In The Supreme Court of Bermuda

CIVIL JURISDICTION
2015: No. 64

BETWEEN:

IN THE ESTATE OF CLAUDE ALFRED ALLEN, DECEASED

EX TEMPORE JUDGMENT

(in Chambers)

Application for declaration of entitlement on intestacy-donees of gift under will dead at death of testator-Succession Act 1974 section 5(1), Case 7-sufficiency of evidence filed in support of application

Date of Judgment: January 25, 2017

Mr. Richard Horseman, Wakefield Quin Limited, for the Applicant
Ms. Sara-Ann Tucker, Trott & Duncan, for the Executor

The application

1. By a Re-Amended Warning to Caveator dated 15th May 2015, the Applicant Edward George Dill was required to enter an appearance to prevent administration proceeding notwithstanding his *caveat*. He did enter an appearance on 29th May 2015 and that appearance made the following assertion:

> "*My biological father Mr Godfrey Allen is Mr Claude Alfred Allen's eldest brother*".

2. A Summons for Directions was filed on behalf of the Executor on 31st August 2015 and issued on the 2nd of September 2015 seeking expedition of the grant of probate and the issue was thus joined as to the standing of the Applicant Mr Dill in relation to the estate of the Deceased. The matter proceeded with a Consent Order for directions being signed on the 2nd November 2015 when directions were given for the filing of evidence. That evidence took somewhat longer than was anticipated but on the 13th January 2016 Mr. Dill, the Applicant, filed an Affidavit in support of his application to be adjudged the nephew of Claude Alfred Allen ("the Deceased").

The Applicant's evidence

3. The Applicant explained the circumstances of his birth and broadly speaking asserted that his paternity, although not formally acknowledged in the birth certificate, was recognized by other family members. He deposed in paragraph 6 of his Affidavit as follows:

> "*My father was the deceased eldest brother and therefore the deceased was my uncle. I met the deceased in the early part of1990 through my uncle… Rudolph Allen. In 2005, the deceased asked if I would consider giving up my apartment, to come and live with him at his home, due to his declining health. I accepted my uncle's request, and moved in with him at 'By the Sea' 25 Wellington Back Road, St. George's Parish, Bermuda. I lived with my uncle until he died in 2012, and continue to reside there*".

4. He exhibits the funeral programme from the Deceased's funeral service which confirms that he was listed as one of the Deceased's nephews. And Mr Horseman relied on that as evidence that his status as the nephew of the Deceased was openly acknowledged and recognized by the family, it being common practice in Bermuda that funeral programs are usually prepared (and certainly claim to be prepared) on behalf of the family as a whole.

Relevant legal principles

5. The reason why the Applicant seeks a declaration is that the deceased had a Will which made a gift of the dwelling house in question which failed because the beneficiaries named predeceased the testator. It was common ground that the legal position is that where that fact pattern occurs, the relevant gift falls to be dealt with on the basis of intestacy. That legal principle is supported by '*Williams on Wills*', Volume 1 (at paragraph 9.2) which says as follows:

> "*In general a gift cannot be made by will to a person dead at the date of the will, and the gift also fails if the donee dies before the testator, even though he is alive at the date of the will*…."

6. The relevant provisions in the Succession Act which the Applicant relies on are found in section 5:

"*(1) Subject to section 11, the residuary estate of an intestate shall be distributed in the manner or held on the trusts mentioned in this section, namely—*

Case 7

If the intestate leaves no husband or wife and no issue and no parent, then the residuary estate of the intestate shall be held in trust for the following persons living at the death of the intestate and in the following order and manner, namely—

First, on the intestacy trusts for the brothers and sisters of the whole blood of the intestate; however, in the event that any of the brothers and sisters of the whole blood of the intestate predeceased the intestate leaving issue any of whom shall be living at the death of the intestate such issue living at the death of the intestate shall take equally among them if more than one the share which their respective parents would have taken if living at the death of the intestate; but if no person takes an absolutely vested interest under such trusts…" (The remainder of Case 7 is not relevant).

Sufficiency of evidence

7. Mr Horseman points out that the evidence show that there are numerous other beneficiaries under those provisions of the succession act and that the applicant's prayer for a declaration that he is the nephew of the deceased us not going to confer on him a windfall but rather will entitle him to a very modest share approximately 1/20th in the property in which he is now residing in. Ms Tucker for the Executor agreed that the property fell to be distributed according to those intestacy rules but opposed the grant of the declaration sought on technical sufficiency of evidence grounds. She complained firstly that the Applicant's birth certificate did not name the father, and secondly that no evidence had been filed by the Applicant's mother.

8. What quality of evidence is required to support a declaration of this sort will vary depending on the nature of the objections raised. In the present case the Applicant has made the very broad assertion that his status as a nephew is one that has been long recognised and was publicly acknowledged by the family upon the death of the Deceased. In these circumstances it seems to me, having regard to the overriding objective and the need to deal with cases in an efficient manner[1], that the Court should be slow to impose a burden on the Applicant to produce compelling evidence of his status in circumstances where there is no positive challenge being made.

9. In this case no evidence has been filed in opposition to the Affidavit sworn by the Applicant. The nature of his claim is such that one would expect any contrary evidence to be easily available to the Executor, there being no suggestion that key family members capable of giving such evidence are unavailable, are overseas or are not available or contactable. In these circumstances the Court is given greater

[1] Order 1A of the Rules of the Supreme Court 1985.

confidence that the evidence that has been put before the Court by the Applicant is in fact reliable.

Disposition

10. Accordingly, bearing in mind that the civil burden of proof is all that has to be discharged, I am satisfied that it is more likely than not that the Applicant is indeed the nephew of the Deceased and I grant a declaration accordingly.

[After hearing counsel]

11. The costs of the application are awarded to the Applicant to be taxed if not agreed.

Dated this 25th day of January, 2017 _____
IAN RC KAWALEY CJ