ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 440 OF 1996

BETWEEN:

SHERWIN WILLIAMS
SHELDON WILLIAMS

Plaintiffs

and

ROBER B LAYNE
VERVINA LYNCH

Defendants

Appearances:
Arthur Williams for the Plaintiffs
Olin JB Dennie for the Defendants

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2000: July 4, 18, August 1, September 27
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JUDGMENT

[1] MITCHELL, J: This was an action brought by the Plaintiffs against the Defendants as Executor and Legatee respectively for an order that the Last Will and Testament of Tyndale Williams deceased be pronounced against, and for a declaration that the deceased died intestate leaving him surviving the Plaintiffs as the only persons entitled to share in his estate.

[2] The action was brought by a generally endorsed writ issued out of the High Court on 11 December 1996. The writ does not indicate whether the jurisdiction of the Court sought to be invoked is Civil or Probate. Given the issues to be determined, this case should have been brought and conducted as a Probate Action. The provisions of Order 53 of the Rules of the Supreme Court, which replaced the old Contentious Probate Rules, would have applied. If at the time of the issuing

of the writ a Grant of Probate of the disputed Will had not yet been made, the Plaintiff would have entered a Caveat to stop the granting of Probate by the Registrar to the contested Will. If a Grant had earlier been made, there would have been a Citation to bring in the Grant to have it cancelled. There would have been Affidavits of Testamentary Scripts describing the alleged wills, if any, in existence. There might have been an application in Chambers for the Defendants to bring in the contested Will and to attend in court for examination. The witnesses to the contested Will would have been required to attend any trial as the court's witnesses, to be cross-examined by counsel for the Plaintiffs and counsel for the Defendants. As it is, the procedures set out in Order 53 of the rules was not followed. This case not having been brought within the four corners of the rules designed for the protection of beneficiaries of a deceased's estate, some of the safeguards and remedies available to them under our Rules of Court have been lost to them. A Grant of Probate appears to have been made to the 1st Defendant by the Registrar some time after the commencement of this suit. The 1st Defendant Executor, in the face of the writ which had been issued and served on him, attended at the Registry and collected the Grant of Probate and proceeded to sell the sole St Vincent asset mentioned in the Will. The 1st Defendant has disbursed the proceeds of sale of that asset to his mother the 2nd Defendant Legatee. I do not place any blame on the solicitors in this case for the non-observance of the rules that should govern Probate Actions. I take judicial notice of the notorious fact that for at least the past 30 years no Probate Action Cause Book has been kept in the Probate Registry of St Vincent, and all actions that should have been brought as Probate Actions have been brought and conducted from start to finish, without any intervention by anyone, as a simple High Court suit. The Court in this case will simply have to do the best it can in the circumstances, applying the fractured rules of court to the issues and evidence, in an attempt to do justice between the parties.

[3] Giving evidence for the Plaintiffs were Sherwin Williams, Elwardo Lynch the brother of the 2nd Defendant, Eyon Cato the brother of the deceased, and Dr

Gadiredy Srenivason the District Medical Officer. Giving evidence for the Defendants were Virvinia Lynch the 2nd Defendant, and Roger Layne the son of Virvinia Lynch.

[4] The facts as I find them are as follows. The deceased Tyndale Williams was a Vincentian who lived and worked most of his life in Trinidad. There, he had two sons, the Plaintiffs. They are his only children. At the time of his death, he owned two pieces of real estate and money. One of the properties that he left is a house and land situate at Chin Chin road in Cunupia in Trinidad. The other property was a house and land situate at Arnos Vale in St Vincent. He also had various sums of money on deposit in the Royal Merchant Bank and Finance Company Ltd of Trinidad. He had become friendly with the 2nd Defendant in Trinidad. They had begun a relationship about 3 years before his death at the age of 71. The 2nd Defendant was a Vincentian business woman who did business in Trinidad. She travelled frequently between St Vincent and Trinidad. The 2nd Defendant owned her father's property in Chateaubellair in St Vincent. While her father was still alive he had given her a Deed of Gift to his property. Her father had operated a shop in the ground floor of the property in Chateaubellair, and he had continued to live upstairs even after the transfer of the property to the 2nd Defendant. During their short relationship, sometimes the deceased and the 2nd Defendant stayed at the deceased's home in Chin Chin road, sometimes at the deceased's home in Arnos Vale, and sometimes at the 2nd Defendant's home in Chateaubellair that had been given to her by her father.

[5] The deceased was a long-time sufferer from kidney disease. He occasionally had to be put on dialysis. In July 1996, the deceased and the 2nd Defendant were in Chateaubellaire when the deceased took a turn for the worse. He was admitted to Hospital in Chateaubellaire on 30 July, and released on 2nd August. Dr Gadireddy Sreenivasa gave evidence to the Court. He is, and was at the time, the District Medical Officer for Chateaubelair. He had on 26 November 1996, after the death of the deceased, at the request of the Plaintiffs, issued a Report. This

Report was put in evidence, and the doctor attended at court to explain his findings in the Report. The Report and the evidence were to the effect that the deceased was a known end-stage renal disease patient on peritoneal dialysis. According to the Report, the deceased had been admitted to the hospital on 30 July for "unresponsiveness." He was found to be suffering from severe anemia, renal osteodystrophy, and end-stage renal disease. Because of an infection on his abdomen, he was not able to be put on dialysis. He was discharged from the hospital, according to the Report, "responding to verbal stimuli not well oriented," conscious but in poor health condition. According to the doctor's evidence, the deceased was discharged "with poor prognosis." The doctor described the deceased at the time as being in a severe anemic condition, with low haemoglobin, and a severe anascara condition, ie, bloated from body fluid. He was not eliminating waste and was hypoglaecimic. He was in the last stages of life when he left the hospital. The doctor did not see the deceased again until he was called to view the body after death. His evidence was that when he was told of the death of the deceased he had not been surprised to hear of it. He had expected the death. The deceased had died at the 2nd Defendant's home on 9 August 1996 from the above described complications arising from chronic renal failure just 7 days after he had been discharged from the hospital.

[6] On 8th August 1996, the day before he died, the deceased is supposed to have signed his last Will and Testament leaving his properties in St Vincent and Trinidad to the 2nd Defendant, and TT$60,000.00 from his bank accounts in Trinidad to his two sons, the Plaintiffs. There was no residuary clause in the Will. This is the Will that is being challenged in this case.

[7] A prudent solicitor faced with preparing a last will for an elderly and obviously weak and very ill client, will normally require a medical examination of the proposed testator at the time of the execution of the will and certification by a doctor as to the competence at the time of the proposed testator. This is even more useful if the solicitor's instructions are that the bulk of the estate is being left

to the beneficiary who is giving him the instructions to prepare the will. It is an appropriate safeguard where the solicitor is asked to hurry the preparation of the will as the testator has not much longer to live. Such a precaution is particularly helpful where the proposed principal beneficiary is a virtual stranger to the testator, and the children of the testator are being cut off with a token sum of money, as was the case here. A testator is entitled to cut off his children, and to give his estate to whomsoever he wishes. But, the court must be satisfied that that was indeed the intention of the testator. A duly executed will, rational on the face of it, is entitled to a presumption that the testator had testamentary capacity at the time it was executed. If the will is contested, the burden lies on those propounding the challenged will to establish the capacity of the testator. A careful solicitor will normally ensure that he personally interviews an ill, weak and elderly proposed testator; he will keep on file his notes as to his observations and discussions with that elderly testator, so that he can give evidence when called upon to do so as to the state of health and competence of the testator at the time he received the instructions to prepare the will. He will keep on file the medical certificate that he has obtained as described above as to the state of the mental and physical health of the proposed elderly and dying testator to produce at the trial when called upon to do so. If he interviews the ill and elderly proposed testator, he will ensure he does so in private, without the family members and proposed beneficiaries being present, to ensure that he is satisfied that the testator knows what he is doing and is not acting under any undue pressure. If the solicitor has not received directly from the testator the instructions to prepare the will, he will make a note of the instructions he was given and the circumstances in which he received them, and the steps if any that he took to determine that those instructions represented the intentions of the proposed testator. If the solicitor is not going to be present at the time of the execution of the will, he will make a note of the instructions that he gave for the proper execution of the will. He will follow up to ensure that those instructions were carefully followed. Though none of the above steps and precautions are essential requirements for the validity of a will to be made by a sick and dying testator, where they or similar steps are not taken the risk is that

the persons propounding the challenged will may fail to satisfy the court either as to the intentions of the testator or as to the testamentary capacity of the testator.

[8] The contested Will in this case was prepared by Mr Dennie, a solicitor in Kingstown. He also acted as counsel for the Defendants in this suit. He did not appear as a witness at the trial. From the evidence of the 1st and 2nd Defendants, it would appear that the 2nd Defendant, the principal beneficiary, travelled from Chateaubellaire to Kingstown the day the Will was to be signed, the day before the death of the deceased, and gave Mr Dennie the instructions to prepare the Will. The evidence was that Mr Dennie did not visit or speak to the deceased before preparing the Will, nor did he personally supervise the execution of the Will by the deceased and the witnesses. There was no medical examination of the deceased conducted prior to his execution of the Will that would help the court to determine his capacity to understand what he was doing. The draft Will after it had been prepared by Mr Dennie was taken back to Chateaubellaire by the 2nd Defendant and taken by her to be signed by the deceased as he lay dying in his bed surrounded by the principal legatee the 2nd Defendant, her two adult sons, Nigel Lynch and Roger Lane the 1st Defendant who was to be the executor, and allegedly a local JP Mr Ashton. These same last-mentioned 3 parties were to witness the execution of the alleged Will. Of the 3 witnesses to the Will only the 1st Defendant the executor gave evidence. The evidence of the defendants was that there were customers in the shop below at the time of the signing of the Will. None of these customers was brought up to the deceased's death-bed to act as impartial and independent witnesses to the Will. The evidence of the 1st Defendant, son of the 2nd Defendant and principal legatee, was to the effect that the Defendants considered the execution of the Will by the deceased to be a private family affair. The JP was not sub-poenaed by the Defendants to give evidence at the trial, and had apparently refused to come to court when requested by them to do so. The court finds it more than passing strange that the only supposedly impartial and unconnected witness to the execution of the contested Will failed to come to court to testify as to the circumstances in which he

supposedly witnessed the execution of the Will by the testator, particularly in the light of the allegations being made by the Plaintiffs. The other son, Nigel Lynch, who had witnessed the Will, was living in the USA, and did not appear at the trial. It was suggested to the Defendants in cross-examination that the JP had subsequently alleged both to the members of the family of the Plaintiffs and members of family of the Defendants that he had not really been present at the time of the execution of the Will, and that the Will had been brought to him to sign as a witness after the death of the deceased and that he had reluctantly done so. That allegation had been put to the 1st Defendant long before the date of the trial, so that he knew that it was coming at the trial. The Defendants denied that suggestion in cross-examination. As the JP did not appear in the witness box to state that as a fact, and it was denied by the Defendants, I do not accept that that was what happened. In any event, the JP was a third and supernumerary witness to the Will. It was also suggested that the signature of the deceased on the Will was a forgery. The Defendants denied it. The signature of the deceased on the Will appears to me, from a comparison with his signature on other documents put in evidence, to be the signature of the deceased, though a very weak version of his earlier signatures. I do not find the signature of the deceased on the Will to be a forgery as was claimed by the Plaintiffs. What is incontrovertible, is that at the time the Will was put in front of the deceased for execution, he was on the very brink of death from the final stages of kidney failure, he was lying in bed with his body bloated with fluids, disoriented by hyopglaecemia and undischarged body waste, and was incapable of understanding what he was signing.

[9] The Plaintiffs rely on the following authorities:

Barry v Butlin (1838) 2 Moo PC 480

Harewood v Barker (1840) 3 Moo PC 282

Banks v Goodfellow (1870) LR 5 QB 549

Battan Singh v Amirchand [1948] AC 161

Both counsel provided the court with the results in writing of their extensive research into the law surrounding the issues in this case. If I do not repeat or summarize this research here it is not because I do not appreciate the effort. However, in my view this case does not break new ground and can be decided on its facts in the light of the well-established principles that apply to such cases and that have been produced to the court by both counsel.

[10] Given the findings above, I am satisfied that the Plaintiffs have established their claim that at the time the deceased Tyndale Williams executed the alleged Will he did not know what he was doing. I would go further, if necessary, and say that the evidence does not satisfy me that he ever gave any instructions for any will to be prepared for him to sign. If he did ask for a will to be prepared, I am not satisfied that the Will he signed as presented in court represented his true intentions. For either or both those reasons, the alleged Will dated the 8 August 1996 is not a valid will. The finding of the court is that the testator Tyndale Williams died intestate leaving him surviving the Plaintiffs who are the only persons entitled to share in his estate. Necessary and consequential orders are that the Grant of Probate made to the Executor is set aside. Further, the Defendants are to account to the Plaintiffs for all actions taken by them and all monies and other property of the deceased received by them in the administration of the estate between the death of the deceased and the date of this judgment. It follows that the Plaintiffs are entitled to apply for a grant of Letters of Administration to the estate of the deceased and to proceed to administer the balance of his estate in St Vincent and in Trinidad. The Plaintiffs are entitled to their costs to be taxed if not agreed.

I D MITCHELL, QC
High Court Judge