

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO P. 075 OF 1994

BETWEEN	BEVERLEY MONCRIEFFE	1 <sup>ST</sup> CLAIMANT
A N D	WINSTON McKENZIE	2 <sup>ND</sup> CLAIMANT
A N D	KEITH GRACEY	DEFENDANT

Mr. Walter Scott for Claimants instructed by Mr. Carl Dowding of Pickersgill, Dowding and Bailey-Williams.

Miss Sandra Johnson for Defendant instructed by Sandra C. Johnson & Co.

Will – Application to admit copy will to probate – Whether will executed by deceased – explanation of absence of original –allegation of the existence of a later will – whether earlier will revoked - writing appearing on a page subsequent to the testatrix’s signature – effect of

**BROOKS, J.**

12<sup>TH</sup>, 13<sup>TH</sup> and 19<sup>TH</sup> April and 3<sup>RD</sup> MAY, 2007

Miss Iris Owen died on 13<sup>th</sup> February, 1991. She is survived by her son Mr. Keith Gracey, who is her only surviving immediate family member. She however was apparently a very kind person during her lifetime, as she fostered a number of other children, some of whom were in unfortunate circumstances. Two of those were brothers, Winston and Delroy McKenzie.

On or about November 1, 1988, Miss Owen executed a will. That very day, she is said to have deposited that will with a bank, for safekeeping.

Shortly before her death, Miss Owen gave Mr. Gracey a note to collect the will from the bank. He says that he did so, but subsequently lost it.

Mr. Winston McKenzie and Mrs. Beverley Moncrieffe have brought this claim asking the court to admit to probate what they say is a copy of the will executed by Miss Owen on 1<sup>st</sup> November 1988. Mr. Gracey contests the application on the basis that the document sought to be proved is not a copy of the will which he collected from the bank. The propounded copy names Mr. Delroy McKenzie and Mr. Gracey among the beneficiaries of her estate. If it is not admitted to probate, the estate would all go to Mr. Gracey on the basis that Miss Owen died intestate.

The issues for the court are whether the original of the document exhibited in court was in fact executed by Miss Owen, whether the execution was in accordance with the requirements of the Wills Act, whether sufficient explanation has been given for the absence of the original, and whether this will was renounced by a later will. Some five witnesses testified and the issue of credibility also arises to be resolved. The credibility issue will be addressed during the assessment of the previously mentioned issues.

#### **Was the document executed by Miss Owen?**

The main evidence concerning the execution came from the two attesting witnesses to the propounded will, Mrs. Beverley Moncrieffe, who

is also named therein as an executor, and Mr. Austin Hemmings. Mr. Hemmings testified that Miss Owen requested him to prepare her will for her and that he did so, on her instructions. He said that Miss Owen had attended his office premises along with Mrs. Moncrieffe, but that Mrs. Moncrieffe remained outside of his actual office while he wrote out the will. Mrs. Moncrieffe was then invited into the office. At his direction, Miss Owen signed the document in the presence of Mrs. Moncrieffe and himself and Mrs. Moncrieffe signed the document when he placed it before her. He signed the document thereafter. He stated that the document produced to him in court was a copy of the will that he had prepared and signed. He said, "[t]his document is precisely what I was asked to write by Miss Owen". The document was admitted in evidence as Exhibit 1.

During the course of cross-examination Miss Johnson, appearing for Mr. Gracey, showed Mr. Hemmings a piece of paper. He agreed that he had written his name on that paper but denied that he had done so at the request of Mr. Gracey and a Miss Daphne Gordon. He denied that he was visited by the pair and had told them that Exhibit 1 was not the document he had prepared for Miss Owen. He was unable to explain how it was that this paper came into the hand of the defence, but emphatically denied that he had had any conversation with Mr. Gracey and Miss Gordon. He admitted that

he had seen Miss Gordon before attending court, but that this was in and around the town of Saint Ann's Bay, where his offices were.

The second attesting witness was Mrs. Moncrieffe. She corroborated Mr. Hemmings on the fact of the execution by Miss Owen. Her account was however a little different from his. According to Mrs. Moncrieffe, while she was at work at the St. Ann's Bay branch of the Bank of Nova Scotia on November 11, 1988, she received a telephone call from Miss Owen. Miss Owen made a request for Mrs. Moncrieffe to come to the Credit Union's office (where Mr. Hemmings worked) to witness her signature. Mrs. Moncrieffe testified that she knew Miss Owen before that date as she was a regular customer at the bank's branch and also because Mrs. Moncrieffe usually bought animal feed from Miss Owen's business establishment.

Mrs. Moncrieffe said she treated the call as urgent, because she knew that Miss Owen would have wanted to go back to her business place. Mrs. Moncrieffe testified that when she got to Mr. Hemmings office she waited outside for a while and then she was called in. In her witness statement Mrs. Moncrieffe said:

"(5) Ms. IRIS OWEN (deceased) then signed the Will in the presence of Mr. Hemmings and myself. Thereafter, Mr. Hemmings and I signed as witnesses."

In cross-examination Mrs. Moncrieffe said:

"Having waited, eventually I was called in into the office area and I was told that Miss Owen had done her will. The piece of paper was like that (demonstrates) and her signature was there.

"Miss Owen asked me to sign.

"The deceased covered up the will and asked me to witness her signature.

"I did so.

"When I signed the document Miss Owen had already signed. Her signature was already there when I was asked to sign. I did not actually see Iris Owen sign. I do not know whether the document had Mr. Hemmings' signature at the time that I signed, I only saw Iris Owen's signature at the time."

She then described her familiarity with that signature.

Mrs. Moncrieffe went further than testifying about the execution. She says that Miss Owen attended the bank later that very day and lodged there, for safekeeping, an envelope which Mrs. Moncrieffe assisted in placing in safe custody. She testified that the envelope had written on it "This is the last will and testament of Iris Owen". She however did not see the contents.

There were some areas of discrepancy between this testimony and Mr. Hemmings'. The first concerned whether the two ladies went to Mr. Hemmings' office together; the second was whether Miss Owen signed in Mrs. Moncrieffe's presence or merely indicated her signature on the page; the third was whether Miss Owen looked well or seemed to be ailing at the time of execution. I take into account that these events occurred almost twenty years ago and that memories could have faded in the interim. Neither witness was shaken in cross-examination and both gave credible accounts of the events at the Credit Union.

The evidence of the attesting witnesses is supported to some extent by Mr. Winston McKenzie, who testified that he accompanied Miss Owen to Mr. Hemmings' office at the Credit Union. He says that he sat on the outside while she went in. He further testified that while he waited, Mrs. Moncrieffe came to the office and waited with him until she was called in by Mr. Hemmings. She then went in and left him on the outside. Mr. Winston McKenzie also testified to accompanying Miss Owen to the bank after leaving the Credit Union building. At the bank, he says Miss Owen lodged her will, but he did not see it, and he was not given a copy thereof.

From the various accounts of Mrs. Moncrieffe, Mr. Hemmings, Mr. Winston McKenzie, and that of Mr. Gracey who says that he collected his mother's will from that bank, I accept that Miss Owen did indeed execute a will in the presence of Mr. Hemmings and Mrs. Moncrieffe and later lodged the will in a sealed envelope for safekeeping on that November day.

The question however is whether this document, Exhibit 1 is a copy of the document executed and lodged by Miss Owen. Mr. Hemmings testifies that it is, saying that it is in his handwriting, the contents are as he recorded them on Miss Owen's instructions and that it bears his signature and those of Miss Owen and Mrs. Moncrieffe, as they were affixed that day.

I have noted that neither in his pleadings nor in his evidence has Mr. Gracey asserted that the signature on Exhibit 1 is not his mother's. He has pleaded in the defence filed, that her signature has been fraudulently superimposed thereon. That pleading was not supported by any evidence.

Based on a balance of probabilities I find that the original of Exhibit 1 was in fact executed by Miss Owen as the attesting witnesses have testified before me. Both witnesses held responsible positions at the time of the execution. Mr. Hemmings was the manager of the St. Ann's Bay Credit Union and Mrs. Moncrieffe was secretary to the bank's manager. Mr. Hemmings does not stand to benefit from his testimony in this matter. He may be regarded as an independent witness. Mrs. Moncrieffe, who has since emigrated, could benefit from any executor's commission. Both testified in a credible fashion, with good demeanour and neither was discredited in cross examination. I accept their testimony. I reject the testimony of Mr. Gracey's witness Daphne Gordon, that Mr. Hemmings had denied, in her presence the authenticity of the document. She said that Mr. Gracey was present at the time, yet Mr. Gracey did not speak to the incident, nor was he asked about it.

**Was the execution was in accordance with the requirements of the Wills Act?**

As was indicated above, there was a discrepancy between Mr. Hemmings and Mrs. Moncrieffe concerning whether the latter was present when Miss Owen affixed her signature. Neither of the two versions would affect the validity of the execution and attestation. Neither account describes a situation which runs afoul of section 6 of the Wills Act. That section requires for the validity of the execution that:

“...it shall be signed at the foot or end thereof by the testator, or by some other person, in his presence and by his direction; and such signature shall be made or **acknowledged** by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and subscribe the will in the presence of the testator...” (Emphasis supplied.)

Mr. Scott, acting for Mrs. Moncrieffe and Mr. Winston McKenzie, referred to the case of *Ramsaran v Ramsahai and others* (1989) 26 J.L.R. 92 in support of the principle that where the will contains a proper attestation clause, there is a presumption of due execution of the will, even though the recollection of the attesting witnesses is defective. There is no need to apply that presumption here as I accept that the testimony of both witnesses supports proper execution and attestation.

It is important to note that Mrs. Moncrieffe says that she saw Miss Owen's signature when Mrs. Moncrieffe was invited to sign as a witness. In



the case of *In re Goods of Mary Gunstan, Blake v Blake*, (1882) 7 L.R. P.D.

102, the headnote states:

“To constitute a sufficient acknowledgment...the witness must at the time of the acknowledgment see, or have the opportunity of seeing, the signature of the testator, and if such not be the case it is immaterial whether the signature be, in fact, there at the time of attestation, or whether the testator say that the paper to be attested is his will, or that his signature is inside the paper.”

In the circumstances I therefore find that the execution, as described by the attesting witnesses, was in accordance with the Section 6 of the Wills Act; that is Miss Owen either signed or acknowledged her signature on the document in the presence of both Mr. Hemmings and Mrs. Moncrieffe at the same time and they in turn signed it in her presence and in the presence of each other.

**Is this paper writing the last will and testament of Miss Owen and has a sufficient explanation been given for the absence of the original?**

There may be merit in treating with these two questions together since they arise from the question as to whether the will which was executed on November 1, 1988 was revoked. It should be noted that in the event that the will is deemed to have been revoked and there is no subsequent will forthcoming, this situation results in an intestacy *Cutto v Gilbert* (1854) 9 Moo. PCC 131.

In order to have a copy of a will admitted to probate, in the absence of the original, there must be credible evidence as to, “the will’s existence after

the date of the testator's death or, where there is no such evidence, the facts on which the applicant relies to rebut the presumption that the will has been revoked by destruction". (Rule 68.17 of the Civil Procedure Rules 2002.)

The reason for this requirement is that where a will is known to have been in the possession of the testator and there is no evidence of its having subsequently left his custody, but it cannot be found on his death, there is a rebuttable presumption that he destroyed it with the intention of revoking it. This presumption does not apply in this case as Mr. Gracey was directed by Miss Owen to fetch her will from the bank and that he did so. He did not deliver it to her. He accounts for its absence saying that he lost it. She was, by then, confined to bed by a grave illness and in considerable pain. In fact, she died two days later. It is therefore fair to say, and I so find, that Miss Owen did not destroy the document which was recovered from the bank, either with the intention of revoking it, or at all.

The second aspect raised by this issue is whether Miss Owen executed another will after November 1, 1988. Mr. Gracey testified that Exhibit 1 is not a copy of the document that he collected from the bank on February 11, 1991. His testimony is that on February 12, 1991 he went to his mother's home, with the document in his pocket. At that time he says he had a fight with one of the persons that Miss Owen had fostered. It is when he arrived

at his home later that day that he discovered that his pocket had been torn and the will was missing. It was never found despite his searches.

In speaking to the contents of the document that he says that he recovered from the bank, Mr. Gracey in his witness statement, said as follows:

(3) That the Will I obtained from the aforesaid bank on February 11, 1991 bore a date in December 1988 and Winston McKenzie and S. Wesson were the Executors appointed therein."

(9)...That on collection of the said will I opened the said sealed envelope and observes (sic) that the said Will was witnessed by S. Wesson and Winston McKenzie."

*Williams on Wills*, 7<sup>th</sup> Ed. at page 171 cites the law relevant to lost subsequent wills thus:

"Where a subsequent will is not forthcoming, the person alleging that it revoked an earlier will must strictly prove his allegation and there must be proof of difference of disposition. If the person alleging revocation succeeds there is an intestacy, otherwise the earlier will is entitled to probate."

The cases cited in support of the principle included *Benson and Sankey v Benson* (1870) L.R.. 2 P.& D. 172. In that case, Lord Penzance (at page 176) adopted the principle propounded in *Harris v Berrell* 1 Sw. & Tr. 153 that:

"If it is once proved that a will has been duly executed, ...it is entitled to probate unless it is also shewn that it has been revoked...the burden of shewing that it has been so revoked lies upon the party who sets up the revocation."

In applying that principle, the onus of proving a revocation of the November 1 will lies on Mr. Gracey. However, I reject Mr. Gracey's

evidence that this was not a copy of the document he retrieved from the bank. Although he considered the document an important one, he did not lodge it for safekeeping with anyone, nor did he show it to anyone else. I find that his mere say-so that the will that he recovered was different and later than November 1, 1988 is not credible.

I also find that Mr. Gracey has failed to show that there was a revocation of the November 1 instrument. There is no rule that a testator revokes a previous will by merely making a later one. (*Simpson v Foxon* [1907] P. 54). Section 15 of the Wills Act outlines the circumstances in which revocation will be stipulated.

“15. No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed...”

Mr. Gracey has not said that the document which he recovered from the bank revoked all earlier wills, and he has not testified as to any gift mentioned therein being inconsistent with those mentioned in Exhibit 1. He did plead such differences in his amended defence, but there was no evidence to support the pleading. Finally, Mr. Gracey did not prove the due execution of the later document. He is required to do so as part of the onus which he accepts in seeking to show that the November 1 will was revoked (see *Delapenha and others v Allen and others* (1985) 22 J.L.R. 13). He did

not mention seeing Miss Owen's signature on the document. He did not mention seeing an attestation clause. Mr. Winston McKenzie was not asked whether he had witnessed any will executed by Miss Owen. The other alleged witness, S. Wesson was not produced and his absence was not accounted for.

In this context *Cutto v Gilbert* cited above, is instructive. At page 140, Dr. Lushington said:

The first fact to be proved, is the execution of some testamentary paper; and we here think it right to observe...that where the revocation of an existing Will is sought to be established by the proof of the execution of a subsequent Will not appearing, and where there is no draft or instructions in writing, when such fact is to be proved by oral evidence only, such evidence ought to be most clear and satisfactory; for we concur...that to revoke an existing Will by parol evidence alone that another Will had been executed, is, though the law may admit of it, a course of proceeding not unattended with danger, and, consequently, that such oral evidence ought to be stringent and conclusive."

This passage was cited with approval by Rowe, J.A. at page 24 of the report of the *Delapenha* case cited above.

In light of Mr. Gracey's failure to meet the required standard the November 1 will must be deemed to remain in force.

I now turn to the circumstances of the discovery of Exhibit 1. This document is said to have been found in a metal box in a closet at Miss Owen's home, shortly after her death. Mr. Delroy McKenzie testified that it was he who found the document. The metal box, he said, was where Miss Owen kept all her important documents. The titles for the various parcels of

real estate were kept in that container, as were the birth certificates of all the various children that she raised. Mr. Delroy McKenzie was not shaken in cross-examination and his testimony was given in a clear, credible manner.

Mr. Winston McKenzie, in his witness statement, also purported to testify concerning the discovery of Exhibit 1. He stated therein, that he found a copy of Miss Owen's will in the metal container. When he was cross-examined on the matter, he proved to be less than convincing. He denied having found the copy, but appeared flustered when confronted with the contrary position in his witness statement. He insisted that what was in the witness statement was wrong. I prefer the testimony of Mr. Delroy McKenzie on the matter and I accept it as being truthful.

I accept that Exhibit 1 is a true photocopy of the will executed by Miss Iris Owen on November 1, 1988, and that it should be admitted to probate.

**Words appearing below the signature**

It is to be noted that Exhibit 1, which appears to be a photostatic copy of a printed will form, consists of two pages. Only the first of the two pages bears the signatures of Miss Owen and the attesting witnesses. The second page bears directions to her executors and bequests to a number of persons including Messrs. Delroy and Winston McKenzie. Section 6 of the Wills

Act requires the signature of the testator to be at the foot or end of the will. It goes on to say that, "no signature under this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it...". At page 45 of the 25<sup>th</sup> Edition of *Tristram and Coote's Probate Practice* the learned authors state that words appearing "below the signature will be excluded from the probate, even though there is evidence that they were present at the time of the execution of the will". *In the Goods of Evans* (1923) L.T. 669 is cited in support of the principle. The learned authors continue:

"Where a will is signed at the foot of the first page only, but for lack of space is continued on the next page, the second page will not be admitted to probate unless there is also a reference, above the signature on the first page, to the subsequent portion which effects incorporation of the latter."

In the instant case there is no such incorporation of the second page. Mr. Hemmings testified that although he prepared the will in the form presented by Exhibit 1, he could not account for the absence of an execution of the second page. In the circumstances, and based on the authority cited, the latter page of Exhibit 1 will not be admitted to probate. I should state that there was no contest between the parties concerning this result.

The will has no residuary clause and so any items forming part of the estate which are not dealt with on page 1, will fall to be dealt with on intestacy.

## Conclusion

Based on the evidence presented, I find that Miss Owen executed her last will and testament on November 1, 1988. The execution was in accordance with Section 6 of the Wills Act, and the witnesses were Mrs. Beverley Moncrieffe and Mr. Austin Hemmings. I find that the will was not destroyed by Miss Owen, but was last in the possession of Mr. Gracey. He however, has failed to produce it to the court. I accept the evidence that the propounded document is a true photocopy of the November 1 will.

The onus of proving that Miss Owen had revoked the November 1 will lies on Mr. Gracey and I find that he has failed to do so. The first page of the propounded copy-will may therefore be admitted to probate. The second page was not executed in accordance with the Wills Act.

The order of the court therefore is:

1. The first page of the paper writing dated November 1, 1988 and bearing the signature of Iris Owen, deceased, is a true copy of the last will and testament of the said Iris Owen and may be admitted to probate as such.
2. The Executor's costs of this claim shall be paid from the assets of the estate of the said Iris Owen. The Defendant shall bear his own costs.