IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 1992/P-616

BETWEEN	VIOLET NICHOLAS	CLAIMANT
AND	WILBERT ELLISTON	DEFENDANT

Mr. Keith Brooks for the claimant.

Mr. John Graham and Ms. East instructed by Arthur Williams & Co. for the defendant.

Original Will not found – last seen in possession of testatrix – was Will destroyed animo revocandi – whether the testatrix was of sound mind, memory and understanding – onus on propounder to prove testatrix of sound mind. Will itself may determine the mental capacity of the dispositive mind – onus on propounder to rebut presumption of Will destroyed animo revocandi.

Heard the 22nd and 23rd July 2008, 12th November 2010 and 8th April 2011

Campbell, J.

(1) Ms. Tryphena Agatha Gordon, died on the 26th May 1991, aged 89 years. She had, during her life, taught at the Kingston Technical High School. Her husband, who had predeceased her by some twenty years, was a former Registrar of Births and Deaths. The union had produced no children; however, she had provided a home for many children over the years. Some of these children were relations of herself and her husband's family. Towards the end of her life, she suffered a stroke and displayed behaviour which was inconsistent with her former self.

(2) Mrs. Gordon had executed three Wills, the earliest in 1971, another on the 1st April 1988 and finally on the 11th October 1990. In her Will of 1988, she had bequeath her only realty, her residence situated at 18 Upper Montrose Road to the claimant and Edna Virtue, her neices, as

joint tenants, subject to them performing certain pecuniary duties within six months of her death. She subsequently, on the 11th October 1990, executed another Will, giving a life interest in the property to a Charles Mattis, who is described as a brother and after his death, the remainder to his nephew, the defendant in the matter.

(3) After her death, no original Will was found, the two later wills surfaced. The nieces, named as executrices under the first of these two Wills, applied for Letters of Administration in the matter. Charles Mattis lodged a caveat against the grant. Edna Virtue lodged a warning to the caveator, to state his interest in the estate of the deceased. In his appearance, Mattis was described as the lawful brother of the deceased and one of the beneficiaries under the Will. On 11th November 1992, the deceased's nieces filed writ and statement of claim, and alleged at paragraph 3 of the statement that "the deceased was not survived by any brothers or sisters," but was predeceased by a sister, Ida Irene Richards who left issue, who was the claimant in the matter; and at para 12. "No last Will and Testament was found after her decease for the said Tryphena Agatha Gordon and in consequence, thereof, the said Edna Virtue has made application by Suit No. 616 of 1992, filed in the Registry of this honourable court for a grant of Letters of Administration to the estate of the said deceased and I will refer to and rely on the said application."

(4) In the defence, Charles Mattis contended, he is a lawful brother of the deceased, and that one Lilian Richards Thompson is also a lawful niece of the deceased. He alleged that neither he nor Lillian Thompson had given consent to the grant of Letters of Administration. The defendant counter-claimed that the deceased duly executed her last Will dated the 11th October 1990, with the claimant named as executrices. It was contended that the 1990 Will is valid and

(5) At a case management on the 29th November 2006, the applicant, Wilbert Ellison, was added. Edna Virtue claim was struck out, on her death. The evidence of Charles Mattis was taken to be used as Witness Statement in this matter. The amended particulars of claim stated that Lillian died on 21st July 2000, survived by her child Mellisa Thompson, and said no other persons were entitled to a share in the estate, save and except the said Mellisa Thompson and Beverley Richards-Cruickshank.

(6) In the defence to the counterclaim, filed May 2007, it was alleged that if the deceased executed the Will dated the 11th October 1990, it was last in her possession and was not found at her death, and it would be contended that the Will was destroyed by the deceased *animo revocandi*. Further, that Will was made when the deceased was not of sound mind, memory and understanding.

Claimant's Submission

(7) The claimant's submissions proceeded in the following manner. Firstly, it was argued that the deceased died intestate; no last Will and Testament having been found on her death. The claimant, as her niece, is entitled to a grant of Letters of Administration. On an intestacy the onus passes to the defendant to show why Letters of Administration should not be granted. That the defendant has no answer to her claim, but seeks to avail himself of a defence that would be available only to Charles Mattis, if Charles Mattis were in fact a brother of the deceased. The submission proceeded that the defendant is unable to establish a father son relationship between the father of the deceased and Charles Mattis. That even if there was a last Will, it was not made whilst the deceased was of sound mind. Further, the last Will was traced to the hand of the deceased and was not seen after her death, it therefore raises the presumption that the Will has been destroyed animo revocandi, the consequence is that any duplicate is also revoked.

Defendant's Submission

(8) The defendants argued that Mr. Charles Mattis, the brother of the deceased, was given a life interest in the property, while Mr. Wilbert Elliston was given a remainder interest. The original Will cannot be found but the contents are contained in a photocopy that was executed by the deceased at the same time as the Will. The defendant contends that the Will was never revoked or destroyed. That the defendant seeks that the contents be proved in solemn form.

(9) The issues are: (a) Whether the Will dated 11th October 1990, was duly executed and is a valid Will. (b) On the facts of this case, does the presumption arise that the Will was destroyed by the deceased animo revocandi, having been traced to the hands of the testator, not found after death.

(10) **Was the Will of 1988 revoked by the second Will**?

The evidence of Debra McDonald, attorney-at-law, was that in October 1990 she was requested by Charles Mattis to meet with the deceased who wished to make her Will. She went to the home of the deceased, prepared a draft Will in accordance with the deceased instructions and gave it to the deceased who confirmed that the Will was in order. On the 11th October, she returned to the home of Mrs. Gordon with the completed Will. She read it over to Mrs. Gordon, who confirmed that it was in accordance with her instructions. She signed and it was witnessed by her secretary who had accompanied her. She identified a photocopy of the Will that the testator had signed. In cross-examination, she said she did not know that the deceased had made a previous Will and did not remember being shown a Will dated 1st April 1988. Her practice was to make two copies of the Will along with the original. She was of the view that she had left one with Ms. Gordon. Of this evidence, Mr. Brooks argued that no one had seen the copy Will after it was given to Mrs. Gordon. Ms. McDonald's evidence has not been challenged in any material particular.

(11) Questions were raised as to whether Ms. McDonald had sight of the previous Will dated 1st April 1988, because of the similarity between the Wills in many areas. The main area of departure was the disposition of the only freehold property to Charles Mattis instead of the claimant and Edna Virtue. The October 1990 Will recited the sum of money to the same persons, except for Charles Mattis, who in the latter Will received no money. It is noteworthy that Mr. Mattis name appears in the earlier Will as residing at the home of the testatrix. Mr. Mattis' evidence was to the effect that he was the brother of Ms. Gordon, that assertion was not challenged in cross-examination. In the Will of October 1990, the testatrix describes Charles Mattis as her brother.

(12) The defendant has discharged the onus placed on him to prove the existence of the Will of October 1990, which was duly executed. See **Delaphena & Others** (1985), 2 JLR. 13, which quoted with approval the dictum of Dr. Lushington in **Cutto v Gilbert** (1854) 9 Moo P.C. 130, "We agree in the position laid down at the bar that the onus probandi lies upon her, she must prove the execution of the subsequent Will, and establish her position at all that it is a revocation." I find that the Will was duly executed. I accept the evidence of Debra McDonald that the deceased had instructed her to draft the October 1990 Will, which she did and the deceased duly executed same.

Whether the testatrix was of sound mind, memory and understanding

(13) The claimant sought to impugn the validity of the Will by saying that it was not made at a time when Mrs. Gordon was able to understand its true import and implication, and so was, therefore, invalid and should not be admitted to probate. It was submitted that where a Will is rational on its face and is duly executed, it is presumed that the testatrix was sane at the time she

made her Will. Where questions are raised to contest the sanity of the testatrix, the onus is on the person propounding the Will to prove that the testator was of sound mind.

(14) A part of the challenge to the deceased's mental state was that the property was being given to someone described as a nephew, and the claimant, despite her close association, did not know the testatrix to have any nephews. Further, she thought that the change brought about by the new disposition to Charles Mattis warranted new arrangements being made with the claimants in their capacity as trustees to give effect to those new terms. The failure of the testatrix to advise them of the new terms was the source of concern. The close relation that the nieces enjoyed with the testatrix, according to the claimant, would result in a different treatment than what was conveyed under the 1990 Will. The claimant states the deceased was not able to remember common things and that her thoughts wandered.

(15) The evidence of Dr. Richards was important in this area. He was a neuro-surgeon, but had not examined the testatrix, whom he had known for several years, she being a person with whom he communicated regularly. He had noticed that in telephone conversations with the testatrix, she had cried and laughed inappropriately. Around September 1988, she had suffered a medical catastrophe and it appeared to have affected her mental abilities. Dr. Richards reports that she appeared to have a difficulty speaking and she would repeat the same facts over and over. She was tearful and frightened. Later when he saw her, she appeared less agitated and anxious. However, she had become paranoid; she thought persons were "obeahing" her. Dr. Richards testified that this was unlike the wise, generous, meticulous person that he had known. He saw her several times before her death, she became a bit more cheerful and her optimism increased, but never to pre Gilbert mental attitude or clarity. Dr. Richards opined that at the

Richards testified that this was unlike the wise, generous, meticulous person that he had known. He saw her several times before her death, she became a bit more cheerful and her optimism increased, but never to pre Gilbert mental attitude or clarity. Dr. Richards opined that at the time the will was made "I was noticing signs of senility or psychosis in her demeanour and actions.

(16) It was not enough to show the testator was not of sound mind. We are aware that Dr. Richards did not have the benefit of any diagnostic tests on the testator. If she had been mentally incapacitated, would we expect that she would have received some medical attention? It is clear from the evidence that she was being attended by a Dr. Velma Nicholson, who appeared to be on call. What is required in law is a demonstration that the testatrix's mental capacity was so reduced that she was unable to appreciate the testamentary act in all its bearing. In **Banks v Goodfellow** 5 QB 549, the court held,

> "The alleged misdirection is that the learned judge, in leaving to the jury the question whether at the time of making the will the testator was free from delusions, did not proceed to tell them that though the delusions, under which the testator had undoubtedly before labored, might not have been present to his mind at the time of making the will, yet, if they were latent in his mind so that if the subject had been touched upon, the delusions would have recurred, he was of unsound mind, and therefore incapable of making a will."

(17) The evidence of Debra McDonald and Wilbert Elliston do not indicate that there was any manifestation of mental incapacity either on the reception of instructions or the execution of the Will. Dr. Richards did not examine the testatrix; neither was any tests done on her. I find that the testatrix was not mentally unsound or incapacitated, that the propounders of the October Will have discharged the burden that the testator was of sound mind when the Will was made. I find support for so finding by an examination of the acts of the testatrix in disposing of the property.

(18) However, it may be determined from the Will itself, the mental capacity of the dispositive mind. The beneficiaries under the October 1990 Will were identical to the 1988 Will. Dr. Richards has testified that it was post 1988 that his observations of mental deterioration were first observed. There has been no complaint as to accuracy of the descriptions of the beneficiaries or of their suitability save for the defendant to be devisee under the Will. The accounts and the banking institutions from which the funds were to be taken have not been criticized for being inconsistent or non-existent.

(19) The disposition to Charles Mattis, instead of the claimant and Edna Virtue, is a rational change which recognizes the closer relationship with her brother. The allegation that her brother was not known to the claimant is not to my mind surprising. Charles Mattis was a product of an out of wedlock relationship between her father and a woman who was not the deceased's mother. Such relationships were and still are not usually disclosed even to close family members. It is not irrational for her to feel that, albeit, a half brother, he was closer to her than her nieces. The death notices drafted by Edna Virtue acknowledged that the testatrix was survived by a brother, Charles.

(20) Dr. Richards had indicated that the testatrix had suffered a "catalytic medical event." The defendant appeared to have been close to the testatrix during that period. This is evidence in his being asked along with his uncle Charles, to accompany her to the bank along with Edna Virtue (Aunt Edna) and his managing the affairs of the property for the testatrix. It is unchallenged that the management of the property was a vexing problem for the testatrix according to the testimony of Dr. Richards. The defendant's assistance in obtaining repairs and in the collection of rental and the lodging of those rental in her accounts would have been appreciated by the testatrix. This appreciation was further demonstrated by her calling him over almost everyday "to

demeanour or action. The evidence of Debra McDonald is to the effect that she was lucid and clear.

(21) In **Banks v Goodfellow** (supra) the court relied on **Cartwright v Cartwright** 1 PHILLIM 90, for the effects of lucid moments at the time of execution of the Will, in a testator who had manifested mental unsoundness. Cockburn CJ, said at page 557.

> "The case is a remarkable one from the fact that the will had been made by a person actually confined in a lunatic asylum who was undoubtedly insane both before and after the making of the will; nevertheless it was upheld."

The judgment quoted with approval the learned trial judge, "I think the strongest and best proof that can arise as to the lucid interval is that which arises from the act itself that I look upon as the thing to be first examined, and it can be proved and established that it is a rational act rationally done, the whole case is proved."

(22) I find that the acts that constituted the making of the will are rational acts rationally done. In respect of Charles Mattis, her sole survival sibling, the acts are explainable, based on ties of his being a half-blood brother and the natural friendship which existed between them. In respect of the defendant, it is not only that the defendant was her brother's nephew, the acts are also explainable as an act for rewarding his "dutiful and meritous conduct" which is unchallenged before the court.

(23) Mr. Brooks has argued that, even if the court should find that a duly executed Will was made in October 1990, it has been traced to the hands of the testator and has not since been found after her death, therefore there arises a presumption that the Will has been destroyed *animo revocandi* by the testatrix herself. The evidence of Ms. McDonald was that she made several copies of the Will which were all signed by the testatrix, she may have given a copy to

Ms. Gordon. It was also the evidence that the testatrix had taken a copy of the Will to her safety deposit box. The testatrix was the last person to enter the safety deposit box before her death. The safety box was next accessed after her death when the records indicate that Ms. Virtue accessed the box. No copy was then found. On these facts, Mr. Brooks submitted that this may mean that the document that Elliston testified was placed in the safety box was not her Will and the deceased must have removed it. This, according to Mr. Brooks, raises the presumption against fraudulent abstraction by another person in cases of this type. Both sides relied on the principle enunciated in the Privy Council case of **Allan v Morrison** (1900) 1 A.C 604, an appeal from the Court of Appeal in New Zealand, affirming the decree of the Supreme Court. The appellant, an executor of a Will had propounded the draft of a Will and claimed it be probated in solemn form until the proper Will should be found. In dismissing the appeal, the Privy Council held at page 610.

> "It is not denied that a presumption (to use the language of Lord Wensleydale in Wech v Phillips, 'that if a will traced into the possession of the deceased and last seen there is not forthcoming on his death, it is presumed to have been destroyed by himself: and that presumption must have effect unless there is sufficient evidence to rebut it."

(24) It was accepted that the onus was on the propounder of the copy Will to rebut the presumption. In order to rebut the presumption, it is not enough to rely on acts of a party other than the testatrix. Some act of the maker of the Will, which is inconsistent with his having destroyed his Will must be put in evidence. Mr. Brooks submitted that since there was a presumption against fraudulent abstraction or spoliation, it cannot be stated or alleged that the Will was destroyed by some other person other than the testatrix. In Calvin Fraser, the principle was stated thus at paragraph 330, "The main question of fact to be examined is, by whom was this Will destroyed? Prima facie, by the deceased

himself, who was in possession of it: and the executor letting up the duplicate must, as I have said, shown either by direct positive evidence or by circumstances, producing a strong moral conviction that it was not done by the deceased,"

(25) The strength of the presumption will be affected by the testatrix's custody of the Will. It was accepted that the testatrix had a safety deposit box number 1257 at the Bank of Nova Scotia. The box was in the name of the testatrix and or Edna Virtue. The bank, in their letter, confirms that the testatrix had access to the safety deposit box after the Will had been signed, on two dates, the 23rd and 30th October 1990. Edna Virtue visited the box on the 30th October 1990, on three occasions. The evidence which is unchallenged is that the testatrix had taken the Will to the safety box. The visit of the testatrix to the safety box was with the express purpose of depositing the cheque therein. The bank wrote on the day following that part contents of the safety deposit box was left in error in the office. Because the contents were in a sealed envelope the bank was unable to say what those 'contents' consisted of. The bank's letter precipitated the visit of the testatrix to the bank on the 30th October 1990. The presumption of destruction of the Will will be weakened by the steps taken by the testatrix to secure the Will. One takes into contemplation her age, the fact that in the provision of the instruction to the attorney, on both occasions, she was in bed; the unchallenged evidence that the reason for both visits was to deal with the question of the Will. Although Elliston had asserted that he called the bank and he was advised that the Will had been left outside, his testimony conflicts with the response of the bank that they were unable to say what was in the envelope. What was not challenged however is Ellitson's assertion that the deceased and Edna Virtue had both answered yes to his question as to whether they had put the Will in the box. The testatrix never accessed the box again.

(26) The declaration of the testatrix that she was leaving the property to him when she died was just prior to accessing her safety box to deposit the Will. There was no challenge to this evidence. The good relations that had predated the signing of the Will continued up to her death, the defendant remained helpful to the testatrix as evidenced by his being present on both occasions that she visited the bank after the signing of the Will. The question I ask myself, she having given those instructions, seven months before her death, what acts did she perform to indicate that she had not changed her dispositive mind? Are there acts of the testatrix which are inconsistent with her destroying the Will? I find that this declaration, which is unchallenged, is inconsistent with her destroying the Will. I find that the testatrix and Edna Virtue's answer to defendant that they had put the Will in the box, in circumstances where the testatrix was not to visit the box again, is inconsistent with her destroying the Will.

(27) The character of the testatrix was contrary to the presumption. All the witnesses speak of the character of the deceased, a retired teacher; as being meticulous, organized, intelligent and wise. She understood the importance of a Will, the Will of October 1990, being the third Will that she had made. Dr. Richards, her life long confidante, says in cross-examination, he would find it strange that such a business-like person would want to die without making a Will. It would be out of character based on the evidence I have before me for her to be holding out herself as having made a Will, and make a number of bequests to her church, school and persons with whom she had enjoyed cordial relations then, for no reason that has been rehearsed before us, destroy the will, thereby dying intestate.

The court finds that:

(a) The deceased duly executed her Last Will and Testament dated October 11, 1990.

(b) The plaintiffs were appointed the executrices and Trustees of the said Will.

(c) The defendant was one of several beneficiaries under the said Will

(d) The said Will was never revoked or destroyed by the deceased or by any other person in her presence and/or by her direction with the intention of revoking same, but was at the time of her death a valid and subsisting Will, but the same cannot now be found.

(e) The contents of the said Will are contained in a duly executed copy thereof which was executed by the deceased at the same time as the said Will.

(f) When the testatrix duly executed her last Will and Testament on October 11, 1990, she was of sound mind, memory and understanding.

Judgment for the defendant on the claim and counterclaim. I make the following orders:

1) That the court pronounces in solemn form of law for the contents of the Will and Testament dated 11th October 1990 of Tryphena Agatha Gordon as contained in the duly executed copy which was executed at the same time as the original will.

2) Probate of the said copy is granted to the claimant, Violet Nicholas, the executor named therein.

3) Costs of both parties to be raised and paid out of the estate of the deceased.