30.5.2003

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 12 of 2003

IN THE MATTER OF an Application under sections 4 and 42 of the Succession Law (1995 Revision)

AND

IN THE MATTER OF THE Estate of Malcolm O'Connell Ebanks, deceased

BETWEEN: Thora Forbes, Tony O'Connell Ebanks and Kennedy Ebanks

Applicants

AND Jacqueline Adrian Scott

Respondent

BEFORE THE HONOURABLE MR. JUSTICE KELLOCK (IN CHAMBERS)
APPLICATION HEARD: March 19 and April 15 2003

APPEARANCES:
Mr. Kenneth Farrow instructed by Quinn & Hampson
for the Applicants

Ms. Sheridan Brooks instructed by Brooks & Brooks
for the Respondent

REASONS FOR JUDGMENT

The Facts

Malcolm O'Connell Ebanks died on January 19, 2002. He was survived by his legitimate daughter Jacqueline Scott (the respondent) and by Thora Forbes (sometimes Thora Straker), Tony Ebanks, Kennedy Ebanks and David Cassidy Ebanks.

In 1991 the deceased made a will (it is dated April 24, 1991) by which he appointed Thora Forbes, Tony Ebanks and Kennedy Ebanks as his executors and trustees and provided a legacy of

$15,000.00 to the respondent. He divided the remainder of his estate among Thora Forbes and her brothers, Tony, Kennedy and David Ebanks.

In 2002 the deceased made another will (dated January 2, 2002). By this will Thora Straker (Forbes), Jacqueline Scott and David Ebanks were appointed the executors and trustees of the estate. The 2002 will left legacies of $5,000.00 to Martha Powery (the common law wife of the deceased) and $15,000.00 to Jacqueline Scott. In addition, the deceased gave a portion of his real property in West Bay to the respondent. He then gave his gas station business and the real property used in connection therewith (which was also located in West Bay together with the residue of his estate to Thora Straker, Tony, Kennedy and David Ebanks.

It is common ground that the 1991 will was properly executed. However, it appears that the 2002 will was not. While the document was executed by the would be testator and two witnesses their signatures were not placed on the document in each others presence. While the 2002 will purported (by clause 1) to revoke "all former wills..." it was ineffective for want of proper execution.

The dispute which I have to resolve arose in this way.

In December 2001, the deceased instructed Quinn & Hampson to prepare a fresh will. He was then suffering from cancer and was aware that it was terminal. Mr. Farrow (of Quinn & Hampson) was given the original of the 1991 will by Thora Forbes and she also provided the deceased instructions as to the content of the new will. As the deceased was too ill to attend at

Quinn & Hampson's offices, Mr. Farrow gave the new will he had drafted to Ms. Forbes with oral instructions concerning its proper execution. "Unfortunately, those instructions were not carried out", to quote from Ms. Forbes affidavit sworn October 11, 2002 (paragraph 5). Ms. Forbes then says in paragraph 6 of the same affidavit:

> "I returned the original of the 2002 will to Mr. Farrow on 4 January 2002. On 14 January 2002 Mr. Farrow returned the original 1991 will to me with instructions that it should be destroyed. I told my father this – by this time, he was in George Town Hospital – and he told me to shred it which I did."

Shortly after January 19, 2002 Ms. Forbes instructed Mr. Farrow to apply for probate of the 2002 will. It was at this point that the respondents' attorneys took the position that the will had not been properly executed. Ms. Brookes suggested that the 2002 will had not been properly executed in a letter to Mr. Farrow dated April 26, 2002. This letter was sent by fax on that date. Ms. Forbes then found a copy of the 1991 will and instructed Mr. Farrow to apply for probate of it.

In these circumstances the applicants seek to prove the 1991 will and also seek special leave to do so in light of section 4 of the *Succession Law* which requires that probate be obtained "within 6 months of the death or within 2 months of the termination of any dispute touching the right to such probate…".

It would therefore seem that the application to me which was made on January 7, 2003 is arguably in time. Be that as it may, the special leave was not opposed in argument and I cannot think of any reason why the court ought to refuse special leave in the circumstances.

The Issues

It was initially thought that the issue in this case was whether or not the destruction of the 1991 will was effective to revoke it absolutely or only conditionally. That is to say Ms. Brooks took the position that the 1991 will had been revoked absolutely and Mr. Farrow countered with the submission that the doctrine of dependant relative revocation applied. On Mr. Farrow's submission the 1991 will was destroyed only because the deceased thought he had made a new will which had revoked the 1991 will. This is certainly what Mr. Farrow thought as he wrote to Ms. Forbes on January 14, 2002 as follows:

> "I now return to you the will that your father made on April 24, 1991 which should now be destroyed."

Ms. Forbes evidence is that she passed on that suggestion to her father, who then told her to shred the 1991 will which she did. There is no evidence as to exactly what the deceased thought but there is also no evidence that he had an intention to revoke the 1991 will for any reason other than Mr. Farrow's advice, which is to say that he thought his new will was effective and that the 1991 will had been revoked.

It appears however, that the 1991 will was not destroyed in the manner contemplated by section 15 of the *Wills Law* which provides that:

> "No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid*; or by another will or codicil executed in manner (sic) herein before 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, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

Ms. Forbes said in her oral evidence on April 15, 2003 that her father was not present when she destroyed the original of the 1991 will at the Bank of Butterfield.

The Law

It seems odd that the intention of the testator should play such an important role in the law relating to testamentary dispositions except when it comes to the formalities required for the proper execution of or the revocation of such instruments.

The 2002 will was not executed as required and in addition the intended revocation by destruction of the 1991 will failed by reason of section 15 of the *Wills Law* and as a result the 1991 will was not revoked. "Destruction (of a will) by testator's direction but not in his presence is ineffectual". (50) Hals. 4th (reissue paragraph 344), and see in Re *Dadds*, [1857] Deane 290.

Consequently, I must find that the 1991 will was properly executed, it was not revoked and may be proved.

In the circumstances, there is no need to consider whether (if the 1991 will had been effectively destroyed by the deceased or by Ms. Forbes in his presence and at his direction), the revocation should be regarded as absolute or conditional. Consequently, there is no need to decide whether the judgment of the Court of Appeal in Re: *Jones* [1976] 1 Ch. 200 is the governing authority rather than cases like Re: *Estate of Davies* [1951] All. E.R. 920. I have looked at many of the authorities relating to this issue and must say that they are not easily reconciled. However, on the facts here the case for conditional revocation seems stronger. (see Re *Bunn* [1926] All. E.R. 626).

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* By section 13 a will is revoked by marriage.

Conclusion

In the circumstances, the leave sought will be granted and an order will go for the relief claimed by the applicants with the costs of all parties to be taxed and paid out of the estate.

Kellock J.

Dated: May 30, 2003

Released , 2003.