets a deadline whereby if the money owed is not paid by that time, then the creditor claims to have an absolute fee simple title. *Id.* at 428-29, 257 S.E.2d at 706-07. In *Gregorie*, the court noted two cases where the repurchase agreements set a deadline whereby if the money owed was not paid by that time, the creditor claimed to have an absolute fee-simple title. *Id.* at 429, 257 S.E.2d at 707. The court found no reason for such a stipulation if one already had title under the absolute deed received from the grantee. *Id.* We also find noteworthy the *Gregorie* court found Hamlin's own testimony, the party attempting to establish an absolute deed, convincingly showed a sale was not contemplated. *Id.* at 429-30, 257 S.E.2d at 707.

In the present case, Brooks's testimony did not produce such convincing evidence in favor of an equitable mortgage. Further, the Repurchase Memorandum did not have a stipulation granting Brooks a fee absolute should Decedent fail to meet a deadline for payment of $60,000.00. The Repurchase Memorandum simply stated that after Decedent paid $60,000.00 to Brooks, she would deed the Cooks Hill property back to him. Brooks was adamant the property was sold or given to her in fee absolute because of her financial support to Decedent. The record contains no evidence of any language in the Repurchase Memorandum that would give rise to an inference of a mortgage. Accordingly, we find this factor weighs in favor of Brooks.

Burden of Proof

Finally, an allegation that a deed, absolute on its face, is in fact a mortgage "must be sustained by testimony prima facie showing that [the allegation] is true." *Id.* at 431, 257 S.E.2d at 707. "When this is done, it removes the presumption arising from the fact that a paper is presumed to be what its face imports." *Id.* at 431, 257 S.E.2d at 707-08. "When this is done, it is incumbent on the mortgagee to remove the inferences that may be drawn from such prima facie showing. This is sometimes spoken of as the burden of proof, but it is simply making it incumbent on the mortgagee to disprove the case as then made." *Id.* at 431, 257 S.E.2d at 708.

While the Repurchase Memorandum and Decedent's Cost List may have created a prima facie showing the deeds created equitable mortgage, we find Brooks has disproved that showing. *See* 54a Am. Jur. 2d *Mortgages* § 93 (stating for a court to find an instrument absolute on its face was intended by the parties as a mortgage,

"[t]he evidence must be, according to various statements, clear and convincing, plain, credible, satisfactory, unequivocal, unambiguous, and conclusive and [i]t will not suffice if composed of loose and random statements, or facts and circumstances of doubtful import"). As we stated above, many of the factors that must be shown to establish an equitable mortgage did not fall in Respondents' favor.

CONCLUSION

The writings and testimony presented in this case were vague and inadequate and simply did not come close to the amount of evidence put forth in *Gregorie* to establish an equitable mortgage. Moreover, the Repurchase Memorandum in the present case was written long after the second conveyance, which we find is a strong indicator that at the time of execution, the conveyances were not intended to be an equitable mortgage. Brooks successfully disproved Respondents' prima facie showing. Accordingly, the Referee's order is

REVERSED.

SHORT and KONDUROS, JJ., concur.