

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM COLLETON COUNTY
COURT OF COMMON PLEAS

R. Thayer Rivers, Jr., Special Referee

Case No. 2009-CP-15-1148

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 9/20/2008), Jimmy Ray Walker, and Wilson Whitney Walker as surviving children and Devisees of the Decedent, Kenneth Ray Walker, who died testate on 9/20/2008, Respondents,

v.

Catherine W. Brooks, Appellant.

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities.....	iii
Statement of Issues on Appeal.....	1
Statement of the Case.....	2
Facts.....	4
 Arguments	
I. THE SPECIAL REFEREE ERRED IN DETERMINING THAT THE DEEDS CONVEYING THE SUBJECT PROPERTY TO THE APPELLANT DID NOT PASS FEE TITLE, BUT RATHER CONSTITUTED AN EQUITABLE MORTGAGE AGAINST THE LAND.....	5
II. THE SPECIAL REFEREE ERRED IN DETERMINING THAT THE RESPONDENTS WOULD BE ENTITLED TO A DECLARATION THAT THE DEEDS CONVEYING THE SUBJECT PROPERTY TO THE APPELLANT DID NOT PASS FEE TITLE, BUT RATHER CREATED A RESULTING TRUST SUCH THAT APPELLANT HOLDS LEGAL TITLE TO THE LAND FOR THEIR BENEFIT.....	16
Conclusion.....	17

TABLE OF AUTHORITIES

Cases

<u>Bowen v. Bowen</u> , 352 S.C. 494, 575 S.E.2d 553 (2003).....	16
<u>Fibkins v. Fibkins</u> , 303 S.C. 112, 399 S.E.2d 158 (Ct. App. 1990).....	5
<u>Gregorie & Son v. Hamlin</u> , 273 S.C. 412, 257 S.E.2d 699 (1979).....	5-10, 12-15
<u>Hayne Fed. Credit Union v. Bailey</u> , 327 S.C. 242, 489 S.E.2d 472 (1997).....	16
<u>Horry County v. Ray</u> , 382 S.C. 76, 674 S.E.2d 519 (Ct. App. 2009).....	5
<u>McDowell v. South Carolina Dep't of Social Servs.</u> , 296 S.C. 89, 370 S.E.2d 878 (Ct.App.1987).....	16
<u>Settlemeier v. McCluney</u> , 359 S.C. 317, 596 S.E.2d 514 (Ct. App. 2004).....	5
<u>Stackhouse v. Cook</u> , 271 S.C. 518, 248 S.E.2d 482 (1978).....	5
<u>Williams v. Wilson</u> , 349 S.C. 336, 563 S.E.2d 320 (2002).....	5

Treatises

55 Am.Jur.2d, Mortgages.....	8
------------------------------	---

STATEMENT OF ISSUES ON APPEAL

- I. THE SPECIAL REFEREE ERRED IN DETERMINING THAT THE DEEDS CONVEYING THE SUBJECT PROPERTY TO THE APPELLANT DID NOT PASS FEE TITLE, BUT RATHER CONSTITUTED AN EQUITABLE MORTGAGE AGAINST THE LAND.

- II. THE SPECIAL REFEREE ERRED IN DETERMINING THAT THE RESPONDENTS WOULD BE ENTITLED TO A DECLARATION THAT THE DEEDS CONVEYING THE SUBJECT PROPERTY TO THE APPELLANT DID NOT PASS FEE TITLE, BUT RATHER CREATED A RESULTING TRUST SUCH THAT APPELLANT HOLDS LEGAL TITLE TO THE LAND FOR THEIR BENEFIT.

STATEMENT OF THE CASE

This matter arises from two cases which were both filed in the Court of Common Pleas for Colleton County. The first case, filed on December 3, 2009 as Case No. 2009-CP-15-1068, was styled Catherine Brooks v. Roger Walker, Enterprise Bank of South Carolina and Bank of Walterboro. In this action, Catherine Brooks (hereinafter "Mrs. Brooks" or "Brooks") alleged that from 2004 until 2008, her nephew, Roger Walker, converted to his own use various payments she was owed as owner of several parcels of land in Colleton County; these being specifically lease payments, payments for the removal of sand and/or fill dirt, and proceeds from an insurance policy. (R. pp. 12-17) In addition, as most, or all, of these payments were processed through the Enterprise Bank of South Carolina or the Bank of Walterboro, Mrs. Brooks sued these institutions for negligence. In his Answer, Roger Walker moved to dismiss the Complaint for failure to properly state a claim of conversion, and further averred that the payments at issue were meant for the use and benefit of his father, Kenneth Ray Walker (hereinafter "Kenneth Walker" or "Kenneth"), that Mrs. Brooks held title to the land in question for the benefit of Kenneth Walker, and several additional defenses including statute of limitations, laches, ratification, estoppel, and waiver. (R. pp. 108-120) The Defendants Enterprise Bank of South Carolina and Bank of Walterboro answered with general denials, several affirmative and equitable defenses, and, in the case of the Bank of Walterboro, asserted several cross-claims against its fellow Defendants.

The second action, filed on December 31, 2009 as Case No. 2009-CP-15-1148, was styled 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 9/20/2008), Jimmy Ray Walker, and Wilson Whitney Walker as surviving children and Devisees of

the Decedent, Kenneth Ray Walker, who died testate on 9/20/2008 v. Catherine W. Brooks,. In this case, Roger Walker, Jimmy Ray Walker, and Wilson Whitney Walker (hereinafter the "Walkers") alleged that two deeds executed by their late father, Kenneth Walker, to his sister, and their aunt, Mrs. Brooks, were not meant to convey fee title to Mrs. Brooks, but were executed so that she might hold title for his benefit. (R. pp. 18-56) They further claimed that Kenneth Walker entered into an oral contract with Mrs. Brooks in March 1996, which was first modified in early 2003, and again by a written statement in July 2004, whereby she agreed to convey the property back to him upon the payment of \$60,000. They also claimed that a portion of this money had already been paid to Mrs. Brooks, and that they had offered to pay the outstanding balance, but Mrs. Brooks refused to convey the property back, thereby breaching her contract with the late Kenneth Walker or his devisees. In her Answer, Mrs. Brooks denied the Walkers contentions and plead several other defenses including duress, laches, unclean hands, the statute of frauds, and the applicable statute of limitations. (R. pp. 121-131)

By consent of the parties the cases were consolidated for mediation and trial. Mediation was conducted on February 4, 2011 and resulted in a settlement agreement between Mrs. Brooks and the Defendants Enterprise Bank of South Carolina and the Bank of Walterboro. Thereafter, by Order dated May 11, 2011, the consolidated cases were referred to the Honorable R. Thayer Rivers, Jr., as Special Referee, for trial without a jury. The trial was conducted in two separate, day-long hearings on May 26, 2011 and June 17, 2011. At the conclusion of the evidence, both the Appellant and Respondents agreed to reserve their rights as to all motions. The Special Referee issued his Order on August 26, 2011 which awarded title to the subject real property to

the Walkers upon payment of \$27,400 to Mrs. Brooks. (R. p. 10, para. 3) Appellant thereafter served her Notice of Appeal on September 22, 2011.

FACTS

At the heart of both the above cases is a dispute regarding the ownership of several parcels of real property in Colleton County. In two deeds, the first dated March 19, 1996, and recorded in Book 717 at Page 129 in the records of Colleton County, and the second dated February 5, 2003 and recorded in Book 1004 at Page 61 in said records, the late Kenneth Walker (d/o/d September 20, 2008) conveyed five tracts of land (hereinafter the "Property") to his sister, Catherine Brooks.¹ (R. pp. 671 & 675) Mrs. Brooks claims full ownership of these lands while Kenneth Walker's sons, (and Mrs. Brooks' nephews) Roger Walker, Jimmy Walker, and Wilson Walker (the "Walkers"), claim that when their father deeded these lands to Mrs. Brooks, he did so pursuant to an oral contract, first formed in 1996 and amended thereafter in 2003 and 2004, whereby Mrs. Brooks would convey the property back to her brother upon his payment of \$60,000. The Walkers further assert that part of this consideration (\$32,600) was paid during Kenneth Walker's lifetime and that they have offered to pay the remaining balance to Mrs. Brooks, but that she has refused to convey the property back to them. All issues in this matter arise from this dispute between Mrs. Brooks and the Walkers.

¹ In his deed from 2003, Kenneth Ray Walker also purported to convey a sixth tract of approximately 1.838 acres to Mrs. Brooks, but it appears that he had previously conveyed this parcel to his nephew, John R. Walker, in 1994.

ARGUMENTS

I. THE SPECIAL REFEREE ERRED IN DETERMINING THAT THE DEEDS CONVEYING THE SUBJECT PROPERTY TO THE APPELLANT DID NOT PASS FEE TITLE, BUT RATHER CONSTITUTED AN EQUITABLE MORTGAGE AGAINST THE LAND.

As the S.C. Court of Appeals recently stated in Horry County v. Ray, 382 S.C. 76; 674 S.E.2d 519, 522 (Ct. App. 2009):

The appellate court's standard of review in equitable matters is our own view of the preponderance of the evidence. Williams v. Wilson, 349 S.C. 336, 339-40, 563 S.E.2d 320, 322 (2002). "An action to establish an equitable lien and to establish lien priorities is an action in equity." Fibkins v. Fibkins, 303 S.C. 112, 115, 399 S.E.2d 158, 160 (Ct. App. 1990) (citations omitted).

Likewise, in Settlemeier v. McCluney, 359 S.C. 317, 596 S.E.2d 514, 516 (Ct. Ap. 2004):

In an action in equity, tried by the judge alone, ... this Court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence." Stackhouse v. Cook, 271 S.C. 518, 521, 248 S.E.2d 482, 484 (1978).

Thus, in reviewing the Order of the Special Referee, this Court has great latitude in determining the proper disposition of the issues on appeal.

In his Order, the Special Referee stated:

... I believe that the facts in this case are actually controlled by Gregorie & Son v. Hamlin, 273 S.C. 412, 257 S.E.2d 699 (S.C. 1979). In that case a deed which was regular on its face was given along with a right acknowledging a debt and an agreement to re-convey the premises upon a payment of a stated sum of money was held to be an equitable mortgage. (R. p. 9, para. 5)

In Hamlin, the court based its determination that a deed absolute from Gregorie to Hamlin should be viewed as an equitable mortgage on seven factors²:

- 1) That there was an existence of debt from Gregorie to Hamlin which debt survived the

² The Hamlin opinion also discusses an eighth factor, the defense of laches, which is not being addressed in this Brief.

January 31, 1961 conveyance;

- 2) There was a deed, plus a separate agreement, to re-convey the subject property;
- 3) There were previous negotiations of the parties which indicated that a) there was no discussion between the parties as to a sale; b) there was no discussion between the parties as to price or consideration; c) Hamlin claims to have purchased "OAKLAND" from a third party which never held legal title; d) Hamlin never attempted to have the property appraised prior to the sale; e) there was no contract of sale preceding the conveyance.
- 4) The consideration stated as a purchase price was grossly inadequate for the more than six hundred (600) acres of "OAKLAND" Plantation in 1961;
- 5) The dealings between the parties were as creditor and debtor;
- 6) The terms of the agreement for reconveyance quite clearly set out the intentions of the parties in 1961;
- 7) The burden of proof by the Plaintiff has been carried by clear, definite and convincing evidence;

Id. 257 S.E.2d at 702. The Special Referee committed error because the course and conduct of the relations between Mrs. Brooks and Kenneth Walker were radically different than those between Gregorie and Hamlin. Thus, when the Hamlin factors are applied to the case at bar, it is clear that the decision of the Special Referee must be reversed and Mrs. Brooks recognized as the fee simple owner of the Property.

a) **1st Hamlin Factor: Outstanding Debt**

First, there is no evidence of an outstanding debt between Mrs. Brooks and Kenneth Walker that would suggest that his deeding the property to her was intended as some form of security. Kenneth Walker conveyed land along Cooks Hill Road to Mrs. Brooks in a two deeds dated March 1996 and February 2003. (R. pp. 671 & 675) While there is ample evidence in the record that Mrs. Brooks provided much needed support to Kenneth, there is no evidence that there was a outstanding debt to support his conveying his land to her as security pending repayment, much less a series of debts which would support the argument that he made such security pledges in 1996 and again in 2003. This is very different from the situation in Hamlin, where the evidence indicated that:

Beginning approximately in the mid-1950's, Hamlin had loaned money to that business at the request of Ferd Gregorie, Sr. In addition, Hamlin co-signed a promissory note held by Arkansas Fuel Oil Corporation in the principal amount of Thirty Thousand (\$30,000.00) Dollars, he being the one promisor thereon at that point financially responsible.

Id. 257 S.E.2d at 700; and,

Both Hamlin and Gregorie were involved in the discussions with the First National Bank relative to this loan. As a result of these discussions with the Bank, a note and mortgage were executed on January 26, 1961 by Ferdinand Gregorie, Sr., in favor of the First National Bank of South Carolina in the amount of Thirty-Five Thousand (\$35,000.00) Dollars. The note but not the mortgage was guaranteed by Hamlin.

Id. 257 S.E.2d at 701. In fact, the deed from Gregorie to Hamlin, as well as the repurchase agreement, was executed at the same time as the January 1961 mortgage to First National Bank.

Id.

The relationship between Gregorie and Hamlin stands in sharp contrast to that which existed between Mrs. Brooks and Kenneth Walker. Brooks and Walker were siblings, and her testimony makes it plain that their relationship during the period relevant to this case was, though punctuated by bitter, sometimes bordering on violent, disagreements, on the whole familial and affectionate.

Note also that the evidence indicates that when Kenneth Walker wished to enter into a debtor/creditor relationship with a family member he knew how to do so. In July 1991, Kenneth gave a mortgage, in the original principal amount of \$10,000, to Patsy Walker; his niece and Mrs. Brooks' daughter. This mortgage was recorded in the records of Colleton County in Book 458 at Page 277. In June of 1998, Patsy Walker assigned this mortgage to her aunt, and the sister of both Mrs. Brooks and Kenneth Walker, Jane W. Ballagh³ (hereinafter "Ballagh"). (R. p. 528) At the time of the assignment, Kenneth had paid very little against the principal of the mortgage,

³ In her testimony, Jane Ballagh stated that while the mortgage listed Patsy Walker as the

such that a payment ledger kept by Ballagh indicates that when Mrs. Brooks began making payments on Kenneth's behalf, there was still a balance of \$9,270.10 owed on the loan. (R. p. 525)

Beginning in July 2000, Mrs. Brooks began making payments on the loan and eventually paid it off in 2004. (R. p. 527) At that time, Ballagh executed a satisfaction of the mortgage. (R. p. 531) The value of this evidence is that it shows that Kenneth Walker could, and did, enter into a formal debtor/creditor relationship with members of his family. Had this been his intent at the time he deeded the Property to Mrs. Brooks in 1996 and 2003, then it is logical to infer that he would have structured those conveyances as mortgages, just as he did with Patsy Walker and Ballagh. But, rather than give a security interest to Mrs. Brooks, he conveyed outright title to her. If he had intended anything other than an absolute conveyance, then he would have executed a mortgage, not a deed.

b) 2nd & 6th Hamlin Factors: Reconveyance Agreement

The most striking difference between the facts of the case at bar and those in Hamlin is the total lack of any reconveyance agreement. This element also comprises the crux of the Special Referee's misapplication of settled law. In Hamlin, the court cited to American Jurisprudence, 2nd Edition for the proposition that:

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. 55 Am.Jur.2d, Mortgages.

The key to the S.C. Supreme Court's decision in Hamlin was its view that the documents executed on January 26, 1961, including a note and mortgage to First National Bank of South

mortgagee, she herself had made the loan to Kenneth Walker. (R. p. 151, ln. 5 – p. 152, ln. 2)

Carolina, a deed from Gregorie to Hamlin, and a repurchase agreement back to Gregorie, were to be read as a single transaction which rendered Hamlin's deed an equitable mortgage.

Between Mrs. Brooks and Kenneth Walker the facts are very different. There are two deeds, dated March 1996 and February 2003 respectively, which on their face convey fee simple title to Mrs. Brooks. There is no evidence of any agreement contemporaneous to either deed which indicates that Kenneth Walker retained any right to re-purchase the property. Instead, both the Walkers and the Special Referee, rely on two hand-written notes to provide the terms of the alleged agreement to convey the property back to Kenneth Walker. The first note, dated July 16, 2004, states:

... I, Kenneth Walker would like for all the money from Larry Herndon 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 at Walterboro, S.C. Any money Kenneth pays Catherine W. Brooks will be toward the sixty thousand dollars.

(R. p. 532) The second document, Plaintiff's Exhibit 15, is an undated document in the form of a rough ledger with a caption stating "Kenneth [s]tarting at \$60,000 – Kenneth gave me." (R. p. 524) The ledger lists dates starting with "2003" and ending "7-3-08", and amounts of money purportedly received by Mrs. Brooks. On the far right of the page, there is a descending balance down from \$60,000. The final amount listed is \$27,400. (R. p. 524) Based on the amounts listed on this exhibit, the Special Referee determined that the Walkers would be entitled to receive title to the Property in exchange for a payment of \$27,400 to Mrs. Brooks. (R. p. 9, para. 3)

The Special Referee erred in determining that these hand-written notes constituted a reconveyance agreement along the lines of that found in Hamlin. First, the documents presented as Plaintiff's Exhibits 15 and 18 were not drafted contemporaneously with either the March 1996 or February 2003 deeds. (R. pp. 524 & 532) The only evidence of the time at which these

documents were written is the date of July 16, 2004 stated in Plaintiff's Exhibit 18. (R. p. 532) As for Plaintiff's Exhibit 15, the monies listed for 2003 and 2004 are stated as annual totals while monthly payments begin to be listed with January 2005. (R. p. 524) The best inference that may be drawn, therefore, is that Plaintiff's Exhibit 15 was initially drafted sometime in early 2005, and certainly no earlier than the July 2004 date of Plaintiff's Exhibit 18. These dates are important because it is clear that Plaintiff's Exhibits 15 & 18 were drafted over eight years after the March 1996 deed from Kenneth to Mrs. Brooks and at least a year and a half after his February 2003 deed. Contrast this with the facts in Hamlin in which the deed from Gregorie to Hamlin, and the re-purchase agreement Hamlin signed in favor of Gregorie, were signed on the same day, along with the mortgage and note (which Hamlin signed as guarantor) from Gregorie to the First National Bank of South Carolina. Hamlin, 257 S.E.2d at 701.

Second, the Special Referee disregarded Mrs. Brooks' logical explanation of the meaning and circumstances of Plaintiff's Exhibits 15 & 18. It is uncontroverted by either side that the Property has generated income for many years in a couple of different ways. First, there is a building on the property that has been rented by a third party; for the period relevant to this case, by Eagle Disposal, and its successor in interest, American Bio-Mass, LLC. (R. p. 144, ln. 4 – p. 145, ln. 19) In addition, sand and fill dirt were sold from the property (R. p. 153, ln. 24 – p. 154, ln. 9) Mrs. Brooks made clear in her testimony that she was willing to sell the land to Kenneth for \$60,000 (R. p. 311, lns. 9-15), and that she worked with him on a venture that she hoped would make this a reality. This involved a plan to dredge sand from a pond located on the property which would be purchased by Larry Herndon. (R. p. 273, ln. 16 – p. 274, ln. 9) Unfortunately, this plan never came to fruition, and Brooks never received any money from the

sand operation. (R. p. 294, lns. 9-24 & p. 309, lns. 9-20) This testimony begs the question of the source of the sums listed on Plaintiff's Exhibit 15. (R. p. 524) As Mrs. Brooks explains, the amounts listed were derived from payments coming in from the existing leases to American Bio-Mass, LLC and Wood Brothers, Inc. (R. p. 275, ln. 15 – p. 276, ln. 14) Therefore, the monies shown on Plaintiff's Exhibit 15 were those already belonging to Mrs. Brooks. As she testified:

- We got [\$]42,300, right, but he still hadn't paid me none of my money, because that was my money. (R. p. 285, ln. 20 – p. 286, ln. 10);
- Kenneth never paid me any money that was his money.” (R. p. 294, lns. 8-12);
- Q: All right. But you did – you actually got paid 32,600 –
A: Of my own money. Boy I think you're hard of understanding.
(R. p. 308, lns. 16-19);
- Until I got my \$60,000, I wouldn't give you air if you was in a jug if you told me you'd give me \$60,000. They didn't pay me any of my money. I mean they didn't pay me any of their money. They paid me my money. (R. p. 309, lns. 16-20)

Thus, the evidence presented at trial plainly shows that Mrs. Brooks did not receive the \$60,000 from Kenneth's venture with Larry Herndon, but rather from lease payments to which she was already entitled.

Why then did Mrs. Brooks write out most of the annotations listed on the ledger? While it is clear that Mrs. Brooks and Kenneth Walker had a loving relationship, it is equally certain that it could be rocky. There were times that Mrs. Brooks was clearly afraid of her younger brother. As she explained in her testimony:

- 1) At one point, Mrs. Brooks called one of the banks in Waltherboro and asked that Roger Walker no longer be allowed to cash checks which were made out to her. Thereafter, this was made known to Kenneth and Mrs. Brooks was afraid that: “I was going to be attacked.” (R. p. 287, ln. 6)
- 2) She also stated that “Kenneth would slap the devil out of you,....” (R. p. 287, ln. 25)

3) In response to a series of questions from the Walkers counsel about the note and ledger, and why she wrote them, Mrs. Brooks testified:

A: I did what Kenneth asked me to do, yes. I wrote that. No. Kenneth never paid me any money that was his money. . . . (R. p. 294, lns. 8-10)

A: I did anything Kenneth asked me to do, except he offered for them to kill my husband if I would split the insurance with him. . . . (R. p. 294, lns. 16-18)

This testimony shows that Mrs. Brooks was afraid of her brother, and generally tried to do what would keep him happy.

The best inference to be drawn from the evidence, then, is that Mrs. Brooks wrote the note and ledger which became Plaintiff's Exhibits 18 and 15 because Kenneth wanted her to, and complying to his wish in this regard would keep him on friendly terms. This inference is further supported by the fact that writing out the note and keeping the ledger cost her nothing. Since Mrs. Brooks knew that only she could convey the property back to Kenneth, there was no harm in keeping the ledger in accordance with his wishes because, at the end of the day, she was only going to sell if she were paid.

Mrs. Brooks testified that she was willing to sell the property back to Kenneth for \$60,000. (R. p. 311, lns. 9-15) But because that money never materialized, she never considered executing a deed and never relinquished title to the Property.

c) **3rd Hamlin Factor: Negotiation of Price &**
5th Hamlin Factor: Relationship of the Parties:

Mrs. Brooks and Kenneth Walker negotiated as to the price she was to pay for the property. The 1996 deed from Kenneth to Mrs. Brooks states consideration of \$13,250.00 (R. p. 671) Mrs. Brooks testified that she and Kenneth went to the office of Auburn Bridges, Esquire, an attorney in Walterboro, and discussed this amount as reflecting the money she had actually given to him or paid on his behalf. (R. p. 278, ln. 20 – p. 280, ln. 2; p. 299, ln. 17 – p. 303, ln. 8)

There was no discussion of her giving Kenneth a mortgage. (R. p. 278, ln. 20 – p. 280, ln. 7; p. 301, lns. 6-11)

At the trial of this case, no evidence was presented of extensive negotiations of terms between the parties prior to Kenneth Walker's 1996 and 2003 deeds. However, this fact, as well as Mrs. Brooks not obtaining appraisals of the various parcels, or the absence of written contracts of sale, does not carry the same weight in this case as these factors did in Hamlin. The interactions between Kenneth Walker and Mrs. Brooks were not primarily related to business. They were brother and sister who had grown up together on the Property. Having been raised on the land, Mrs. Brooks had no need of an appraisal to estimate its worth in purely economic terms. Likewise, the absence of a written sales contract between siblings is not probative of a brother's intent to convey to his sister.

In this way there is a similarity between this case and Hamlin, because in each instance the relationship of the parties determined the character of the transaction. Hamlin had a long history of giving loans to Gregorie. Thus, it makes perfect sense to read the transaction of January 1961 as a continuation of their longstanding debtor/creditor relationship. On the other hand, Mrs. Brooks and Kenneth Walker were siblings who had a stormy, but ultimately close relationship, which does not show the hallmarks of lender to borrower so obvious between Gregorie and Hamlin.

d) 4th Hamlin Factor: Inadequacy of Consideration:

The deed in Hamlin stated consideration of \$35,000 for a tract of approximately 600 acres, while the evidence before the court showed that within two years of the transaction,

portions of the land had actually been sold for \$2,000 per two-acre lot. Id. 257 S.E.2d at 705. As noted for Hamlin's 3rd and 5th factors in the previous section, the vastly different relationship of the parties in this case denudes this element of any real probative value. Family members can, and often do, transfer property to one another for little or no consideration.

Further, the evidence of value which was presented in the case indicates that the great disparity seen in Hamlin is not present here. The court in Hamlin determined that consideration was inadequate because Hamlin had "purchased" land for \$35,000 which market conditions demonstrated was easily worth \$300,000 to \$600,000. Id. 257 S.E.2d at 705. In his Order, the Special Referee notes that while there is no evidence of specific amounts being owed at particular times, the amount never "exceeded \$60,000". (R. p. 5) The Special Referee further observed that the taxable values assigned to the parcels Kenneth conveyed to Mrs. Brooks in 1996 was approximately \$36,000 for that year, while the additional parcel conveyed in 2003 was valued for tax purposes at approximately \$85,000. (R. pp. 5-6) Assuming that Kenneth was indebted to Mrs. Brooks in the amount of \$60,000, a comparison of the values indicates that he deeded her property worth approximately twice this figure. Compare this to the situation in Hamlin in which \$35,000 was said to have purchased property worth nearly ten to twenty times this amount. Thus, the inadequacy of consideration found in Hamlin is not repeated in the present action.

e) **7th Hamlin Factor: Conveyance shown to be mortgage by clear and convincing evidence:**

Finally, the Special Referee erred in determining that the Walkers are entitled to the Property because they have not proven their case by clear and convincing evidence. In analyzing the evidence, this Court should consider the following:

- 1) The 1996 and 2003 deeds from Kenneth Walker to Mrs. Brooks (R. pp. 671 & 675) clearly indicate an intent to convey fee title to the various parcels of the Property. Neither contains any sort of reverter clause or re-conveyance language of any kind.
- 2) The evidence shows that when Kenneth Walker intended to provide a security interest in real property to a family member who was loaning him money, he did so. This is clearly demonstrated in the mortgage he executed in favor of Patsy Walker and Jane Ballagh.⁴ (R. p. 528)
- 3) The Special Referee largely based his determination on the unsigned note dated July 16, 2004 (R. p. 532) and the ledger (R. p. 524), even going so far as to state that the ledger was the “most persuasive” document. (R. p. 9, para. 10) In so ruling, the Special Referee completely ignored the extensive testimony of Mrs. Brooks that she was willing to sell the property to Kenneth Walker, and that she hoped that the dredging venture with Larry Herndon would generate the revenue which would allow Kenneth to pay her off. (R. p. 273, ln. 16 – p. 274, ln. 9) But, this proposed dredging operation did not prove to be profitable and Mrs. Brooks never received any money from it. (R. p. 294, lns. 9-24; p. 309, lns. 9-20)
- 4) As argued in subsection b) above, Mrs. Brooks was at times fearful of Kenneth and wrote the note and ledger to pacify him.

In light of this evidence, it does not seem that the Special Referee had clear and convincing evidence upon which to base his ruling.

⁴ As was noted above, Jane Ballagh testified that the actual loan secured by this mortgage was made by her in the first place.

II. THE SPECIAL REFEREE ERRED IN DETERMINING THAT THE RESPONDENTS WOULD BE ENTITLED TO A DECLARATION THAT THE DEEDS CONVEYING THE SUBJECT PROPERTY TO THE APPELLANT DID NOT PASS FEE TITLE, BUT RATHER CREATED A RESULTING TRUST SUCH THAT APPELLANT HOLDS LEGAL TITLE TO THE LAND FOR THEIR BENEFIT.

In his Order, the Special Referee stated that the Walkers had "... prayed for and shown sufficient testimony to be entitled to a declaration of a resulting trust in the matter,..." (R. p. 9, para. 5) In spite of this determination, the Special Referee continued by finding the facts more in line with an equitable mortgage theory, and it is on this basis that he decided the case. But, just as the Special Referee erred in determining that Brooks held only an equitable mortgage to the Property, he likewise erred in determining that the Walkers were entitled to ownership of the Property under the theory of resulting trust.

In Bowen v. Bowen, 352 S.C. 494, 575 S.E.2d 553 (S.C. 2003), the S.C. Supreme court discussed the imposition of a resulting trust:

Equity devised the theory of resulting trust to effectuate the intent of the parties in certain situations where one party pays for property, in whole or in part, that for a different reason is titled in the name of another. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 248-249, 489 S.E.2d 472, 475 (1997) (citing McDowell v. South Carolina Dep't of Social Servs., 296 S.C. 89, 370 S.E.2d 878 (Ct.App.1987)). The general rule is that when real estate is conveyed to one person and the consideration paid by another, it is presumed that the party who pays the purchase money intended a benefit to himself, and accordingly a resulting trust is raised in his behalf. Id. at 249, 489 S.E.2d at 475. The presumption, however may be rebutted and the actual intention shown by parol evidence. Id.

The problem with the Special Referee's conclusion is that the evidence in no way fits the requirements of a resulting trust as described in Bowen. In order for the facts of this case to even raise the issue, a third party would have needed to convey the Property to Mrs. Brooks while Kenneth Walker paid the consideration. Although the parties disagree on many points, there is

simply no suggestion by either side that any such event took place. Since there is absolutely no evidence which would support the contention that Mrs. Bowers held title in a resulting trust for the benefit of Kenneth Walker, the Special Referee's determination is incorrect.

CONCLUSION

Appellant respectfully requests that this Court reverse the judgment of the Special Referee and issue an Order confirming Mrs. Brooks' fee simple ownership of the Property.



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May 15, 2012

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM COLLETON COUNTY
COURT OF COMMON PLEAS

R. Thayer Rivers, Jr., Special Referee

Case No. 2009-CP-15-01148

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 9/20/2008), Jimmy Ray Walker, and Wilson Whitney Walker as surviving children and Devisees of the Decedent, Kenneth Ray Walker, who died testate on 9/20/2008, Respondents,

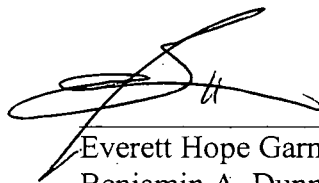
v.

Catherine W. Brooks, Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

May 15, 2012



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