

BRITISH VIRGIN ISLANDS

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim No. BVIHCV2009/0058

BETWEEN

DENNIS DONOVAN

Claimant

-AND-

IRENE DONOVAN

Defendant

Appearances:

Ms. Sheryl Rosan and Mr. Michael Maduro for the Claimant
Mr. Duane K.J. Jean Baptiste for the Defendant

2010: February 05
2010: February 10, March 31

Probate – Deceased made “Last Requests” in St. Thomas, USVI – Defendant and Notary Public are witnesses in the Last Requests – Claimant named as executor – Defendant applied for Letters of Administration in the BVI – Claimant filed caveat and applied for probate of Last Requests – Matter pending before the Registrar – Claimant applied and was granted order that Defendant be passed over and that he be vested with grant of probate.

Application to set aside order- jurisdiction of court with respect to foreign wills – principles of passing over – Last Requests is a will- Registrar is proper officer to admit a will to probate – matter premature before Judge - remitted to Registrar for determination in accordance with relevant probate laws.

JUDGMENT

Introductory

[1] **HARIPRASHAD-CHARLES J:** On 10 February 2010, I gave an oral decision in this matter and promised the parties that I will reduce my reasons into writing. I do so now. This judgment arose out of an application made by the Defendant, Irene Donovan (“Mrs. Donovan”) to set aside an Order made by Ross J on 15 July 2009 (“15 July 2009 Order”) which reads:

"IT IS HEREBY ORDERED:

[1] That whereas the Defendant has failed to defend the Claim, the relief sort (sic) in the statement of claim that the Claimant be vested with a Grant of Probate in the Estate of CARL ETINNE DONOVAN is hereby granted provided that it is not acted upon for a period of 14 days after service of this order on the Defendant (Irene Donovan) during which (sic) 14 days, the Defendant shall be at liberty to apply to seek to have the order varied or set aside.

[2] Costs be paid to the Claimant by the Defendant is the sum of \$2,225.00."

[2] The 15 July 2009 Order has its genesis in a Fixed Date Claim Form, filed on 17 February, 2009 by the Claimant, Dennis Donovan ("Mr. Donovan") wherein he sought an order that Mrs. Donovan be passed over and that he be vested with a Grant of Probate in the Estate of the Deceased, Carl Etinne Donovan ("the Deceased"). Mr. Donovan is the brother of the Deceased and Mrs. Donovan is the wife of the Deceased. The parties are in a discordant relationship over the Deceased's property.

[3] Mrs. Donovan seeks to set aside the 15 July 2009 Order on the grounds that (1) Mr. Donovan acknowledges that she [Mrs. Donovan] has a superior claim which is implicit in his application when he sought an order that she be "passed over" and (2) the "Last Requests" of the Deceased is not a will.

[4] Mr. Donovan opposes the application. He says that Mrs. Donovan has not satisfied the requirements of Part 13.2 of the Civil Procedure Rules 2000 ("CPR13"), which states that *"the court must set aside a judgment entered under CPR 12 if judgment was wrongly entered because in the case of (a) failure to file an acknowledgment of service- any of the conditions in rule 12.4 was not satisfied; or (b) judgment for failure to defend – any of the conditions in rule 12.5 was not satisfied."* To be brief, CPR 13 has no applicability to the matter at hand and I believe that this was conceded by Ms. Rosan, Learned Counsel for Mr. Donovan, during the hearing.

Background facts

[5] On 24 February 2008, the Deceased made “Last Requests” which was signed by him and two witnesses, namely his wife, Mrs. Donovan and Ramona James-Allamby, a Notary Public. The “Last Requests” was executed in St. Thomas, United States Virgin Islands. In his “Last Requests”, the Deceased’s wishes are as follows:

1. “He (Mr. Donovan) must discuss my funeral arrangements with my wife. She will make all the arrangements and he will be responsible for the expenses.
2. Whatever property I am entitled to in the British Virgin Islands I leave to him to fulfil my Last Requests.
3. He must sell a piece of property and give the proceeds in my wife, Irene Donovan.
4. From the proceeds of the sale of any remaining piece of property to which I am entitled, he must do the following:
 - (a) repay himself for my funeral expenses;
 - (b) make a gift of five thousand (\$5,000) dollars to the City Seventh Day Adventist Church Building Fund;
 - (c) give monetary gifts to my nephew, Devin and Dexter Donovan;
 - (d) give monetary gifts to my surviving brothers.”

[6] It is evident from the “Last Requests” that the Deceased chose his brother and not his wife to execute his last wishes. The Deceased died on 6 June 2008.

[7] On 1 October 2008, Mrs. Donovan applied for Letters of Administration to her Deceased husband’s Estate with knowledge of the “Last Requests” (as she was a witness). This application was published in the newspaper and came to the attention of Mr. Donovan. Mr. Donovan then sought legal representation from C.E. Dawson & Co., which then caused a search to be done in the Probate Registry of the Supreme Court on 17 November 2008. It appears that no record of such application or for that matter, any other applications pertaining to the Estate of the Deceased was found.

- [8] On 20 November 2008, Mr. Donovan filed a caveat in the High Court to prevent a Grant of Probate in the Estate of the Deceased from being sealed. On 24 November 2008, Mr. Donovan made an application in the High Court Registry for a Grant of Probate in the Estate of the Deceased. This application bears the number BVIHPB Probate No. 92 of 2008. Then, on the same day, he caused a caution to be filed in the Land Registry prohibiting any dealings with respect to the properties of the Deceased until the outcome of the probate application. The application is still pending before the Registrar.
- [9] In the interim, on 17 February 2009, Mr. Donovan filed a Fixed Date Claim Form seeking an order from the High Court for the Grant of Probate in the said Estate of the Deceased. On 7 April 2009, Mr. Donovan attempted to personally serve Mrs. Donovan with the Fixed Date Claim Form and the Statement of Claim in accordance with a Court Order dated 25 March 2009. Mrs. Donovan did not accept such service. On 6 May 2009, the Court ordered that the same documents be served on Mrs. Donovan by registered mail at her address in St. Thomas, United States of the Virgin Islands. This was done. On 22 June 2009, the Court ordered that the matter shall not be dealt with summarily and that Mrs. Donovan be strongly advised to avail herself with legal counsel. Mrs. Donovan did not accept service of this Order.
- [10] On 15 July 2009, Ross J made the Order vesting the Grant of Probate in the Estate of the Deceased to Mr. Donovan but subject to a proviso that it is not to be acted upon for a period of 14 days after service of the Order on Mrs. Donovan, during which time Mrs. Donovan would be at liberty to apply to seek to vary or set aside the Order. Mr. Donovan attempted to have the Order served on Mrs. Donovan via Postal Restrictive Delivery Mail on 28 July 2009. Again, Mrs. Donovan did not accept service.
- [11] Having exhausted all possible methods of service of documents on Mrs. Donovan, Mr. Donovan's last straw was to apply to the court to have the Order served on Mrs. Donovan by substituted service by two consecutive advertisements in the newspaper. This application was fixed for hearing on 11 January 2010. However, on that date, the application was withdrawn as the firm of J.S. Archibald & Co accepted service of the Order

on behalf of their client, Mrs. Donovan. The Court also ordered that Mrs. Donovan be given 14 days to apply to set aside or vary the Order of Ross J.

- [12] On 22 January 2010, Mrs. Donovan filed the present application seeking to set aside the Order of Ross J.

Jurisdiction of the BVI Court with respect to a foreign will

- [13] First, I will deal with the issue of whether this Court has jurisdiction to entertain an application relating to a purported will executed outside the territory of the BVI. The law is that a will, other than a valid international will, may be regarded as properly executed either as a result of statute or by common law. Since the laws of the BVI pertaining to foreign wills are silent, common law principles are applicable. At common law, a will of immovables is properly executed if its execution complies with the formal requirements of the *lex situs*¹.

- [14] Paragraph 2 of the “Last Requests” expressly states that “whatever property I am entitled to in the British Virgin Islands I leave to him (Mr. Donovan) to fulfil my “Last Requests”.” So, the “Last Requests” deals with property situated in the BVI. It follows therefore, that a purported will made in St. Thomas, USVI can be probated in the BVI since the Deceased’s property is situated here.

- [15] I am satisfied that the BVI is the proper jurisdiction to deal with the application for a Grant of Probate in the Estate of the Deceased.

Grounds for setting aside application

- [16] Learned Counsel for Mrs. Donovan, Mr. Jean- Baptiste premised the application to set aside the 15 July 2009 Order on two grounds. First, he says that by the very nature of the claim by Mr. Donovan, it is implicit that he [Mr. Donovan] realises that Mrs. Donovan has a superior right over him, hence the application to pass over her. Secondly, the “Last Requests” of the Deceased cannot be considered a will.

¹ Philipson-Stow v IRC [1961] AC 727, [1960] 3 All ER 814, HL.

Principles of Passing Over

[17] The laws of the Virgin Islands are silent on the issue of passing over an individual who is primarily entitled to administer a deceased's estate. Notwithstanding, section 11 of the West Indies Associated States Supreme Court Act² empowers the Court to adopt the law and practice administered in the High Court of Justice of England where no special provision is made in the laws of the BVI.

[18] Section 116 of the Supreme Court Act 1981 (UK), provides for the law on "passing over." It states as follows:

1. "If by reason of any special circumstances it appears to the High Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this section, would in accordance with probate rules have been entitled to the grant, the court may in its discretion appoint as administrator such person as it thinks expedient.
2. Any grant of administration under this section may be limited in any way the court thinks fit."

[19] According to Mr. Jean Baptiste, it follows that the burden of proof is on Mr. Donovan to satisfy the court of the existence of "special circumstances" which would make it necessary or expedient to pass over Mrs. Donovan in favour of him. Learned Counsel referred to a number of cases to ably support his submission.

[20] But, during the hearing, Ms. Rosan sought to clarify the use of the phrase "passing over" in the claim. She stated that she is merely seeking a Grant of Probate in the Estate of the Deceased since the Registrar has to date, failed to deal with her application. As a result of this clarification, it will be futile for me to explore that issue any further. In any event, I am of the view that it has little or no bearing on the outcome of the case.

Is the "Last Requests" a Will?

[21] Alternatively, Mr. Jean Baptiste submits that the "Last Requests" of the Deceased is not a will. This is an issue for the court to determine. In deciding whether a document can be

² Cap. 80 of the Laws of the Virgin Islands

proved as a will or codicil, the court ascertains it both from the language of the document and from extrinsic evidence.

- [22] The law is that a document intended to take effect only at death is a will. Ms. Rosan referred to the nature of a will, as stated in *Parry and Clark, The Law of Succession, 9th Ed.*, where the author states: “A will is the expression by a person of wishes which he intends to take effect only at his death”. Such document is usually worded so as to describe itself as a “Will”. However, it is certainly not necessary for a document, which is intended to operate as a will or codicil, to describe itself as such. Lord Penzance in **Cock v Cooke**³ explained it as follows:

“It is undoubted law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary.”

- [23] Whatever form it takes, any document can be proved as a will if (i) the person executing it intended it to take effect only at his death and (ii) it was duly executed. To be duly executed, a document must conform with the requirements of the Wills Act particularly section 7⁴.
- [24] Thus far, I accept that the “Last Requests” of the Deceased was a document which the Deceased intended for it to take effect only at his death. Left to be determined is the issue of whether the document was duly executed in accordance with the Wills Act. This is dealt with under the following sub-head.

Power of Registrar to grant probate or letters of administration

- [25] Wills are normally probated in the Probate Registry of the Supreme Court. Section 3(1) of the Supreme Court (Non-contentious) Probate Rules⁵ (“the Probate Rules”) expressly states that “an application for a grant of probate or letters of administration shall be made at the Registry.” Section 10(1) states that “the Registrar shall not allow probate or

3 (1866) LR 1 P & D 241, 243.

⁴ Cap. 81 of the Laws of the Virgin Islands and more specifically, Part II.

⁵ Made on 1 October 1986 under Section 7 of the Probates (Resealing) Act and Section 17 of the Supreme Court Order, 1967 (S.I. 1967 No. 223)(U.K.).

administration to issue until all the enquiries that he sees fit to institute have been answered to his satisfaction". So, it is plain that the proper officer to admit a will to probate or to grant letters of administration is the Registrar.⁶

[26] It seems to me that a High Court Judge only becomes involved in applications of this nature where there is a doubtful execution: see section 13 of the Probate Rules which states: "*if on perusing the affidavit setting forth the facts of the case it appears doubtful whether the will has been duly executed, the Registrar may require the parties to bring the matter before a Judge in Chambers for his ruling thereon.*" Of course, decisions of the Registrar in probate proceedings are subject to appeals to the High Court. No such situations have arisen here.

[27] Therefore, at this initial stage, a Judge is not the proper judicial officer to deal with applications for Grant of Probate or Letters of Administration as is evident in section 3 (1). Such applications must be made to the Registrar for her determination after making all the enquiries as stipulated in section 10. For these reasons, the 15 July 2009 Order ought to be set aside.

Costs

[28] This is no longer an issue as the parties have agreed on costs.

Conclusion

[29] The Order of Ross J made on 15th July 2009 is hereby set aside. The Registrar is directed to determine the pending application in BVIHPB Probate No 92 of 2008 in accordance of the relevant laws. If the Registrar refuses to grant Probate of the Last Requests of the Deceased, Carl Etinne Donovan, she should state her reasons for refusal in writing.

Indra Hariprashad-Charles
High Court Judge

⁶ Section 2 defines "Registrar" as the Registrar of the Supreme Court and includes the Deputy Registrar.