[2016] JMSC Civ 57

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

THE CIVIL DIVISION

CLAIM NO. 2012 HCV 06028

IN THE MATTER OF THE ESTATE OF ULYSSES JABEZ BUCHANAN late of Friendship in the parish of Hanover, Farmer, deceased, testate.

AND

IN THE MATTER of an Application under the Trustee Act, The Trustees, Attorneys & Executors (Accounts & General) Act and Rule 68.61 of the Civil Procedure Rules 2012.

BETWEEN	**ROY BUCHANAN**	**1ST CLAIMANT**
AND	**ERICA BUCHANAN TRUSTY**	**2ND CLAIMANT**
AND	**KEVIN BUCHANAN**	**3RD CLAIMANT**
AND	**JEAN HALL**	**DEFENDANT**
	(Executrix of the Estate of Ulysses Jabez Buchanan, Deceased.)	

IN CHAMBERS

Mrs. Sonja Anderson-Byfield, Attorney-at-Law for the Claimants.

Mr. John Thompson, Attorney-at-Law for the Defendant.

Heard: 24th March 2015 and 28th April 2016.

Administration of Estate – Probate Law - Interpretation of a Will – Intention of Testator – Expressed or Implied Intention - Read Will as a whole – Ordinary meaning of words/phrases – Words/Phrases used in a different sense - Court not to rewrite Will or improve upon – No speculation – Presumption against Intestacy – Residuary clause – Partial Intestacy – Intestates' Estates and Property Charges Act.

CAMPBELL J;

Background

[1] The late Mr. Ulysses Jabez Buchanan, died on the 2nd February 1977. He had executed his last Will and Testament dated 19th December 1975 under the guidance of an experienced Attorney-at-Law. At the time of his tragic death in a motor vehicle accident, he was survived by three (3) minor children, the claimants herein. His sibling, Ms. Jean Hall, now age eighty-five (85) years old was appointed as executrix of the deceased's estate; she is the defendant herein.

[2] It is unchallenged that the claimants were maintained by the Executrix, from the estate and from the family businesses, Glascow and Kings Valley Farms, from infancy and also thereafter. Provisions were also made for their educational needs as well. On 18th August 1997, the executrix obtained a Grant of Probate from the Supreme Court. There is a lack of agreement as to the interpretation to be placed on the Will.

Fixed Date Claim Form

[3] The claimants, by way of a Fixed Date Claim Form filed 6th November 2012, are seeking the following orders, inter alia;

1. The phrases "*to my estate*" and "*to the estate of the said Ulysses Buchanan*" under the last Will and Testament of

the deceased, **ULYSSES JABEZ BUCHANAN** are to be construed as a devise of those assets to the claimants, as the deceased's legal heirs on intestacy.

2. Alternatively, that the residuary clause under the deceased's last Will and Testament is void for uncertainty thereby resulting in the residuary estate falling on a partial intestacy within the meaning of the **Intestates' Estates and Property Charges Act** and is distributable in accordance with the said Statute.

3 Costs to be paid by the Defendant or out of the estate of Ulysses Jabez Buchanan

[4] On 3rd February 2014, Justice Daye, directed that the issue of the interpretation of the Will of the deceased, Ulysses Jabez Buchanan, be determined as it relates to the following ;

What is the meaning and intention of the deceased in the use of the words and/or phrase;

- "***Must go to my estate***"
- "***the sum allotted to the individual must be returned to the estate of Ulysses Buchanan***"
- "***All remaining cash must go to my estate.***"

Terms of the Will

[5] In the deceased's Will it was stated*;*

> *"all my shares consisting in the Spring Valley and Glascow properties in the parish of Hanover and Kings Valley in the parish of Westmoreland and cash in my own name in the Bank of Nova*

Scotia, Savanna-la-mar in the parish of Westmoreland and all other properties, except Malcolm Heights, ***must go to my estate****".*

The property of Malcolm Heights, was directed; "*to go to my sister Jean Hall Nee Buchanan, housewife*."

[6] In relation to the deceased's children, the Will provided for pecuniary legacies. For Roy Buchanan, a sum of $6,000.00, for Kevin Buchanan a sum of $3,000.00 and for Ericka Buchanan, a sum of $5,000.00. These sums were to be paid on attaining the age of twenty-one (21) years. Kevin's share was directed to be lodged in a commercial bank to his account and the interest that accrued was to be used for his maintenance. If any of the deceased's children was to die before attaining the age of 21 years, the Will provided that the sum allotted to that individual "***must be returned to the estate of Ulysses Buchanan."*** The Will ended with the provision that **"*all remaining cash must go to my estate."***

The Claimants' Submission

[7] The claimants argue that the words and phrases for determination ought rightfully to be interpreted as the deceased's heirs, that is, the beneficiaries that follow the channel of the natural descent in keeping with succession laws, namely his children. Alternatively, if the words and/or phrases are so ambiguous that the deceased's intention are void and given the lack of a residuary clause, that a partial intestacy has arisen, resulting in the said claimants being entitled to the deceased's residuary estate under the **Intestates' Estates and Property Charges Act.**

[8] The object of the construction of a Will is to ascertain the testator's expressed intention, that is, the intention which the Will itself declares either expressly or by implication. The court is concerned with determining what the testator meant by the words used in the Will. (See; **Abbott v Middleton** (1858) 7 HLC 68).

[9] In **Perrin v Morgan** [1943] A.C. 399, a locus classicus in the interpretation of a Will, the House of Lords allowed the appeal and gave a wide reading to the word "*moneys*". Viscount Simon L.C., with whom Lord Atkin agreed, held at page 406 of the judgment that;

> *"the fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended."*

[10] Lord Thankeron recognized that the cardinal rule of construction of Wills, is that they *"should be so construed as to give effect to the intention of the testator" and found that the word "money"* was capable of being used by a testator in one of various senses in conformity with the ordinary use of the English language, and that the paramount duty of the court is to decide on the sense in which the particular testator used the word in the particular Will without any prior presumption as to the particular sense intended by the testator.

[11] Extrinsic evidence of the testator's intention is not admissible as direct evidence of his testamentary intention, except in very special cases. Evidence of the circumstances surrounding the testator is admissible (*known as the armchair principle*) and encompasses evidence of the testator's habits and knowledge of persons or things.

[12] The claimants outlined some facts to illustrate the intention of the testator. Counsel noted that the deceased attributed much value to real estate, through which he had amassed substantial wealth. The Will speaks to property at:

i. Spring Valley and Glascow, which he holds as Tenant-in-common with his brother, Fredel Quentin Buchanan;

ii. Kings Valley consists of 1775 Acres 2/10 Perches and is registered in the name of a company, Buchanan's Kings Farm Limited. The shareholders in Buchanan's Kings Farms Limited are deceased with majority shareholding of 13000 shares, Fredel Buchanan with 12,500 shares, Abijah Buchanan

with 10,000 shares, Banfield Buchanan with 7,000 shares and Gladstone Buchanan with 2,500 shares.

iii. Property at Malcolm Heights.

[13] In setting aside the property at Malcolm Heights for the Executrix he made a specific devise to her. It is clear from this devise that it was the only asset he intended the executrix to benefit from. The exclusion of the Malcolm Heights property and the provision thereafter for "*all other properties*" to go to my estate, signify that Jean Hall was not regarded as part of the class of beneficiary that would partake in "*his estate*."

[14] The monetary bequests for his children demonstrated, that they were minors at the time of the creation of his Will and accordingly, would have been foremost on the mind of the deceased. The monetary bequests were in unequal and three distinct shares.

[15] The deceased was clearly an intelligible and prudent businessman, who knew the appreciating power of money through investments and accumulation. The Courts are apt to presume that a testator did not intend capricious, arbitrary, unjust or irrational consequences to flow from his or her dispositions. (See; **Halsbury Laws of England,** 4th Edition Reissue, Volume 50 at page 346).

[16] The word "*estate*" has more than one meaning. In its technical sense the term estate signifies the "*degree, quantity, nature and extent of interest which a person has in real property*." The rules of construction dictates that technical words in a Will are to be taken in their technical sense, unless the context clearly indicate a contrary intention, or unless it satisfactorily appears that the Will was drawn solely by the testator, and that he was unacquainted with such technical sense.

[17] When the word estate is read as a phrase "*to my estate*", it suggests the deceased was speaking of the destination of the interest as oppose to the interest in the properties themselves.

[18] The word *"estate*" is intended by the testator to mean natural persons, that is, the persons who would take his estate in keeping with the natural course of succession on his death. The natural channel of succession on his death is that his assets would flow to his children.

[19] The American case of **Estate of Brunet** 34 Cal. 2d 105, demonstrates that the word "*estate*" can equate to natural persons. (See; also **Reid v Neal**, 183 N.C. 192).

[20] The claimant urges the court to hold that the phrase "*to return to my estate*" should be construed to mean that the property was to go to the testator's heirs or next of kin and accordingly, that the devise was a valid one. Bearing in mind that, if the words referred to are susceptible of any construction which is consistent with the validity of the Will in its entirety, the court should not declare them void.

[21] It is more reasonable to conclude, that the testator, in using the term "*estate*" intended that his heirs (being minor children at the time) should take the said properties when they were mature and capable of doing so, which in the testator's eyes was at the age of twenty-one years.

[22] If this natural meaning is ascribed to the words, it would mean that the testator has simply given direction relating to the manner in which his properties are to be handled without dictating who his beneficiaries will be. In this regard, he would have abdicated his right to determine the recipients of his bounty on death (i.e. his beneficiaries) and would have allowed for the succession laws of Jamaica to make that determination for him.

[23] The term "*intestate*" is defined in the **Intestates' Estates and Property Charges Act** as including "*a person who leaves a will but dies intestate as to some*

beneficial interest in his real or personal estate." The Act provides the manner in which the estate of an intestate is to be distributed. Section 8 provides in essence, the executor as personal representative becomes a statutory trustee of the indisposed estate and as these assets were not specifically devised or bequeath, they fall on intestacy and must follow the statutory distribution provided for in section 4 of the **Intestates' Estates and Property Charges Act**.

The Defendant's Submission

[24] There is no challenge that the children of Ulysses Buchanan are the beneficiaries under the Will. Also the gift to the deceased's sister the executrix is a valid one. There is a clear intention under the Will to benefit the children as named therein. The Will created a trust. It is submitted that as a result of the encumbrances, on the properties it was not practical for the testator to leave lands to his children as he co-owned these with siblings. Such a direct gift of lands to the children would bring an end to the family partnership business and this would be far from the testator's intention.

[25] In examining the phrase "*return to my estate*", as used in the Will, return means to "*give back*". The term "*estate*", as intended to mean a "*trust*" for his children. This phrase infers that it is the "*estate*" which is the trust.

[26] The elements of trust have been satisfied and clearly expressed. Therefore the certainties of intention to create a trust as to the subject matter and the object being the children and the property being certain has complied with the certainties as required for creation of any trust. An equitable interest can be completely constituted by an assignment of that interest to trustees. Disposition of an equitable interest must be in writing as in this case.

[27] By inference the testator estimates all the value as to his shares in the Family Enterprise and had created a trust for his children to that monetary value. In 1975 the aggregate sum of fifteen thousand dollars ($15,000.00) was a large sum then

and there is no evidence, that the testator had this cash at hand or in the Bank at this time. It is inferred and was a fact that this sum would come from the shares in the family business. The testator directs that these sums were to be paid at age twenty-one (21). He differed payment as his children and beneficiaries were minors at the time of death and the time of the execution of his Will.

[28] In respect of the claim that there was no residue clause in the Will and that therefore whatever property is not specifically disposed of in the Will fails to be distributed as to the children by rules on intestacy, this is not applicable to this Will as the testator clearly did not intend this effect as he stated all remaining cash "*must go the my estate*". It is submitted that cash here is synonymous to money. The court is urged to infer that the monetary shares, which the testator had expressed for his children, could represent the proportion of entitlement under such trust, in view of all the circumstances to hold that there was a valid Will in its entirety and that same was unambiguous and certain and to interpret the said clause to this effect.

Claimants' Response

[29] The claimants are in agreement that a trust was created as the children at the time were minors. It is also agreed that the children are the beneficiaries of the Will. However, there is contention in relation to what constitutes the trust property (the corpus of the trust) and how the trust is to be constituted and administered.

[30] The testator exhibited great business acumen and mental intelligence during his life time and had he meant for his children to be supported from monies accruing out of a joint business arrangement, he would have clearly stated so in his Will.

[31] There is nothing in the Will to support that the testator intended for these funds to be paid from any business between the testator and his siblings. The Will clearly shows that the testator only gave thought to the assets that he was competent to dispose of.

[32] The use of the word "*share"* signifies the testator's appreciation that his interests in the properties were not absolute but was partial in nature, that is, as divisible one-half interest in Spring Valley and Glascow properties and a shareholding interest in the Kings Valley property.

Discussion

[33] Mr. Ulysses Buchanan, died some thirty-five (35) years ago. During his lifetime he acquired several properties some of these properties were jointly owned with his brothers, or through his majority shareholdings in registered companies in whose names the lands were owned. Mr. Buchanan successfully negotiated several loans, on these properties in pursuance of his business interest. He appeared prudent, a fact borne out by his making his Will at a relatively young age. His main focus of concern was his three minor children, who it appears he was totally responsible for their maintenance and support, and his sister the executrix.

[34] It was against this background that Mr. Buchanan sought legal counsel, of Mr. Headly Cunningham, leading Counsel in the preparation of his Will. Cheshire and Burns in **Modern Law of Real Property**, tenth edition, defines a Will thus; "*A will is a declaration made by a testator, in the form required by law, of what he desires to be done after his death.*" This is particularly so in relation to the disposition of property. The most important consideration, is that at the time of making his Will, his three children are lacking in capacity to take a legal estate in land. He however, deals with the attainment of their legal age, by the making pecuniary bequests to them on the occasion of their majority. The testator then looks at the eventuality of each child dying before attaining their majority and disposes that in such a case, the sum allotted to the child should be returned to the estate of Ulysses Buchanan. The final sentence directs, "*all remaining cash must go to my estate."*

[35] In respect of his disposition of land, his sole absolute gift, is to Jean Hall, the property being Malcolm Heights, all other properties, "*must go to my estate*." The Court has been urged by the defendant to accept a meaning of '*estate*" which is a reference to the business that the deceased shared amongst himself and his siblings. The only property with a shared interest is King Valley, which is part of a registered company. The testator's language isolates his property from any joint ownership with his siblings. Both sides have agreed that, '*the children are the beneficiaries under the will*." The parties in this case are far apart in the interpretation of the intention of the testator in his Will. The testator in his Will made reference to his estate, but it is not clear as to what he meant by his estate. The issue before the court is to determine the meaning and the intention of the deceased from the use of the following words and/or phrases;

a) "*Must go to my estate*" in clause 1, line 5 of the Will.

b) "*The sum allotted to the individual must be returned to the estate of the said Ulysses Buchanan*" in clause 4, lines 2 and 3 of the Will.

c) "*All remaining cash must go to my estate*" in clause 4, line 3 of the Will.

[36] The principle of law in interpreting a Will is well established. In construing a Will the court has to discover the intention of the testator as expressed in the Will, reading the Will as a whole. In **Perrin v Morgan**, Lord Romer highlighted at page 420;

> *"I take it to be a cardinal rule of construction that a will should be so construed as to* ***give effect to the intention of the testator, such intention being gathered from the language of the will read in the light of the circumstances in which the will was made****. To understand the language employed the court is entitled, to use a familiar expression, to sit in the testator's armchair. When seated there, however, the* ***court is not entitled to make a fresh will for the testator merely because it strongly suspects that the***

> ***testator did not mean what he has plainly said****."* **[Emphasis Added]**

[37] In a similar vein, Viscount Simon L.C. agreed with the statement of Lord Romer. He opined at page 406 in **Perrin v Morgan** that;

> *"The fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended. The question is not ... what the testator meant to do when he made his will, but what the written words he uses mean in the particular case—what are the '**expressed intentions' of the testator**." **[Emphasis Added]***

[38] As such a court of construction cannot rewrite a Will. It has been urged on the Court, to hold that the phrase "*to return to my estate*" should be construed to mean that the property was to go to the testator's heirs or next of kin and accordingly, that the devise was a valid one. The difficulty, I find with such a construction, is that the deceased used expressed and absolute words to convey the property at Malcolm Heights to his sister Jean Hall. Why should the disposition to his heirs be less expressed and absolute? The court cannot "*speculate upon what peradventure may ... have been in the testator's mind; [the court] must find words which are absolute and express*," per Lord Halsbury L.C; **Scale v Rawlins** [1892] A.C. 342 at p.343). Similarly, according to Jenkins L.J. in **Re Bailey** [1951] Ch. 407 at page 421;

> *"It is not the function of a court of construction **to improve upon or perfect testamentary dispositions.** The function of the court is to give effect to the dispositions actually made as appearing expressly or by necessary implication from the language of the will applied to the surrounding circumstances of the case."* **[Emphasis Added]**

[39] In **Williams of Wills**, 7th Edition, (1995) it is made clear that the words used by the testator are to be given their ordinary grammatical meaning. Therefore, the words will not be given; "*an artificial, secondary, or technical meaning*" without

the applicability of the ordinary meaning being demonstrably wrong. (**Williams on Wills**, see page 522.)

[40] However, where the word or phrase has more than one ordinary meaning, the court in **Perrin v Morgan** noted that the meaning intended by the testator is ascertained by a consideration of all the terms of the Will. Lord Romer at page 421 of the judgment stated;

> *"Rules of construction should be regarded as a dictionary by which all parties including the court are bound, but the court should not have recourse to it to construe a word or phrase until it has ascertained from the language of the whole will read in the light of the circumstances whether or not the testator has indicated his intention of using the word or phrase otherwise than in its dictionary meaning—whether or not, in other words ... the testator has been his own dictionary."*

Meaning of Estate – Ordinary Meaning – Dictionary Meaning.

[41] According to **Black's Law Dictionary,** 9th Edition, "estate" means the amount, degree, nature and quality of a person's interest in land or other property; especially a real estate interest that may become possessory, the ownership being measured in terms of duration.

The second definition is all that a person or entity owns including both real and personal property.

The third definition is the property that one leaves after death; the collective assets and liabilities of a dead person.

[42] The testator's usage of the term "*estate*" throughout the Will appears to have the same meaning. That meaning to my mind accords with the second definition in **Black's Law Dictionary**, and constitute a pool or destination of all that the testator owns. That property he has encircled and marked, *"my estate"*. He does not make any disposition from that pool, he ensures however that all his other

properties and remaining cash must reside there. The testator, to my mind has separated his property both real and personal, from any bequests that he has made. He has made provision for the return of remaining cash '*to my estate'*, and for all other property, "*must go to my estate".*

[43] The claimant has submitted that the word "*estate"* may refer to a natural person. It may very well, have that meaning based on the context within which it is used. In two American authorities rehearsed before us, the court held that the phrase "*my estate*" was properly construed in relation to natural persons. It is agreed that it is not unnatural to construe the meaning of estate in this manner. But was this the meaning the testator intended, reading the Will as a whole? The ordinary meaning of a word is to be examined firstly. I cannot accept that the term, "*return to my estate*", means that the property was to go to the testator's heirs or next of kin and accordingly, that the devise was a valid one.

[44] I find that the clauses containing the disputed terms are void for uncertainty and accordingly, a partial intestacy is declared. A Partial intestacy arises where the deceased effectively disposes of some, but not all, of the beneficial interest in property in a will (See; **Re Thornber** [1937] CH 29).

[45] Having carefully read the Will, and having looked at the various definitions of the word "estate", the ordinary meaning of "*estate*" is any real or personal property owned by an individual. In general, the collective assets and liabilities of a person. The word estate also refers to an interest in property, real or personal.

[46] I cannot agree with the claimant, that using the term "*estate"* the testator intended the properties to be given to his heirs. In the context of the Will, the testator made specific bequest to his children, in the form of monies, and devise to his sister, in the form of a property, Malcolm Heights.

[47] In the last clause of the Will the testator provided that in the event any of his children dies before attaining the age of twenty-one, the money specifically

bequest was to return to his estate. Additionally all remaining cash was to return to his estate. These are clear expressions of the testator, hence no ambiguity.

[48] There is no properly constructed residuary clause in this Will and as such there is no residuary beneficiary or legatee. It is quite uncertain how the residuary estate is to be distributed. Reading the Will as a whole, the court is not convinced that it was the intention of the testator that the remaining estate was to go to the testator's children or siblings in their joint business. In the absence of a clear and proper residuary clause, the estate not devised must be subjected to the law of intestacy pursuant to the **Intestates' Estates and Property Charges Act**.

Presumption against intestacy- Doubtful cases

[49] The presumption that the testator did not intend to die either totally or partly intestate, is rebutted on a fair and reasonable construction, that there is ground for a contrary conclusion that he intended to die partially intestate (See; **Re Harrison, Turner v Hellard** (1885) 30 Ch D 390 at 393, per Lord Esher MR;

> *"There is one rule of construction, which to my mind is a golden rule, viz, that when a testator has executed a will in solemn form you must assume that he did not intend to make it solemn farce – that he did not intend to die intestate when he has gone through the form of making a will.*

You ought if possible, to read the Will so as to lead to a testacy, not an intestacy (See; **Re Johnston** (1982) 138 DLR (3d) 392 at 400).

[50] In order to avoid the intention of intestacy found in a Will, the court would be forced to give an unnatural meaning to the words or construe plain words; "*must go to my estate*", "*the sum allotted to the individual must be returned to the estate of Ulysses Buchanan*" and "*all remaining cash must go to my estate*", otherwise than according to their plain meaning (**Re Mc Ewen Estate** (1967) 62 WWR 227).

Intestates' Estates and Property Charges Act

[51] According to Section 2(1) of the **Intestates' Estates and Property Charges Act**, a residuary estate means every beneficial interest (*including rights of entry and reverter*) of the intestate in real and personal estate, after payment of all such funeral and administration expenses, debts and other liabilities as are properly payable thereout, which (*otherwise than in right of a power of appointment*) he could, if of full age and capacity, have disposed of by his Will.

[52] Section 4(1) of the Act outlines how a residuary estate is to be distributed according to the table of distribution therein. Additionally, Section 8 of the Act provides;

> *"Where any person dies leaving a will effectively disposing of part of his property this shall have effect as respects the part of his property not so disposed of subject to the provisions contained in the will and subject to the following modifications;*
>
> *(a) the requirements as to bringing property into account shall apply to any beneficial interests acquired by the surviving spouse and any issue of the deceased under the will of the deceased, but " not to beneficial interests so acquired by any other persons:*
>
> *(**b) the personal representative shall, subject to his rights and powers for the purposes of administration, be a trustee for the persons entitled under this Part in respect of the part of the estate not expressly disposed of unless it appears by the will that the personal representative is intended to take such part beneficially."*** **[Emphasis Added]**

[53] The court is not convinced that the word "*estate*" refers to the deceased natural children. The said provisions under the deceased's Will is declared void for uncertainty and accordingly, a partial intestacy is declared.

[54] It is the court's conclusion that the testator intended to create a residuary estate, but omitted to outline how it was to be disposed of. A residuary clause distributes all of the testator's property that is not disposed of in other clauses of the Will.

There is some amount of uncertainty and as such the court declares a partial intestacy and orders that the parts undisposed of by the Will be subjected to the provisions of the **Intestates' Estates and Property Charges Act**.

Costs to be paid out of the Estate of Ulysses Jabez Buchanan.