IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. HCV 1509/2006

BETWEEN	*CLEMENT DODD JNR*	*CLAIMANT*
AND	*NORMA JEAN DODD*	*1ST DEFENDANT*
AND	*CAROL DODD*	*2ND DEFENDANT*

Mr. Huntley Watson instructed
by Watson and Watson for Claimant.

Mr. Norman Wright Q.C. and Mr. Heron Dale
Instructed by Norman E. Wright and Co., for the Defendants

Will - Wills Act - partial obscuration of gift to beneficiary – Whether obscuration valid – Doctrine of dependent relative revocation - Effect thereof on gift to beneficiary – Effect of maxim omnia praesumuntua rite esse acta – Effect thereof on validity of will - Grant of letters of administration cum testamento annexo by Registrar of Supreme Court – Declarations sought for revocation of grant – For administration by Administrator General - Accounting

Written submissions filed. Oral Judgment delivered on 4th May, 2010

Coram: Morrison, J.

It was none other than Ludwig Van Beethoven whose genius and sagacity produced this piece of profundity: "Music is a higher revelation than philosophy." Such a revelation it continues to be that immortal men under the spell of its mesmerism have rhapsodized on its effects.

We, no less, have succumbed to her lore. In this context, the cultural musical legacy of the "Studio One" enterprise is as pervasive as it is enchanting. Studio One, popularly so called, is the business entity recorded with the Registrar of Companies, Jamaica, as the Jamaica Recording and Publishing Studio Limited whose registered address is Derrymore Road, St. Andrew. Founded by "Sir Coxsone Dodd" the enterprise had risen from relative obscurity as a sound system to the grandiosity as it now stands. Sir Coxsone, whose proper name is Clement Seymour Dodd Snr. was memorialized upon his death with the conferral of the Order of Distinction for his contribution to the musical reputation of Jamaica. Mr. Dodd is credited to be one of, if not, then, the founding father of Jamaica's popular music which has enjoyed global success and respect.

An undoubted musical icon, Mr. Dodd had expended his time, resources, and his considerable talent in fashioning a unique brand of original music which was the crystallization of the Jamaican people. The latter speaks to an impressive list of notabilities who received their impetus onto this musical stage from the Studio One enterprise: the Skatalites, Bob Marley and the Wailers, Ken Boothe, Delroy Wilson,

Dennis Brown, Ernie Ranglin, Alton Ellis, Burning Spear and others of international acclaim.

The Facts

Clement Dodd Snr. was a precocious and fecund man. He fathered 6 children through three women. He married the first –named defendant who is not the mother of the claimant. In this divided camp as sketched by the pleadings suspicion is omnipresent. Suspicion has now spawned distrust. This famed Record Producer died on the 4th day of May, 2004. Before his decease he made and duly executed his last will and testament dated 4th day of December, 1987. In his will he named his mother Doris Albertha Darlington as the executrix of his estate.

According to paragraph 2 of his will he gave, devised and bequeathed to his wife Norma Jean Dodd and his children Sandra, Carol and Tanya, "in equal shares all my estate and interest in premises situated at 3135 Fulton Street, Brooklyn, New York, in the United States of America, together with all my shares in the business operated in the said premises under the name of the recording studio and all stock and equipment contained therein."

It is paragraph 3 of the said Will that has drawn the ire of the Claimant. It reads in full:

> "I give devise and bequeath to my mother aforesaid to my wife Norma and to my children Clement (Junior), Courtney, Paulette, Carol, Morna and Claudia in equal shares all my estate and interest in premises situated at 13 Brentford Road, Kingston 5, together with all my shares in the Jamaica Recording and Publishing Company Limited, with offices at 13 Brentford Road, Kingston 5."

In the concluding paragraph of his will Clement Dodd, Snr. "gave, devised and bequeathed all the rest, residue and remainder of his estate to his mother, wife and daughter Carol in equal shares absolutely."

His will was attested by two witnesses, namely, Ms. Lucille Reid and Ms. Arlene Davidson.

Doris Darlington predeceased Clement Dodd Snr, on the 25th June, 1998. Probate of her estate was granted to Clement Seymour Dodd (Clement Dodd Snr.) on the 26th day of March, 1999.

From the Agreed list of documents as filed a number of documents were entered into evidence and are comprised as Exhibits 1 – 11. Exhibit 12 is the Original Will which is kept at the Records Office in Spanish Town; exhibit 13 is the Kalamazoo copy (K copy) of letters of Administration with the Will annexed which is kept in the Civil Registry

of the Supreme Court of Jamaica. Exhibit 14 is a copy of the 'K copy" of the said Letters of Administration.

Exhibits 2, 12, 13 are at nub of the present dispute. The foci of attention being the interlineation through the name of the devisee Clement Dodd (Junior) and is to be found at paragraph 3 of the Will.

The name Clement (Junior) is apparent on the face of exhibits 2, 12, 13 and 14. Whereas a visible signature appears over the interlineations on Exhibits 12 and 13 this is not so in respect of Exhibits 2 and 14 – and for good reason: they are photocopies, presumably of the original Will.

From the tenor of the cross-examination of the witnesses for the defence a number of visual apparent discrepancies have emerged as to letter formation and as to the number of some particular dotted lines. On the document at a place provided for a signature of a witness. The insinuation being that the copies are suspect and as such the contagion engendered by such suspicion have somehow virally affected the very interlineation of the name Clement (Junior) which bespeaks complicity on the part of the attorney-at-law Norman Wright Q.C., who prepared the will and Mrs. Norma Dodd to defeat Clement's (Junior) inheritance.

That has to be pith, gravamen and substance of the complaint. I placed little, if any store by that contention.

In the ensuing concatenation, the defendants applied for letters of Administration with the will annexed on the basis of an order for administration by the Administrator General pursuant to the Civil Procedure Rules.

The application having been made, the Registrar, through requisitions, sought explanations from learned Queen's Counsel as to the plight and condition of the will of Clement Dodd, Snr. It is against that background that the affidavits of plight and condition given by Queens Counsel are to be viewed. The affidavits sought to explain the circumstances under which the interlineation was done. It suffices to say, for present purposes, what the affidavits sought to establish: that the interlineation through the name of the Claimant by the testator though initialled by the Testator was unattested by witnesses who were present and that through an oversight they did not affix their initials as witnesses to the interlineation.

It is also important to note that in respect of the affidavits that were supplied none of the two attesting witnesses were forthcoming in order to buttress and support the affidavits of plight and condition.

Unfortunately, there was no evidence led to verify that one of the witness is deceased and that the other could not be located. However, the Registrar being satisfied with the proferred explanation, proceeded to grant Administration with the will annexed in common form. The grant of Administration is, ex facie, one that was regularly done. Notwithstanding, the circumstances of the grant bears careful scrutiny as the Wills Act demand.

As to the matter of the multiplicity of wills afloat in this polemic I remain a trifle incurious at the incongruity that became manifest when Exhibits 12 and 13 were visually compared. Be that as it may, I find that the greater mischief that was made manifest is the violation of Sections 14, 15 and 16 of the Wills Act. There was a signal failure to obey the formularies and formalities of the Act.

As to the defendants charge that the Claimant's relationship with his deceased father had so deteriorated and as such was the primum mobile or the trigger for the purported or ostensible act of the testator interlineating the Claimant's name from the will, I can find no modicum of material support. I do not find that the Claimant's denial that this was so was an attempt at truth obfuscation. I accepted that the Claimant's involvement in the business of the "Studio One" enterprise

was a result of his specialist training. His evidence and that of his supporting witness was preferred to that of the defendants as they delivered themselves with candor and forthrightness. I should, however, not be taken to be saying that the defendants were untruthful. Rather, I am to be understood as saying that the defendants characterization of the relationship between the testator and the Claimant was more in the nature of a perception, the concrete reality of which was not demonstrated. There were no solid indicia of their allegations.

The Submissions of the Claimant

The claimant, rather trenchantly asserts that the purported act of the Testator in drawing a line partially through the name of Clement Dodd, Jnr. is by itself insufficient to establish an animus revocandi. On the evidence as adduced, the claimant declares, there is no supporting expression or action of revocatory intent. Surely, they argue, if the Testator's intent were fixed he could have used a more definitive act of revocation. Notwithstanding, the claimant postulates that even if an animus revocandi were to be presumed then a Court of Construction would be bound to have regard to the language remaining in paragraph 3 of the Will which contains the relevant dispositive clause. On this latter

view they point to several possible, yet contradictory, results that would obtain.

Lastly, the claimant contends, that the weight of the evidence is against a fixed intention by the Testator to disinherit his son.

The claimant pressed in aid a plethora of cases including: **Re Jones [1976] 1 All ER 593; Re: Murray [1956] 1 WLR 605, In Re White, deceased [1991] Ch 1.** Also, reference was made to the work of the learned authors in **Williams Mortimer & Sunnucks on Executors, Administrators and Probate (1982).**

Submissions by the Defendant

The defendants broadside against the claimant's submissions is that the grant of Letters of Administration was obtained with due regularity. Firstly, the Administrator General issued a Certificate consenting to the making of the grant pursuant to Section 68.19 subsections (2) and (3) of the Civil Procedure Rules (the Rules).

Secondly, they pronounce, that the Registrar of the Supreme Court discharged her duties as prescribed by Section 68.35 of the Rules before issuing the grant. The Registrar, they say, in the discharge of her duties, issued (2) requisitions in respect of the interlineation in the Will as well

as to its execution, attestation and the whereabouts of the attesting witnesses.

Thus, the Defendants conclude that a burden was cast on the claimant to prove that: the interlineation was improperly done and as such was ineffective to exclude the Claimant from his inheritance; the interlineation was so done as to invalidate the entire will causing the Testator's estate to fall into an intestacy; the grant had been irregularly obtained and was therefore invalid.

The burden of proof, they maintain remained undischarged by the Claimant. The defendants in further counterpoint, relied on the authorities of Sykes vs. Sykes (1867-68) LR 3 Ch. 301; in the goods of Peretti [1902] p 206 and finally on the Estate of Denning, deceased (1958) WLR 462.

The Issues

Can the grant of Letters of Administration with the will annexed, regularly obtained out of the Registry of the Supreme Court, be set aside on the ground of irregularity?

If so, what are the conditions?

What is the effect of extant copies of the will, incongruous in certain aspects, with that of the "k" copy kept in the Supreme Court and with that of the original well kept at the Island Records Office?

What is the effect of the unattested interlineation in the will?

Who bears the burden of proof in circumstances where the validity of the will has been challenged?

What is the application of the presumption of the maxim *omnia praesumuntur rite esse acta* (the presumption of regularity) in the grant of letters of Administration.

Has the presumption of regularity been rebutted?

Before I delve into the substantive law it is apt that I deal now with certain procedural applications that were made during the course of trial. Whereas I am aware of the court's Case Management powers at the trial stage of proceedings I was loathe to invoke such powers in the interests of justice. Having regard to the Courts overriding objective of dealing justly with a case especially with reference to that philosophy I was swayed into ensuring that the parties are on an equal footing and are not prejudiced by their financial position; saving expense; ensuring that the case was dealt with expeditiously and fairly and, allotting to the case an appropriate share of the courts resources while at the same time taking

into account the need to allot resources to other cases: See **Part 1** of the **Civil Procedure Rules (CPR).**

In addition to the above considerations I am fully cognizant of Parts 26 and 32 of the CPR. It seems to me virtually ineluctable, that having not made an application under Part 32 of the Case Management stage of proceedings, it is now too late, at the trial stage, to then seek to introduce an "Expert's" report and testimony bearing in mind that such an expert witness as defined, "is a reference to an expert who has been instructed to prepare or give evidence for the purpose of court proceedings." In any event, I am fortified in this regard on the basis of the authority of **Calenti v. North Middlesex NHS Trust (2001) LTL 10/4/2001**. There the defendant was refused permission to call a medical expert two weeks prior to trial because to do so would work a significant injustice on the Claimant. The instant case is one in which latitude is sought though Part 32.6(1). The instant case is one in which latitude militates against such a posture:

> "no party may call an expert witness or put in an expert witness's report without the court's permission."

Also, under Rule 32.6(2), the general rule is that the court's permission is to be given at a case management conference.

Again, Rule 32.6(4) and 32.6(5) mandate what needs to be done, assuming permission is given by the Court, let alone the unilateral attempt to introduce the expert's report or testimony which in the circumstances is prejudicial to the other side.

By a similar token of reasoning the lateness of the application by the defendant's attorney-at-law, Mr. Norman Wright, Q.C., to seek to introduce his belated witness into the proceedings long after the trial had begun was, apart from being perplexing, was I find prejudicial to the other side and was thus disallowed.

Analysis

The relevant provisions of Statute Law are to be found at Sections 14, 15 and 16 of the Wills Act. They are stated in extenso.

Section 14: No will shall be revoked by a presumption of an intention on the ground of an alteration in circumstances.

Section 15: No will or codicil or any part thereof, shall be revoked otherwise as 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, 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.

Section 16: No obliterations, interlineation, or other alteration made in any will, after the execution thereof, shall be valid, EXCEPT so far as the words or effect of the will before such alteration shall not apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witness be made in the margin, or on some other part of the will, opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

It is plain that what Section 14 of the Act is directed at is revocation on the presumed basis of an intention by the mere fact of an alteration by the testator. In other words, one ought not to invoke or infer an intention on the part of the testator to revoke his will merely because of an alteration in circumstances.

Section 16 delineates or adumbrates the circumstances by which a will be treated as being revoked. It should be noted, in passing, that the corresponding provisions in the English Wills Act of 1837 are identical in all respects and as such decisions in that jurisdiction on the interpretation of those sections are applicable in our jurisdiction.

Thus, it was held in ***In the Goods of Gosling (1886) 11 P.D. 79*** that a statement at the foot of an obliterated codicil, "We are witnesses to the erasure of the above", signed by the testator and attested by two

witnesses fell within the permissible acts of revocation. Also, in **Re: *Spraclan's Estate [1938] 2 All ER 345***, the Court of Appeal held that the requirement of, "some writing declaring an intention to revoke the same," was met and satisfied on the testator's use of the words, "will you please destroy the will already made out," as signifying an intention on the part of the testator to revoke his earlier will. See also **In the Goods of Durance (1872) LR 2 P & D 460** where Lord Penzance said, "if a man writes to another, 'go and get my will and burn it,' that by so directing the testator shows a strong intention to revoke his will.

Revocation may, as I understand it, be relative to another disposition which has already been made or is intended to be made, and so dependent thereon that revocation is not intended unless that other disposition takes effect: See ***Ex parte Earl of Leicester (1803)7 Ves. 348*** and ***In the Goods of Irvine {1919} 2 IR. 485*** . In the result if from any cause the other disposition fails to take effect the will remains operative as it was before the revocation. In such a case the animus revocandi has only a conditional existence, the condition being the validity of the disposition intended to be substituted: **Powell v Powell (1866), L.R. 1 P & D 209.**

The question which has to be answered is whether the interlineation was ineffectual for want of due execution: **in the Estate of Davias, Russell v. Dalaney (1951) 1 NK ER 920.**

In that case the Testatrix had asked an attesting witness "A" to assist her to make a will. After "A" had written out her instructions the Testatrix put her name on the document whereupon it was given to "A" to sign. While doing so the second attesting witness "B" entered the room and the Testatrix having acknowledged her mark thereon to "B" he also signed as a witness. By so doing the Testatrix purported to revoke all former wills and in the process destroyed the earlier will.

It was held that the later will had failed for want of due execution and that the revocation of the earlier will was conditional on the validity of the later one. Since the later one was invalid the doctrine of dependent relative revocation applied and the earlier will was pronounced upon.

Alterations made in a will after it is signed may be validly effected by the testator acknowledging his existing signature in the presence of witnesses signing in the margin or in some other part of the will opposite or near to such alterations. In this respect, the initials of the testator and the witnesses are sufficient for this purpose. Thus, there must be either

an execution of the alteration or a re-execution of the will: ***In the Goods of Cunningham (1860), 4 Jw v. Tr. 194; 44 Digest 272, 1036.***

In the absence of evidence the presumption is that alterations, interlineations and erasures were made after execution, and the burden is upon the person who seeks to rely upon an alteration in a will to adduce some evidence that this alteration was made before the will was executed.

The general principle is that probate is granted in blank as regards such of the original words as are not apparent, but, if they are apparent, the probate contains the original words: ***In the Goods of Gaussen (1868) 16 WR 212.***

In re: Jones (deceased) Evans v. Harrias and others it was held that where a testator mutilated or destroyed a will with the intention of making a new will but failed to carry out that intention, it did not necessarily follow that the mutilation or destruction was ineffective to revoke the existing will. The revocation was only ineffective where it appeared that, by mutilating or destroying the will the testator's intention was conditional in the sense that he intended that the revocation should only take effect when a new will was executed.

The case ***In the Goods Harsford [1872] P & D 211*** deals with unattested alterations and the doctrine of dependent relative revocation. So too are the cases of ***in the Re Murrray, deceased. Murray v. Murray and others*** and ***In the Goods of McCabe (1872) LR 94.***

The cases supplied by the defendants in rebuttal have been for the most part, counter intended. In **Sykes v. Sykes (1867-68) LR Ch. 301,** a testator by his will gave his residuary real and personal estate to trustees upon trust for his five sons as tenants in common and by a codicil revoked and made void all the trusts in his will contained concerning his residuary estate so far as the same trusts related to his son "R", or his interest therein, and in lieu thereof gave a pecuniary legacy upon trust for his wife and children and if "R" should have no children, he directed that the said legacy should sink into residuary estate and in that event "R" or his representatives should not take any share or interest therein.

It was held that the testator died intestate as to the trusts of one-fifth share of the residuary estate and that the legacy was payable out of the residuary estate and not out of the share which had remained undisposed of. Thus "R's" claim for a one-fifth share of the residuary estate given to him in the will on the basis that if the legal effect of the

words which the testator was using had been brought to his attention he would have made a different disposition. This would arise on the principle that if there is a devise or bequest of residence of one of the shares, that share does not fall into the residue but becomes undisposed or and goes to the next of kin or heir-at- law.

In the instant case the question is whether the purported interlineation is effectual. Clearly on the basis of the foregoing cases it was not.

The defendants reliance on the quote from the **Law of Wills by JS Bailey** need only be restated to demonstrate its effect: "strictly speaking, there is no need to execute any alterations or corrections which were inserted before the will was executed; for although a Court of Probate presumes that alterations were inserted subsequently they will be admitted to probate if evidence is available to show that they formed part of the will at the time of its execution. It is usually advisable, however, to execute all alteration; irrespective of when they were made in order to avoid the difficulty and expense of producing evidence on the point."

It is apooictic that this quote raises the maxim of *omnia praesumuntur rite esse acta*, which as I have already endeavoured to show

casts a burden on the defendants and is inapplicable when the formalities of the Act have been disobeyed.

Again, as propounded by the defendants and quoting from Bailey's work, supra, the view is expressed that the courts may nevertheless grant probate of the will by virtue of the maxim, *exempli gratia*, on the strength merely of the testator's signature plus a couple of other signatures. So, also, where the evidence for or against the wills validity is inconclusive. For that proposition ***in the Goods of Frances Peverett, infra,*** was pressed in aid. A simple reading of the headnote will suffice.

The court extended the presumption of law to the case of an informal holograph document containing no attestation clause and in regard to which there was no evidence to prove the handwriting of one of the persons whose name appeared near the signature of the testatrix at the foot or end of the document.

The question revolved around the non-inclusion of an attestation clause. The President of the Court asked somewhat rhetorically, why should two people sign at all if not as witness? He then answered his own question: The court leans more towards testacy than intestacy .

It suffices to dispose of this contention of the defendants by a reference of their authority: **Bailey's The Law of Wills.**

In respect of the presumption of the execution that the maxim of *omnia praesumuntur rite esse acta*, is applicable where the evidence for or against the validity of the will is inconclusive. However, he posits that the maxim and its benevolent presumption are displaced if the circumstances show on a balance of probability that the rules were not observed: **In The Goods of Berevity]1961] 1 WLR 891.**

In the instant case clearly and irrevocably, there can be no question of the displacement of the benevolent presumption being invoked here as, according to counsel for the defence, the omission of the attesting witnesses signature was an oversight; clearly, the irrepresssible conclusion is that the rules of the Law of Wills were not observed in their formal aspect. Thus, the defendants argument fall to the ground.

It follows inexorably the doctrine of *omnia praesumuntur rite esse acta*, or the presumption of regularity as it is called is inapplicable to the circumstances of the present case. - ***In the Goods of Frances Peverett [1902] p. 205, supra,*** cannot be prayed in aid as the **carte blanche** authority for careless indulgencies. The benevolent maxim expressed therein also has its limitation as I have already adverted to.

In the instant case what is glaringly deficient, with due deference to Queen's Counsel, is the mandated requirement of the initials of the attesting witnesses. While I am prepared to accept counsels words that the, "Testator at the time of the execution of the Will," made the alteration in Clause 3 thereof, "but through an oversight the said alteration was not initialled by the witnesses to the will", I cannot accept that these circumstances can be explained away by the presumption of regularity (execution). In fact, the benevolent presumption is displaced if the circumstances show on a balance of probability that the rules were not obeyed. To put the matter beyond a penumbra of doubt the case of ***in the Estate of Bercovitz [1961] 1 WLR 892 (1962) 1 All ER 552,*** stands as a stark reminder. The facts are taken from the headnote.

A testator typed his will on a single sheet of paper, heading it in the left hand side with an attestation clause and appending his signature on the right hand side opposite. Underneath were the signatures of two witnesses followed by the body of the will and at the foot was a second signature by the Testator. One of the witnesses gave evidence that when they signed everything below the signatures was covered by blotting paper and that she did not see the testator's signature at the bottom of the will. The judge found that the will was not validly executed. That

decision was challenged and on appeal the Court of Appeal upheld the decision of the first instance judge. Danckmerts, LJ had this to say: "it was contended by counsel for the appellants that the Court should apply the presumption of due execution in this case. One of the cases relied on by counsel was ***Harris v. Knight (1890), 15 P.D. 170.....***" He then went on to quote Lindley, LJ from the referenced case: the maxim *omnia praesumuntur rite esse acta*, is an expression, in a short from of a reasonable probability, and of the propriety in point of law of acting on such probability.

However, he cautioned, that when the actual observance of all due formalities can only be inferred as a matter of probability then it has no application.

In the instant case, I have not had the benefit of the evidence of the two attesting witnesses as one is deceased and the other is unforthcoming. All that I am left with then are the affidavits of Mr. Norman Wright Q.C. Yet, I cannot be unmindful of the significant breach of formality. In seeing that the impugned interlineations was initialed by the attesting witnesses. In this respect, therefore, the maxim has no applicability.

Thus, I hold on a balance of probabilities, that the purported interlineation through the name of Clement Dodd Jnr. fails on the basis of the doctrine of dependant relative revocation and on the inapplicability of the maxim of *omnia praesumuntur rite esse acta*,.

The declarations sought by the Claimant that the purported partial obscuration of the gift to him of a share in Jamaica Recording and Publishing Company Limited is invalid and of null effect is upheld. So too is the declaration in respect of the revocation of the grant of Administration with the will annexed and for the administration by the Administrator General to effect the unbiased administration of the estate of Clement Dodd Snr. Also, I grant the declaration for an accounting as to the administration of the estate since the grant of Administration to the defendants and up to 21 days from the date of judgment.