SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(Civil)

Suit No. 583 of 1994
BETWEEN:

(1) DAPHNE DARIUS
(2) THOMAS DARIUS
(3) DOUGLAS DARIUS
(4) SIMON DARIUS

Plaintiffs

and

1. ALDITH DARIUS
2. ELIZABETH DARIUS
3. STEPHEN DARIUS

Defendants

Appearances:
Mr. Dexter Theodore for the Plaintiffs
Mrs. Esther Greene-Ernest for the Defendants

2001: March 5; 22;
April 26.

JUDGMENT

[1] BARROW, J. (Ag.) All the parties are the children of Marie Darius, who died on August 19, 1992. The deceased left six parcels of land, some with buildings on them, a store, bank accounts with significant sums in them and life insurance policies. The assets are not in issue; they are relevant only to indicate that it is a substantial estate that this suit involves. What is in issue is how the assets are to be shared.

[2] The deceased left a will dated 28th December 1968. By that will she gave, in equal shares to the first plaintiff and to the three defendants, her two properties situate at Rose Hill with four buildings standing on them. She also made a gift of the residuary estate to these four named children. From the testimony of the first plaintiff it appears that the beneficiaries were at the time the minor children. From that testimony it also appears that the bulk of the estate was acquired in the period after the deceased made her will. Why the deceased did not alter her testamentary disposition is not in issue. There is no challenge in this suit, nor otherwise, so far as has been revealed, to the validity of the will. The will was in fact admitted to probate on July 12th 1994. The executor named therein was subsequently replaced as personal representative by the three defendants. The first plaintiff was later added as a fourth personal representative. These changes took place in 1998.

[3] The issue as to the sharing of the estate arises because, the plaintiffs say, at a meeting ("the meeting") held a few days after the mother's death of all the children, save the

second plaintiff who was abroad, it was agreed that the children would share the estate equally between the seven of them. The basis of this agreement, says the first plaintiff which followed a long discussion, was that since the will was made when the four beneficiaries named therein wee all minors and now that they were all adults, it was only fair that they divide the estate equally, especially since the mother had accumulated so much more after she made her will.

[4] Consequent upon that decision, says the first plaintiff, all the parties agreed to instruct a lawyer to apply for Letters of Administration, Two of the defendants actually signed a letter from the lawyer to another lawyer requesting that the latter make material available to enable the application to be made for letters of administration. There was, in fact an application made for letters of administration, which was later withdrawn. That agreement, argue the plaintiffs, was a contract between the defendants and the plaintiffs that the beneficiaries under the will would repudiate their legacies and would, in place of their one-fourth share, accept a one-seventh share of the estate.

[5] It was only after the first plaintiff appropriated some $26,000.00 in insurance moneys and something like $48,000.00 in rental income from the deceased's properties (which the first plaintiff admits) that the defendants became upset and decided to go back on the agreement, argue the plaintiffs. As a matter of law, the plaintiffs contend, the defendants cannot be permitted to do this. By altering her position to her detriment in reliance upon the agreement the first plaintiff would be prejudiced if the defendants were to go back on their agreement, she says. And in any case, as a matter of law, once a legacy has been repudiated there can be no retraction of that repudiation, the plaintiffs submit.

[6] The case for the defendants is that they never agreed to repudiate any benefit under the will. They were at all material times of the clear belief that the will was not valid. It was based upon that understanding that they agreed to apply for letters of administration. But because, as it later turned out, the will was valid, the agreement to apply for letters of administration is not legally enforceable, the defendants argue. It was beyond the competence of the parties to contract to convert a testate succession into an intestate succession, they contend.

[7] It is clear from the evidence from both sides that shortly after the mother's death, before instructions were given to apply for letters of administration, there were, putting it at its lowest, doubts as to the validity of the will. In her witness statement the first plaintiff says "We were all speculating about the validity of the will and what I remember saying was that I wonder if the will is valid given its age. We all agreed that we would see a lawyer for advice". In cross-examination the first plaintiff stated that the question as to the validity of the will was discussed at the meeting: "I said, given the age of the will it may not be valid".

[8] The testimony of the second and third defendants is that the utterance of their sister, Daphne, was more definite than that. Stephen says that Daphne told him that the will was not valid. This, he says, took place before the meeting. Elizabeth says that Daphne told her that their mother's will may never have been registered and would therefore be invalid and she believed Daphne. Elizabeth says that Daphne said she had consulted a lawyer on the validity of the will and was advised that it would be valid only if it is registered.

[9] There is a clear contradiction in the testimony of Daphne on the visit to the Registry, which both sides agreed took place. Stephen and Elizabeth both state that they went with Daphne to the Registry to see if the will was registered. They learned that it was not registered. In her witness statement Daphne says categorically that they "went to the Registry of Deeds to obtain copies of Deeds registered in my mother's name. It is not true that we went there to enquire whether my mother's will was registered". But in cross-examination Daphne said: "I went to the registry with Elizabeth and Stephen. The purpose was to look for a registered will belonging to my mother." No attempt was ever made to explain this contradiction and perhaps that was the prudent thing to do. Daphne's answer as to the result of their search does further damage to her credit: "I don't recall if we found a registered will, so much time has passed". Obviously she must recall that they found none.

[10] I believe the testimony of Elizabeth and Stephen and I believe their version of events, including the sequence. When the meeting took place, I find, the defendants were of the belief that the will was not valid. They therefore agreed that application should be made for letters of administration. They did not agree to repudiate their benefits under the will. In their thinking there were no benefits under the will to repudiate there was no valid will. I specifically reject the assertion that the defendants ever agreed that they would apply for letters of administration "whether the will was valid or not". When it was determined that the will was not registered the defendants treated that as determinative that the will was not valid. After that there was only one course open to the siblings, ordained by law, not flowing from agreement: that was to apply for letters of administration.

[11] Counsel for the defendants accepts that there was an agreement to apply for letters of administration. She concedes that there was an obligation created by "the agreement" to apply. But, she says, that agreement can only be valid if there was an intestacy. Since there was a testate succession the agreement is rendered nugatory, says counsel. She cites articles 544 and 586 of the Civil Code as together establishing that the property comprising a testamentary succession devolve to and become vested in the personal representative of the deceased from the moment of death. I accept the submission.

[12] That really disposes of the main issue in the case. The defendants did not agree to repudiate and id not in fact repudiate their benefits under the will. There was no binding agreement to apply for letters of administration. I do not need to decide whether the agreement between the parties was ever intended to create legal relations. It did seem to me that the parties merely agreed as to what was the course of action that they needed to follow and how this was to be done. I did not see that there was anything having or intended to have contractual force in that.

[13] There is one other aspect with which I must deal. The defendants counterclaimed for an order that the first and fourth named plaintiffs be made to account for their dealings with the assets of the estate. They also asked that the first named plaintiff be made to account for moneys that she "extracted" from the first and second defendants. The first named plaintiff admits that she appropriated moneys belonging to the estate. Some of it, she says, she shared with Simon, the fourth-named plaintiff. She denied receiving $12,000.00

from the first defendant for funeral expenses. I order that the first and fourth plaintiffs account for the moneys belonging to the estate that came to their hands and that they do pay over such amounts with interest at the rate of 6% per annum from the date of receipt. The defendants are to be at liberty to apply for directions as to the taking of the account, if necessary. The first plaintiff testified that there were appropriations by others but there is no evidence as to how funds that were in joint accounts that the mother held with some of the children should be treated. No claim for relief was made in relation to these funds and, therefore, I make no order in relation to these funds.

[14] Judgment is to be entered for the defendants on the claim and the counterclaim with costs to the defendants to be paid by the plaintiffs. Based on the indications from both counsel as to an appropriate sum for costs, I allow costs in the sum of $12,500.00.

Denys A. Barrow
High Court Judge (Ag.)