COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2016/PRO/cpr/00018

BETWEEN

JOHN DILLETT II

Plaintiff

AND

LEON H. SMITH

First Defendant

AND

SIMONE L. DILLETT

Second Defendant

Before Hon. Mr Justice Ian Winder

Appearances: Shannelle Bethel with Candice Hepburn for the Plaintiff
Leon Simth pro se
Owen Wells for the Second Defendant

16 and 17 November 2017, 26 September 2018

JUDGMENT

WINDER, J

This is an application for the removal of an executor and a determination as to whether the property conveyed to the second defendant prior to the death of the testator was advanced to her.

Background:

1. The chronology of this dispute may be seen as follows:

>1989 John Babington Bates Dillett (the deceased) acquired 8 acres on Prince Charles Drive.

19 Jan 1989 The deceased made his last will and testament ('the Will'). The Will appointed the First Defendant ("Smith") as the executor. The terms of the Will provided

> 3. I devise and bequeath the 2 acres of land on Sandilands Allotment No. 2 off Prince Charles Drive which she now occupies to my daughter Simone Laverne Dillett absolutely and in fee simple.
>
> 4. I give and bequeath to my son Karl Dwayne Dillett the remainder of the property on the West of the said Sandilands Allotment No. 2.
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> 5. To my wife Beryl A. Dillett I devise and bequeath the house situate on one (1) acre of land in Sandilands Allotment No. 2 off Prince Charles Drive for the rest of her natural life. If she dies before my son John Babington Bates Dillett II he will receive all that is hers.
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> 6. I devise and bequeath to my son John Babington Bates Dillett II all other real property absolutely and in fee simple.

13 Sep 1989 The deceased conveyed property, a 2 acre portion of the Sandilands Allotment No. 2 property, to the Second Defendant (Simone). Simone, according to the Will, had already been in occupation of this property and was so occupying the property prior to the execution of the Will by the deceased.

3 Jan 2000 The deceased died, survived by his wife Beryl Dillett ("Beryl"), sons Karl Dwayne Dillett ("Karl") and the Plaintiff John Babington Bates Dillett II (John) and his daughter Simone.

2. Notwithstanding the death of the deceased, the Will has yet to be lodged for probate, some 19 years later. Smith says that he was impotent to lodge the Will for probate on the basis of a dispute which arose between the survivors of the deceased. The dispute which arose was that Simone contended that she was entitled to an interest in the remaining property of the deceased at Sandilands Allotment No. 2 notwithstanding the conveyance to her by the deceased, of the very property the subject of the devise some 8 months after the execution of the Will.

3. John has commenced this action to replace Smith as executor of the Will. On the evidence John was supported in his application to replace Smith, by Karl and the deceased's widow, Beryl. Beryl has died since the commencement of these proceedings.

Issues

4. There are two issues which the parties seek to have resolved. These are:
   a) The removal of Smith as executor; and
   b) A determination as to whether the property conveyed to Simone subsequent to the death of the deceased was advanced to her or still remained due to her from the estate.

Removal of Smith as Executor

5. At trial, Smith accepted that he be removed. Had Smith not agreed to be replaced, the Court would have had no difficulty in replacing him. 19 years of inaction is unacceptable, the result here was that Beryl died without receipt of the full benefit of the devise granted to her by the deceased. The Court has an inherent jurisdiction to remove executors in appropriate cases. In ***Kemp v Kemp (as Executor for the Estate of Audley Kemp)***

2013/CLE/gen/1006, this Court stated, at paragraphs 8-12 of the written decision:

> **8** The problem of the dilatory personal representative and the usefulness of the Judicial Trustees Act was examined in the case of ***Goodman and another v. Goodman and another*** **[2013] 2 All E. R. 490.** At paragraph [9] of the judgment, Newery J. referred to the second report, of the Law Reform Committee, [of the Chancery Division] published in 1982 which dealt with the powers and duties of trustees (Cmnd 8733). Part VII of the report noted that 'the dilatory personal representative' was a serious problem and went on to describe the remedy under the Judicial Trustees Act at para 7.14:
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> > "The object of this statute is to provide a middle course in cases where the administration of the estate by the ordinary trustees has broken down and it is not desired to put the estate to the expense of a full administration. We are not aware of any case where this remedy has been adopted and found unsatisfactory."
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> **9** The learned Editors of ***William Mortimer and Summvil on Execution, Administration and Probate*** **(10th Ed.)** in referring to disputes in administration at paragraph 60-14 commented -
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> > "If the administration has come to a standstill because relations between the personal representatives have broken down, or relations between the representatives and the beneficiaries have broken down, the court will ordinarily remove the personal representative and appoint new ones to enable the administration to be completed. It is not necessary to establish wrongdoing or fault by the personal representative to obtain his removal. If, for whatever reason (such as clash of personalities, or the lack of confidence in the personal representative by the beneficiaries even if unjustified) it has become impossible or difficult for the administration to be completed by an existing personal representative, then an order for his removal will usually be made." (my emphasis).
>
> **10** The Respondents argue that it is a drastic step for the Court to remove an executor chosen by a testator in the absence of allegations of dishonest or willful misconduct and merely on the ground of delay. The case of ***Isaac and others v. Isaac*** **[2005] All ER (D) 379** was advanced in support of the proposition. In that case the court refused to remove a trustee on the basis that there was "no case of positive misconduct made out against the defendant, nor was there any maintainable allegation of want of honesty, capacity, or reasonable fidelity."
>
> **11** *In* **Isaac and other v. Isaac, Park J.** relied heavily on the writings of the learned authors of Lewin on Trust. According to Lewin on Trusts, para 34,
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> > "the court has an inherent jurisdiction in executing the trusts to remove a trustee, even though his consent or co-operation is not forthcoming. It is, however, quite a drastic step for the court to take, and in my judgment should only be taken in a clear case."

12 Further at para 13-46 of **Lewin on Trust**:

> "The general principle guiding the court in the exercise of its inherent jurisdiction is the welfare of the beneficiaries and the competent administration of the trust in their favour. In cases of positive misconduct the court will, without hesitation, remove the trustee who has abused his trust; but it is not every mistake or neglect of duty or inaccuracy of conduct on the part of a trustee that will induce the court to adopt such a course. Subject to the above general guiding principle, the act or omission must be such as to endanger the trust property or to show a want of honesty or ***a want of proper capacity to execute the duties***, or want of reasonable fidelity." (my emphasis)

The Gift to Simone

6. As indicated, Simone says that she is entitled to a gift under the Will as she had acquired the 2-acre tract for proper consideration of $25,000 and therefore was still entitled to her gift from the deceased. John and the other interested parties contend that, as the plaintiff was desirous of having her gift, inter vivos, the deceased agreed to transfer the 2 acres some 8 months after executing the Will. The plaintiff says at paragraphs 5 and 6 of his Witness Statement:

> 5. (a) That he was fifteen (15) years old when the events the subject matter of this action transpired and probably in grade 9.
> (b) That his father owed eight (8) acres of land boarded by Pine Barren Road.
> (c) He opined that his brother Karl Dillett occupied two (2) acres of land on the eastern side of pine barren road, whilst his sister occupied the property on the western side of pine barren road.
> (d) That crops and fruits and a small house that his father built was on the portion occupied by his sister.
> (e) That his father had pigs and chickens on the property.
> (f) That his sister did invest money in his father chicken business.
> (g) That he is aware that his father conveyed two (2) acres to his sister before his death but is of the opinion that it was her advancement under his Will.
> (h) The he (sic) is unaware that his sister would have paid his father $25,000.00 for the two acres.
> (i) That in grade 9 and being 15 years old he was having imitate conversations with his father about legacies.
> (j) That his sister had her two (2) acres fenced in at some period but he cannot recall when.
>
> 6. ...
> (c) That around the time his father made his Will they was a farm on the eight (8) acres of land which they all participated in as it was a family business.

(d) That his sister never stopped occupying her two (2) acres of land at no time if they she (sic) left the island the island of Nassau, the period she left for he could not recall.

7. Simone's witness, Leslie Miller, says that Simone cleared the land and built a perimeter fence in 1997. Simone says however at paragraphs 8(d) –(f) of her Witness Statement:

> (d) That she provided money to her father for his chicken business, her father would ask to borrow money for his various businesses and would not pay it back.
> (e) That prior to the Will and conveyance she did not occupy any land other than that which she farmed along with her family.
> (f) That she only cleared the two (2) acres conveyed to her after she returned from Switzerland.

8. In ***Henfield (In her capacity as Executrix of the estate Vivian Jane Walkine-Moss) v. Walkine (In her capacity as Executrix of the estate Herbert Cleveland Walkine) - [2015] 1 BHS J. No. 16*** this Court discussed issues not dissimilar to those which arise in the present case. The Court made the following observations:

> **24** According to ***Sir Leonard Knowles*** in his text, ***Law of Executors and Administrators***, at page 515,
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> > "The general rule is that in order to complete the title of a specific legatee to his legacy, the thing bequeathed must at the testator's death, remain in specie as described in the Will, otherwise the legacy is considered as revoked by ademption. For instance, If the legacy be a specified chattel in possession, as of a gold chain, or a bale of wool, or a piece of cloth the legacy is adeemed not only by the testators selling or otherwise disposing of the subject in his lifetime."
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> **25** Similarly, ***Halsbury's Laws of England paragraph 1407*** describes the doctrine of ademption as follows:
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> > "Satisfaction occurs (1) where a covenant to settle property is followed by a gift by will or settlement in favor of the person entitled beneficially under the covenant; (2) when a testamentary disposition is followed during the testators lifetime by a gift or settlement in favor of the devisee or legatee; and (3) when a legacy is given to a creditor.
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> Ademption is the term which correctly describes among other matters, the second category of instances in which the doctrine of satisfaction

applies; and where a testamentary gift is said to be adeemed in whole or part."

26 According to ***Tyre LJ***, in the Scottish case of ***Turner, executor nominate of the late Isabella Coutts Gordon pursuer against John Sutherland Gordon Turner*** [2012] CSOH 41 at ***paragraph 20:***

> "[20] Where the subject matter of a bequest or legacy (whether heritable or moveable) has been disposed of by the testator so that it no longer forms part of his estate at the date of death, the bequest or legacy is said to have been adeemed, and cannot take effect."

27 The Defendant's claim is that whilst the Will of the late Cleveland Walkine did contain a device for a 3 acre parcel to be given to the late Vivian Moss, the said Cleveland Walkine conveyed the said 3-acre parcel of land at her direction during her lifetime. In such event the said 3 acre parcel did not exist at the date of the death of Cleveland Walkine. The Defendant further argues that the inter vivos transfer by Cleveland Walkine, at the direction of Vivian Moss, amounts to *ademption* and nullifies the device in the Will.

28 The Plaintiff denies this claim citing the absence of evidence save for the oral account of the Defendant. Further, the Plaintiff argues that the six 2006 conveyances, though totalling approximately three acres, were given to Vivian Moss' children as gifts and were unrelated to Vivian Moss.

...

39 In the circumstances therefore, I find that the property namely three acres which was devised to Vivian Moss, had been disposed of by the testator Cleveland Walkine so that it no longer forms part of his estate at the date of his death. The gift has been adeemed, and cannot take effect.

9. Having heard the evidence of the witnesses and observed their demeanor as they gave their evidence in the witness box, I have no hesitation in preferring the evidence of the witnesses for the plaintiff. Simone says that she did not occupy any property at the time of the Will or the conveyance. This assertion is clearly inconsistent with the statement in the Will and the evidence which I accept. I find that the property demised to Simone, and described by the deceased in his Will was occupied by her, is the very property which he subsequently conveyed to her by the conveyance of 13 September 1989. I was also not satisfied that she demonstrated that funds were paid by her for consideration of the 2 acres acquired from the deceased. In any event, in all the circumstances I find that the property namely the 2 acres which was devised to Simone, had been disposed of by the deceased so that it no longer formed

part of his estate at the date of his death. The gift has been adeemed, and cannot take effect.

Conclusion

10. In the circumstances therefore Simone has no further interest in the Sandilands Allotment property which remained in the estate of the deceased at the time of his death. I will make the order for the replacement of John as the personal representative of the estate of the deceased, subject to the proper application being made to the Probate Registry.

11. I make no order as to costs.

Dated the 23rd day of May 2019

Ian Winder

Justice