

I. Background

The plaintiff was advised in 1997 that he had been overpaid \$10,886.57 in SSI benefits for the period from July 1995 through July 1997. Record at 13. The commissioner took the position that the value of certain Florida real estate owned by the plaintiff's then-wife, Maria Whitney, and their two children, Robyn and Sarah, should have been deemed a resource to him and have been counted in assessing his eligibility for payment. *Id.*² On November 18, 1997 the plaintiff requested reconsideration, asserting: "I have legal papers stating the house was not mine or my ex's[.] And I can't make ends meet with the over payment." *Id.* at 77. By letter dated February 5, 1998 the Social Security Administration advised the plaintiff to attend a conference on February 20th, bringing with him "any documents you have to support your claim that the house in Florida did not belong to your ex-wife." *Id.* at 75.

At the conference the plaintiff argued that Maria Whitney could not sell, transfer or mortgage the property in question because her two minor children were listed as co-owners. *Id.* at 79. By letter dated April 1, 1998 the request for reconsideration was denied *inter alia* on the basis that "Maria, as legal guardian of the children, could transfer or sell the property on their behalf. This is, in fact, what she did in 8/97 when she quit claimed the deed to Floye David [her mother]. She signed the deed for both children. There was no legal restriction to prevent her from doing this, therefore the property counts as a resource. Since you were a couple at that time, it makes you ineligible also." *Id.* at 81.

The plaintiff requested a hearing before an administrative law judge, asserting: "Maria Whitney had a perantal [sic] responsibility to the children because the property was left in a constructive trust. This is not ownership." *Id.* at 84. A hearing was held on January 20, 1999, *id.* at

² The record indicates that the existence of the Florida real estate came to the commissioner's attention when the plaintiff reported in June 1997 that Maria Whitney had hidden her ownership interest "so AFDC, etc. would not find out about it." Record at 63. Inasmuch as appears, the plaintiff was unaware that this report would trigger inquiry into his own benefit status. *Id.* at 80.

16, following which, by decision dated May 21, 1999, an administrative law judge ruled that Maria Whitney did not have the right to liquidate the property in Florida that was deeded to her and her daughters by her parents, Finding 1, *id.* at 15; that the property was not a “resource” as defined in 20 C.F.R. § 416.1201, Finding 2, *id.*; and that the value of the property in question could not be counted in determining the plaintiff’s eligibility for SSI payments, Finding 3, *id.*

The Appeals Council elected pursuant to 20 C.F.R. §§ 416.1487-89 to reopen the hearing decision. *Id.* at 113. By letter dated May 16, 2000 the plaintiff’s counsel argued to the Appeals Council: “[T]he ALJ correctly found that the Florida residence in question was not a resource because of the restrictions set forth in the conveying deed, namely, that the property was transferred in the manner of a trust for the benefit of Mrs. Whitney’s minor children. The record is, I believe, clear on this point: the grandparents, Mr. and Mrs. David, conveyed the real estate with the understanding that it would not be sold and was for the benefit of the minor children.” *Id.* at 122.

The Appeals Council was unpersuaded, ruling on August 4, 2000 that (i) the plaintiff was ineligible for SSI payments from July 1995 through December 1996 due to excess resources, Finding 1, *id.* at 8; (ii) he was ineligible for SSI payments from January 1997 through May 21, 1997 because he was then confined in prison, Finding 2, *id.*; (iii) he received an overpayment of SSI benefits from July 1995 through May 21, 1997, Finding 3, *id.*; and (iv) he was not without fault in accepting the overpayment, Finding 4, *id.* In reaching these conclusions the Appeals Council noted *inter alia*:

[T]he claimant’s former wife was not barred from selling the house in Florida on the basis that her two minor children’s names were on the deed. In this regard, as the mother and legal guardian of the children, she could have sold the property on their behalf. Indeed, she acted on their behalf as well as on her own behalf when she deeded her share of the house to her mother on August 11, 1997. . . . [E]ven if a court-appointed guardian would have been required for the purpose of selling the house, this would have been a process to be followed and would not have equated to an inability of the claimant’s former wife from liquidating the property. . . . The claimant has not submitted evidence which shows that his former wife attempted to sell the property but was prevented from doing so by Florida State law.

Id. at 7.

The standard of review of the commissioner’s decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

In cases such as this in which the recovery of an alleged overpayment is sought, the commissioner “must demonstrate that the claimant was not entitled to the Social Security funds.” *Cannuni ex rel. Cannuni v. Schweiker*, 740 F.2d 260, 263 (3d Cir. 1984).

The plaintiff submits that any legal title held by Maria Whitney in the property in question was subject pursuant to Florida law to a constructive trust for her children. Plaintiff’s Statement of Errors (“Statement of Errors”) (Docket No. 5) at 3. In his view the Florida realty hence could not properly have been deemed pursuant to 20 C.F.R. § 416.1201 to be an asset available for his support and maintenance. *Id.* at 3-4. I agree.³

II. Discussion

For purposes of determining eligibility for SSI benefits, Social Security regulations define “resources” as “cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance.” 20 C.F.R. § 416.1201(a). “If the individual has the right, authority or power to liquidate the property or

³ The instant complaint does not concern that portion of the Appeals Council decision finding the plaintiff liable for overpayments made during the period from January to May 1997, when he was incarcerated. Statement of Errors at 1 n.1.

his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).” *Id.* § 416.1201(a)(1).

In determining whether certain property properly is classed as a “resource” on the ground that the individual has the “right, authority or power” to liquidate it, the commissioner must look to state law. *See, e.g., White ex rel. Smith v. Apfel*, 167 F.3d 369, 373 (7th Cir. 1999); *Navarro ex rel. Navarro v. Sullivan*, 751 F. Supp. 349, 350 (E.D.N.Y. 1990). The parties do not dispute that the law of Florida controls in this case.

The plaintiff claims that the Florida real estate in question was, at the relevant time, subject to a constructive trust in favor of his two minor children, as a result of which Maria Whitney had no “right, authority or power” to liquidate it. Statement of Errors at 2-3. Under Florida law, the existence of a constructive trust is established by clear and convincing evidence of “(1) a promise, express or implied, (2) transfer of the property and reliance thereon, (3) a confidential relationship and (4) unjust enrichment.” *Saporta v. Saporta*, 766 So.2d 379, 381 (Fla. Dist. Ct. App. 2000) (citation and internal quotation marks omitted). “Even when a property has not been acquired by fraud, a constructive trust will be imposed if equity would be offended should the property be retained by the person holding it.” *Id.* at 382. “This is so because a constructive trust is a remedial device with the dual objectives of restoring property to its rightful owner and preventing unjust enrichment.” *Id.*

Thus, for example, when a son who co-owned a home with his mother quit-claimed his interest in it to her for the purpose of facilitating a sale, the mother died before the sale could be effectuated, and the mother had executed a will giving one-half of her interest in the property to a religious society, the District Court of Appeal of Florida for the Third District held that a constructive trust had arisen in favor of the son, noting:

Contrary to the trial court's implicit holding, proof of evil design on the part of the trustee is not [a] necessary predicate to imposition of a constructive trust. Where there is a confidential relation, a transaction induced by the relation, and a breach of the confidence reposed, a constructive trust may arise even in the absence of fraud. Thus, where one person having legal and equitable title in property transfers it to another with whom he has a confidential relationship to hold for a particular purpose, a constructive trust arises in favor of the promisee which may be enforced where the promisor acts in a fashion so as to harm the beneficiary's interest.

Mayer v. Cianciolo, 463 So.2d 1219, 1222 (Fla. Dist. Ct. App. 1985) (citations, footnote and internal quotation marks omitted); *see also Williams v. Grogan*, 100 So.2d 407, 410 (Fla. 1958) (evidence showed that son had conveyed property interest to mother on understanding she would "take care of [his] interest"; hence, constructive trust arose that was enforceable to prevent devise of all of mother's property to third parties).

The Record in this case reveals the following:

1. The plaintiff and Maria Whitney lived at 1354 Crestwood Street in Jacksonville, Florida ("1354 Crestwood"), off and on for approximately twelve years, until moving to Maine in July 1995. Record at 26-27 (testimony of plaintiff).
2. This property initially was owned by Maria Whitney's parents, Henry Grady David and Floye David. *Id.* at 27 (testimony of plaintiff), 38 (testimony of Maria Whitney), 101 (warranty deed).
3. On June 7, 1988 the Davids, Maria Whitney and the plaintiff entered into a written agreement providing that if three conditions regarding 1354 Crestwood were met (the payment of monthly rent through June 1, 1995, the payment of property taxes and the undertaking of certain repairs), "this property will be legally put into the names of Maria Francis David Whitney and Robyn Denise David, and any other children involved, , [sic] not to be sold or mortgaged until the children are of legal age and only with the consent of all owners." *Id.* at 70.

4. Henry Grady David died on April 6, 1995. *Id.* at 40 (testimony of Maria Whitney). On March 16, 1995 he and Floye David executed a warranty deed transferring 1354 Crestwood to “Maria Frances David, Robyn Danese David and Sarah Ann Whitney” in consideration for payment of \$10 and “love and affection between parents and children.” *Id.* at 101 (warranty deed).

5. According to Maria Whitney, the 1988 agreement was drawn up “so that we’d be paying them [the Davids] a rent every month to stay on the property because their income was low, and in exchange they were going to eventually sign over the property to the children because that’s what they wanted them to have is a home. They didn’t want them to have the money out of the sale of the house, or they would have just left it to us or sold it. It was always my understanding that it was not to be sold.” *Id.* at 39. Henry Grady David had frequently expressed to Maria Whitney his intention to leave 1354 Crestwood to his grandchildren. *Id.* at 42 (testimony of Maria Whitney).

6. Maria Whitney’s name was placed on the deed because her two children were minors, then ages six and twelve. *Id.*

7. According to Floye David, 1354 Crestwood “was put in an estate for Maria Frances David, Robyn David, and Sara Whitney. This was done because the husband at the time, was an alcoholic, and we wanted them to always have a home.” *Id.* at 67 (statement of Mrs. Grady David dated June 11, 1997). “This property was transferred to the minors for their inheritance by their grandparents, in March 1995.” *Id.* at 68 (notarized statement of Floye David dated June 11, 1997).

8. In the opinion of Florida attorney Edwin M. Boyer, “when title is conveyed to multiple parties and one is a minor, any subsequent conveyances or encumbrances of the property would require the appointment of a guardian for the minor for the purpose of conveying the property. Title of the property is not really transferrable [sic] until this occurs and I know of no title company that would

insure transfer of title without a guardianship.” *Id.* at 103 (letter dated January 19, 1999 from Edwin M. Boyer to Murrrough O’Brien, Esq.).

9. In July or August 1997, on behalf of herself, Robyn Denese David and Sarah Ann David, Maria Whitney executed a quit-claim deed transferring 1354 Crestwood to Floye David, Robin Danese David and Sarah Ann Whitney. *Id.* at 69 (quit-claim deed).

The foregoing facts, which the commissioner does not controvert, constitute clear and convincing evidence of all elements necessary to establish the existence of a constructive trust under Florida law, namely:

1. The existence of an express or implied promise: In 1988 the plaintiff and his ex-wife expressly promised his in-laws that in the event the Davids transferred 1354 Crestwood, the property would not be sold or mortgaged until the children reached adulthood. This express promise is entirely consistent with the testimony of Maria Whitney and the statements of Floye David to the effect that the Davids intended the children to have a home.

2. A transfer of the property in reliance thereon: The Davids did indeed transfer 1354 Crestwood to their daughter and two minor grandchildren on almost the exact timetable contemplated by the 1988 agreement, in or about March 1995.⁴

3. A confidential relationship: “[T]he mere existence of kinship, without more, does not give rise to” a confidential relationship. *Cianciolo*, 463 So.2d at 1222 n.1. Nonetheless, a confidential relationship “is not confined to the strict fiduciary relationship existing between those having definite, well-recognized legal relations of trust and confidence, but extends to every possible

⁴ Although the 1988 agreement contemplated transfer of the property after June 1, 1995, it was transferred a few months early because of Henry Grady David’s worsening health. *See* Record at 40 (testimony of Maria Whitney). The commissioner at oral argument pointed out that certain of the 1988 conditions precedent, specifically house repairs, were not satisfied prior to the 1995 transfer; however, the evidence nonetheless bears out the grandparents’ continuing intention, as expressed in 1988, that the property be used solely for the benefit of the minor children.

case in which a fiduciary relation exists as a fact, though it may be a moral, social, domestic, or merely personal relationship.” *Id.* Under the circumstances described, the transfer of 1354 Crestwood in 1995 stemmed from the Davids’ confidential relationship with their daughter, upon whom they relied to honor their wishes concerning the provision of a home for their grandchildren.

4. Unjust enrichment: Although, as the commissioner points out, it is possible that via a guardianship proceeding Maria Whitney could have attempted to sell or mortgage 1354 Crestwood, such an outcome would have unjustly enriched Maria Whitney and/or the plaintiff, had any resulting proceeds been used for his benefit. The grandparents made crystal-clear their desire that no such transaction occur until the children reached adulthood, and then not without the consent of all owners.

In sum, 1354 Crestwood was impressed with a constructive trust whereby, despite Maria Whitney’s technical ownership of an undivided one-third interest in the property, she did not possess the right, authority or power to liquidate that asset at the relevant times. *See Provence v. Palm Beach Taverns, Inc.*, 676 So.2d 1022, 1025 (Fla. Dist. Ct. App. 1996) (“Constructive trusts are akin to an express trust in that a bifurcation of title occurs; bare legal title to the property is held by the possessor of the property while the beneficial interest is held by the person entitled to the property.”). The property at 1354 Crestwood accordingly was not Maria Whitney’s (or the plaintiff’s) “resource” as that term is defined in 20 C.F.R. § 416.1201(a), and should not have been counted against the plaintiff for the purpose of determining his eligibility for SSI benefits.

The commissioner places great weight on the fact that Maria Whitney purported to transfer the property in 1997 simply by signing a quit-claim deed on behalf of the children and herself. However, that she purported to do so does not mean that she had “right, authority or power” to do so. The commissioner, who bears the burden of proof that an overpayment was made, cites no authority for the proposition that Maria Whitney in fact possessed the power to do what she did. Moreover, inasmuch

as the deed purportedly transferred the property back to the grandmother and the two minor children themselves, the purported transfer was not inconsistent with the original intention of the grandparents to provide the two minor grandchildren a place to call home.

Finally, counsel for the commissioner asserted at oral argument that, to prove that 1354 Crestwood was impressed with a constructive trust, Maria Whitney was required to attempt and fail to liquidate her purported one-third interest in the property. If the plaintiff's claim were solely that liquidation of the property would have been too burdensome for it to qualify as a "resource," or if there otherwise were no clear restrictions on its use for his or his ex-wife's benefit, this might indeed be the case. *See, e.g., Chalmers v. Sullivan*, 818 F. Supp. 98, 101 (D.N.J. 1993), *aff'd*, 23 F.3d 752 (3d Cir. 1994) ("Other courts have also found a Social Security claimant to have countable resources based on the claimant's legal rights to dispose of property, despite circumstances that made liquidation or realization difficult."); *see also White*, 167 F.3d at 375 (probate court's denial of petition to release trust funds rebutted presumption that funds were available for care, maintenance of protected person). What distinguishes this case is the presence of a constructive trust in favor of the minors specifically forbidding liquidation of the property at the times in question – a proposition that can be established as a matter of Florida law, without need of state-court litigation to buttress the point.

The Appeals Council accordingly erred in concluding that there was an overpayment for the period from July 1995 through December 1996.

III. Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** insofar as it directs the plaintiff to repay SSI benefits received for the period from July 1995 through December 1996.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 9th day of April, 2001.

*David M. Cohen
United States Magistrate Judge*

ADMIN

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-280

WHITNEY v. SOCIAL SECURITY, COM Filed: 10/03/00

Assigned to: JUDGE D. BROCK HORNBY

Referred to: MAG. JUDGE DAVID M. COHEN

Demand: \$0,000 Nature of Suit: 864

Lead Docket: None Jurisdiction: US Defendant

Dkt# in other court: None

Cause: 42:405 Review of HHS Decision (SSID)

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