

SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL No. 9 of 1995

BETWEEN:

PHYLLIS MITCHELL

APPELLANT

and

FLORENCE LOUISE BELFON

RESPONDENT

Before: The Rt.Hon. Sir Vincent Floissac
The Hon. Mr. C.M. Dennis Byron
The Hon. Mr. Satrohan Singh

Chief Justice
Justice of Appeal
Justice of Appeal

Appearances: Dr. Ralph Gonsalves for the Appellant
Mr. L. A. Douglas Williams for the Respondent

[March 26; April 15, 1996]

JUDGMENT

SATROHAN SINGH, J.A.

The issue in this appeal involves the interpretation of a certain clause in the will of Miriam Leonora Simmons. The appellant contends that the relevant clause is ambiguous. The respondent sees no ambiguity in the said clause. **Cenac J** who heard the summons, found the words used by the testatrix to be, in the context, unambiguous.

The will, gave the appellant Phyllis Mitchell one of the daughters of the testatrix a house nearest to Port Elizabeth, her second daughter, the respondent Florence Louise Belfon, two houses, one, at Belmont and one at Union, her third daughter Hyacinth Simmons a house at Belmont, her husband Lincoln, land, and to her two sons Alfred and George Simmons the residue of her estate to be divided equally between them. The final clause of the will which contains the impugned words reads as follows:

"Lastly I make constitute and appoint my dearest daughter Florence Louise Belfon as Executor of this my Last Will and Testament. **I entrust her to set and approve all boundaries as she may see fit.**"

The last line of this clause which I have emphasized are the impugned words in the will.

The house bequeathed to the appellant and the house bequeathed to the respondent together stand on 30,804 square feet of land. In the purported execution of the task entrusted to the respondent (the executrix) "to set and approve all boundaries as she may see fit", the respondent, in a purported approval of the boundaries of the house bequeathed to the appellant, expressed her willingness to execute a deed of

assent in the appellant's favour for the said house but only with 4,395 square feet of the 30, 804 square feet of land. This meant that the respondent would then execute in favour of herself a deed of assent for the house bequeathed to her at Belmont with the remaining 26, 419 square feet. The appellant considered this distribution unfair and inequitable and contrary to the intention of the testatrix. Hence the advent of these proceedings.

Having given careful thought to the contents of the will, I consider the impugned words ambiguous. These words do not state with any clarity whether "approve all boundaries" gave the executrix the power also to determine the volume of the land relevant to the respective bequests as she purported to do with respect to the bequests to herself and the appellant. Alternatively, if the executrix was so empowered, the words per se did not indicate the yardstick to be used by the executrix in the execution of this power.

The only principle of construction which is applicable without qualification to all wills and overrides every other rule of construction, is the testator's intention as collected from a consideration of the whole will taken in connection with any admissible evidence. The meaning of the will and of every part of it is determined according to that intention. Where a context is found which is sufficient to control the meaning of the words, but the words in that context are ambiguous, contradictory or obscure, the court would adopt that construction which it considers most likely that, in the circumstances, the testator meant by the words of the will, taking into account the general scope of the will and the testator's general purpose. The construction is not to be decided on mere conjecture or belief, but on judicial persuasion of what is the testator's intention, either expressly declared or collected by just reasoning upon the words of the will or evidenced by the surrounding circumstances where they can be called in aid. Generally, the will should be so construed that every word has effect unless to do so would be to defeat the testator's intention as collected from the context of the whole will. [See Halsbury's Laws of England 4th Edition paras. **408**, **412** and **433**].

Taking the will in context and reading it as a whole, it seems to indicate that the respondent Florence Louise Belfon was the favourite offspring of the testatrix. This is demonstrated not only from the fact that she is the only one in the will given the appellation of "dearest daughter" but also the fact that she was bequeathed two of the testatrix's houses and entrusted with the execution of the will. These facts convey a message of the testatrix's confidence in her that she would do what is right in executing her functions as executrix of the will.

Because of the ambiguity of this clause in the will, what is right in the execution of those functions, would have to be what is fair and equitable and in keeping with the intention of the testatrix as can be gleaned from the will. Reading the will in context, I find myself judicially persuaded that a reasonable conclusion as to this intention was that the land upon which the houses bequeathed to the appellant and respondent stood, should as near as possible be devised equally. Support for this conclusion is had from

the fact that in the bequest to her two sons, the residue of the estate was to be divided equally between them.

It is my considered opinion therefore, that to confirm the respondent's decision to give to the appellant **4,395** square feet of the land and to give to herself **26,419** square feet would be to defeat the intention of the testator of having a fair and equitable distribution of the same. For these reasons I would allow the appeal and set aside the order of the learned Judge. I grant the declarations prayed for by the appellant in the originating summons:

1. That the true interpretation and/or construction of the Will of Miriam Leonora Simmons, deceased, made on August 24, 1993, is that two of the beneficiaries, namely the appellant and Florence Louise Belfon, are entitled to an equitable distribution of the land upon which the two respective houses, which each has been devised, stands.
2. That the true meaning and/or interpretation and/or construction of the formulation in the said Will, 'I entrust her (the Executrix) to set and approve all boundaries as she may see fit' is that the Executrix is entitled to set and approve all boundaries in a manner which is fair and equitable.
3. That the division of the said land as between the said two beneficiaries, the appellant and Florence Louise Belfon, be in accordance with the terms of the Survey Plan drawn up by the authorised Land Surveyor, K. Francis, and approved and lodged in the Lands and Surveys Department, Saint Vincent and the Grenadines, on December 1, 1993, bearing the Plan Number Gr 5/44, which terms are:
 - (a) To the appellant, Lots 1 and 1(a) admeasuring totally 15,402 square feet; and
 - (b) To the respondent Florence Louise Belfon, Lot 3 admeasuring 15,402 square feet.

I order:

1. That a deed of assent be made in favour of the appellant vesting absolutely in her the said Lots 1 and 1(a) on the said Survey Plan Gr 5/44.

2. That the respondent execute the said deed of assent within one month from the date of this order, failing which the Registrar of the Court is authorised to so do.

The appellant will have her costs in this Court and the Court below.

SATROHAN SINGH
Justice of Appeal

I Concur.

SIR VINCENT FLOISSAC
Chief Justice

I Concur.

C.M. DENNIS BYRON
Justice of Appeal