



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN PROBATE AND ADMINISTRATION
SUIT NO. P-1155 of 1994

BETWEEN IRVIN WESLEY HOO FATT PLAINTIFF

A N D ZELMA EBANKS DEFENDANT
*(The Executor of the Last Will and testament
of IRVING OSWALD HOO-FATT also known
as IRVIN HOO-FATT and also known as
IRVIN HO FAT)*

Mr. David G. Batts and Miss Daniella R. Gentles
instructed by Livingston, Alexander and Levy for the plaintiff.

Mr. Gayle Nelson and Mrs. C. Beecher-Bravo instructed by
Playfair, Junor Pearson and Company for the Defendant.

Heard: 30th April, 18th May and 14th July, 1997;
8th January and 13th January, 1998;
and November 18th, 1999.

CORAM: BECKFORD, J.

I deeply regret the delay in delivering this Judgment. The main reason for this is that I had a forced change of residence and notebooks with the greater part of the evidence was mislaid. I tender my sincere apologies to everyone concerned.

First let me say I agree with Mr. Batts that the only issue to be determined is whether on the 4th August, 1991 Mr. Oswald Hoo Fatt made a will which revoked all prior testamentary instruments.

It is necessary to give a brief outline of the history of this matter.

Mr. Irving Oswald Hoo Fatt (hereinafter called the testator) departed this life on the 22nd December, 1992. A builder, by trade, he left behind two sets of children. With his wife Doris – he had five children – including -- Irvin Wesley Hoo Fatt (hereinafter called the Plaintiff) – all now adult -- professionals.

The second set of two minor children – Charles and Michelle – he had with his “live-in” paramour Zelma Ebanks (hereinafter called the Defendant).

The Plaintiff alleges that on the 26th December, 1992 he went to the home of the Defendant where she showed him a document dated the 4th August, 1991 which he says was the last will and Testament of the Testator. It is this will which the Plaintiff seeks to propound.

On the 15th June, 1994 the Defendant obtained probate of a will of the Testator's dated 9th June, 1991 – the provisions of which were different to the one of the 4th August, 1991 recollected by the Plaintiff.

On the 15th September, 1993 before the Probate was granted the Plaintiff lodged a caveat against any grant in the testator's estate.

On the 18th October, 1994 an order was made by the Court that a citation be issued to the Defendant to bring in the Probate granted to her on the 15th June, 1994. This citation was based on the Plaintiff's contention that there was a later will dated the 4th August, 1991 which revoked the will of 9th June, 1991 for which Probate had been granted.

On the 19th October, 1994 the Plaintiff issued a Writ of Summons claiming as a residuary legatee and devisee named in the true Last will and Testament of the testator dated the 4th August, 1991 which will revoked the will of the 9th June, 1991 for which Probate had been granted.

The Writ claimed against the Defendant as the Executor of the will dated the 9th June, 1991 for:

1. A revocation of the Probate of the Last will and Testament dated the 6th June, 1991 which was granted on the 15th June, 1994.
2. The Court to pronounce against the force and validity of the will of the 6th June, 1991 and declare it to be revoked by the will of the 4th August, 1991 and

3. The Court to pronounce for the force and validity of the will dated 4th August, 1991 in solemn form.

On the 18th January 1995, the Defendant counterclaimed alleging fraud on the part of the plaintiff and seeking an order that the Court pronounce against the force and validity of the said alleged last will and Testament dated August 4, 1991.

The difficulty that has led to this action is that there is no copy or draft of this alleged will and what is before the Court is a reconstruction of it by the Plaintiff.

So we come to what is the sole issue of fact to be determined:

Did Mrs. Oswald Hoo Fatt on the 4th day of August, 1991

make a will which revoked all prior testamentary

instruments?

It is not challenged that the will of the 9th June, 1991 was in fact made by the testator – what is in issue is whether on the 4th August, 1991 he executed another will using the same Attorney, the same executors and the same witnesses which latter will revoked that of the 9th June, 1991.

It is settled law that the contents of a will can be proved by a sole witness and this is permitted even if the witness is an interested party.

However, the onus rests on the Plaintiff to prove, on a balance of

probabilities, by clear and cogent evidence that the Testator executed a will subsequent to that of the 9th June, 1991 in conformity with the provisions of Sec. 6 of the Wills Act.

Further he must prove that that will was in existence after the death of the testator, and in respect of the reconstruction – the accuracy of that reconstruction.

The Plaintiff's case rested on the sworn evidence of himself and his wife – Mrs. Sharon Hoo Fatt; his brother-in-law Lieutenant Colonel Saddler and the affidavit evidence of Mr. Alvin Mundell – Attorney-at-law – now deceased.

The defence rested on the sworn evidence of the Defendant and Mr. Seymour Stewart Attorney-at-law.

The Plaintiff alleges that on the 26th December, 1992 shortly after the death of the testator he and his wife went to #18 Laurel Avenue to take his young brother and sister to the cinema. There he found the Defendant in a boisterous mood expressing anger at the behaviour of Frederick – the Plaintiff's brother of the full blood. Plaintiff spoke with Defendant who showed him a copy of will dated 4th August, 1991 whereupon he showed this copy to his wife and both of them then committed the detailed contents of this will to memory. Sometime in January 1993, at the reading of the

Testator's will what was read and passed around was a will dated the 9th June, 1991.

Thereafter Probate of this will of the 9th June, 1991 was obtained by the defendant and the plaintiff then lodged a caveat and subsequently brought this action after probate was granted.

The Defendant denies these allegations about a will of the 4th August, 1991 and alleges fraud on the part of the plaintiff and his witness – Mr. Mundell.

There is no documentary proof of this will of the 8th August so it requires stringent and conclusive evidence to prove that such a will was in fact made. The existence and due execution of this latter will must be proved.

It is necessary to carefully scrutinize and evaluate all the evidence to get a complete picture.

So who was the testator? He was a man who obviously managed his two family affairs to his own satisfaction as well as seemingly to that of his children. I say "seemingly" since after his death all the goodwill that seemed to exist between the two branches of his family changed. What is instructive about the testator is that whilst he was alive he held both sides

together in amity. It is clear he was a provider and this was borne out in the evidence emanating from both Plaintiff and Defendant.

In examination-in-chief the Plaintiff said:

“Up until my father’s death we always lived as a family with Charles and Michelle. We lived quite loving as a family regardless of who the mother was. All birthday parties and any function at all – special functions- they would attend ours and we would attend theirs as well. Gifts were always given on a regular basis.” (Emphasis mine).

On cross – examination the Defendant said:

“I would agree that Mr. Oswald Hoo Fatt was a caring father – VERY . (She emphasized the very).

Question: Would you say that he tried to care for both families?

Answer: Yes sir.

Question: Did he not visit Bradley Avenue on a regular basis?

Answer: As far as I know he would visit Bradley Avenue in the day and sleep at Laurel Avenue in the night. On Wednesdays and Saturdays he would spend the whole day at Bradley Avenue.”

Then later:

Question: Mr. Hoo Fatt had a special relationship with some of his other children?

Answer: Yes.

Question: Dr. Hoo for example – he regarded him as someone who had achieved?

Answer: "All of them achieve you know. He was proud of all of them."

The evidence is that the Testator bought a car for Frederick, and further that he gave the Plaintiff US\$10,000.00 towards the purchase of a house in the United States.

It is not disputed that the Bradley Avenue, premises had apartments which housed at one time or another not only the matrimonial home but the Plaintiff and his family as well as his brother Frederick among other tenants. These premises were jointly owned by the Testator and his wife.

In addition there is evidence of a subdivision in Spanish Town of which there are five lots unsold (I bear in mind that there are five children of the marriage). The plaintiff says the property in Spanish Town was bought with money from the testator's wife and was her sole property. Mr. Seymour Stewart said he was able to "assist" the testator "with regard to a subdivision he was having in Spanish Town." I do not believe that, with adult children the testator's wife would give the testator full control of her

solely owned property if he had no financial input bearing in mind his proclivity toward philandering. (The Defendant who should know says, "Mr. Hoo was a wild man.") With regard to the Spanish Town property therefore I prefer the evidence of Mr. Stewart about that subdivision and find that the testator was the person who made the subdivision and made provision for five children of the marriage.

Thus the testator is portrayed as a proud and loving father who kept both sets of his family together; actively interacted with both; provided for both and by all accounts was a loving and provident father. Looking at all the probabilities of the case one can hardly doubt that such a man would ensure that on his demise provision was in place for all his children including the minors who lived with him up to the time of his death. A perusal of the reconstructed will shows that no immediate provision is made for the infant daughter and her entitlement to number 18 Laurel Avenue, is subject to a life interest of her brother Charles.

In proof of the claim that the will of 4th August was in fact made the Plaintiff sought to rely on the Affidavit and Statement of Mr. Alvin Mundell --now deceased.

In his Affidavit dated the 14th October, 1994 Mr. Mundell said he "prepared several wills" for the Testator. In his statement of the 21st April,

1997 he was more definitive where he said he “drafted three wills” for the testator. Now he cannot recall when he wrote the first and the second one “could have been in June, 1991” (the probated will) but the third (the reconstructed will) he is quite sure about – he did this one on the Sunday before Independence – therefore the 4th August, 1991.

Mr. Mundell did not say who were the witnesses to the first will. However, he clearly recalls that both he and his daughter were the witnesses to the testator’s signature in the two later wills.

Mr. Mundell deponed that the will of the 4th August, 1991 expressly revoked the probated will and in addition he sought to show the difference in these two wills in the following manner:

- (a) While the probated will specifically devised premises situated at 18 Laurel Drive, to Charles Hoo Fatt with a proviso that if Charles died before age 18 the said premises was to go to Michelle Hoo Fatt, the Will made on or about the 4th August, 1991 devised the said premises to Charles Hoo Fatt for live and thereafter to Michelle Hoo Fatt.
- (b) That the Probated will specifically devised premises situated at 19 Laurel Drive, to Michelle Hoo Fatt, Charles Hoo Fatt, Marie Hoo Fatt and Zelma Ebanks as joint tenants, and the

Will made on or about the 4th August, 1991 made no specific devise of this premises 19 Laurel Drive, Kingston 10 thus permitting it to fall into the residuary estate of the Testator.

But look at his statement here he says that in the will of the 7th August the provisions in respect of 19 Laurel Drive were that "the other house was to go to his other children of his wife", and further:

"I do not recall there being any residuary clause"

and

"I cannot recall any residuary clause in any of the wills."

After he was shown his Affidavit he said of the reconstructed will:

"There was no specific reference to number 19 Laurel Avenue."

This witness said when he drafted the will of the 4th August; Freddy one of the testator's sons was present. Freddy has featured significantly in the Plaintiff's case yet he was never called to assist the Court.

Mr. Mundell an experienced Attorney-at-law says he had drafted "several" wills for the testator. It is usual that attorneys-at-law who draft wills have a certain format for that purpose. Mr. Mundell says that the Plaintiff's recollection of the reconstructed will accords with his.

The Probated Will starts:

*“THIS IS THE LAST WILL AND TESTAMENT OF
IRVING OSWALD HOO FATT of 18 Laurel Drive,
Kingston 10.”*

On the other hand the reconstructed will starts out:

*“I IRVIN OSWALD HOO FATT OF 18 Laurel Drive,
Kingston 10 hereby declare this to be my last will and
Testament.”*

Both forms are equally correct but different. The Plaintiff says his father's name is IRVIN although he has been called IRVING. Could that be why Mr. Mundell wrote IRVING on the Probated Will?

In the paragraph of the probated will which deals with the bequest to Charles it states “if Charles should die before the age of 18 it should go to Michelle.” The corresponding paragraph of the reconstructed will has the word before crossed out and it reads “if Charles should die then it should go to Michelle”.

The purpose of this untested evidence is to help in satisfying the burden of proof that the propounded will was duly executed and further that it revoked the will of the 9th June, 1991. But was this recollection unaided? Or were the contents of the probated will used as an aide memoire in its reconstruction.

The Plaintiff and his wife then gave sworn evidence as to the existence of the propounded will after the death of the testator. Their evidence in this regard is interesting with a number of contradictions except in relation to the contents of the will.

Plaintiff said on the day he saw this will only he and his wife went to 18 Laurel Drive to take his young brother and sister to the cinema. His sister went in the motor vehicle and was happy to be going to the movies. His wife said they took their children with them to 18 Laurel Drive but neither Charles nor Michelle were ready to go to the movies and only her children were in the van. Michelle did not enter the van.

Plaintiff said he asked the Defendant to show her the will – the wife said Plaintiff never asked to see the will – it was the Defendant who volunteered to show him the will.

Both Plaintiff and his wife agreed that Charles was sent for the will and shouted to Defendant “which will?” and the defendant replied “the one on the dresser.” (implying that there was more than one will.)

After that comes this evidence:

“so I said to her could I have this copy. She told me no it was her only copy.” Then further on he said “Before that I said is this the Last Will and Testament of Poppa? And

she said yes. I asked her if she had the original and she said yes.”

What is clear from this evidence then is that what he was shown was a copy document. Plaintiff said that both his wife and himself read this document several times and committed the contents to memory and that document was a will dated the 4th August, 1991.

Here is a woman (the defendant) allegedly in possession of a will which dispossess not only her but her infant daughter as well and what does she do? She makes a copy of this will and leaves this copy in a conspicuous place – the dresser – where anyone of her children or other family members could have access to it. Not only that the inference is that she puts it with the earlier will so that she had to look to see if the will Charles brought her was “the right one.”

Plaintiff said he was “going around just repeating this will to everybody. To confirm this Lieutenant Colonel Saddler gave evidence. He leaves me in doubt as to whether or not he was present on the reading of the will since he is the only witness – on either side – to deny that the probated will was read. He was not a helpful witness. His evidence as to the behaviour of the Plaintiffs before the reading of the will is however instructive.

put forward by Dr. Hoo Fatt. He was very concerned about that!”

He said that at the time the will of 9th June was passed around “was not the first time I was hearing from Dr.

Hoo Fatt that he had seen another will...”

These statements must be looked at against the background of the entire case. The Plaintiff’s evidence is that Freddy had a will. Mr. Mundell’s is that he wrote 3 wills for the testator- two of them in similar vein to the one of the 4th August, 1991 and one in the terms of the 9th June, 1991. Even if the Plaintiff had seen two wills – why should he be concerned? Because the will held by Freddy and the will of the 4th August were in similar terms if both he and Mr. Mundell are to be believed. The very first time Plaintiff would be seeing something different would be when the will of the 9th June, 1991 was passed around at the reading of the will – that would be the legitimate time for his concern.

The evidence of Mrs. Sharon Hoo Fat seeks to confirm the Plaintiff’s claim that there was a will dated 4th August, 1991 and that it was in existence after the death of the testator.

A will is a legal document which even some lawyers find it difficult to remember (witness Mr. Mundell’s inability to recall what he said he had

written). Yet here we have a Customs broker who cannot recall if the document she saw was a photocopy or not or even the date of her father-in-law's death, being able to recall the date of his will, the names of the witnesses and the contents of the will. By any standard this is a remarkable feat and she is not an amanuensis as in the case of *Sugaen v Lord St. Leonards [1876] 1 P.D. P 154*. Indeed she said of herself "I have a good enough memory." It is my view that a "good enough memory" is not enough to recall the details she said she did in the circumstances under which she said she did.

Even if her claim was to a photographic memory, one has to look at the fact that the other things she remembered were all in connection with this will of the 4th August, 1991.

She recalls:

"Miss Zelma told my husband that Bowen is Alvin Mundell's daughter" yet she cannot recall if the children were with the Defendant at the gate although the reason for going there was to take the children to the movies.

She said her husband told the Defendant that Freddy had a will in which both he (the Plaintiff and Freddy were the Executors). The plaintiff

gave no such evidence and this is contradicted by the statement of Mr. Mundell that in all 3 wills the executors were Freddy and the Defendant.

Further to show that her powers of recall differed from the Plaintiff she denied that Michelle went in the van on the 26th December, 1992, yet her husband said "Michelle was in the van by then – she was very happy to be going to the movies. Charles was standing around."

The question is why her interest in recording in detail the contents of a will which did not concern her?

It is my opinion and I so hold that she neither saw nor committed to memory on the 26th December 1992 the contents of any will dated the 4th August, 1991.

The Defendant denied that she ever had any will dated the 4th August, 1991 or that she showed such a will to the Plaintiff on the 26th December, 1992.

She said that both the Plaintiff and his brother Freddy came to 18 Laurel Drive on the night of the testator's death and searched his room and removed certain articles. She said that on the 26th December Freddy had come to the house and they had had an argument about a cheque and that was the gravamen of her complaint to the Plaintiff that afternoon.

It is instructive to note at this point that although Freddy did not join the Defendant as executor in probating the will of the 9th June, nevertheless he made a claim for funeral expenses and has taken no part in this case.

Mr. Seymour Stewart said that about two months after the reading of the will both the Plaintiff and Mr. Mundell visited his home and sought his co-operation in relation to the disposition of #19 Laurel Avenue.

In the presence of the Plaintiff "Mr. Mundell said he believed a mistake had been made. He said there is a second will. He cannot remember if that will had been made before this one or the other way round -which I considered stupid." Then

"At first Doctor said if I were to cooperate with them it would be to my financial advantage.

Mr. Mundell joined in saying that if #19 Laurel Drive were sold the money could be divided between Us three."

Witness said he was not persuaded by any of that. He said it was he who on the 9th June, 1991 had directed the testator to Mr. Mundell's residence for the will to be written. Further the Testator had shown him the written will or or about the Wednesday or Thursday following Sunday 9th June, 1991.

written will on or about the Wednesday or Thursday following Sunday 9th June, 1991.

In Cross-examination he denied that he had borrowed money from the Testator which he had not returned. He said that he had been a friend and attorney for the Testator and members of his family, including the Plaintiff and that is why he did not prepare the Will for the Testator. As Chairman of the Parish Services Commission he did not do the legal work for the testator in relation to the Spanish Town subdivision but he ‘channeled’ the testator to the “appropriate officer”.

That was the evidence adduced and I have carefully scrutinized it to determine whether on a balance of probabilities there is sufficient evidence to establish due execution of the alleged will of the 4th August, 1991.

There is no evidence of any change of attitude on the part of the testator towards any of the persons he sought to benefit by the dispositions of the 9th June, 1991 will. Why then would he, a loving father, make no immediate provisions for his minor daughter yet do so in respect of his adult professional children. Without any cogent evidence to that effect the Court is asked to say that the testator using the same Attorney and the same witnesses made a significant change to his will in that he made no immediate provision for his infant daughter, none at all for his paramour

with whom he lived and instead left the premises at #19 Laurel Drive to fall into residue, although he had devised it in the will of the 9th June.

Counsel for the Plaintiff says that the evidence in this case is even more cogent and compelling than was in the case in *Sugden v Lord St. Leonards*. I regret I cannot agree with him. Had Mr. Mundell a professional who says he drafted the reconstructed will, been more precise as to the contents had he not contradicted himself in a material particular then his evidence may have been of some assistance. But his evidence was neither cogent nor reliable particularly when viewed against the sworn evidence of Mr. Seymour Stewart.

In the same vein the evidence of the Plaintiff and his other witnesses was riddled with inconsistencies both internally and in relation to the other witnesses.

It is true that the Plaintiff is a professional – but he is a medical professional and it is my view that “a professional man” in the judgment of *Sir J HANNEN in the Sugden case* is a reference to “a professional man of the law” as opposed to any other professional person.

I do not accept the evidence of the Plaintiff that on the 26th December, 1991 he saw and read and committed to memory the contents of