

SAINT LUCIA

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
(PROBATE)

PETITION NO. SLUHPB2012/0039

IN THE Estate of the late HARRY FERDINAND
(Deceased)

AND

IN THE MATTER of an Application for the grant of
Probate with respect to the Last Will and Testament of
the Deceased

AND

IN THE MATTER of Article 794 et seq of the Civil
Code and Article 1015 et seq inclusive of the Code of
Civil Procedure Chapters 242 and 243 respectively

WITHOUT A HEARING

Counsel: Vern Gill

July 26, 2013

DECISION

1. Belle J. This is an application to appeal the decision of the Registrar of the High Court refusing an application for probate of the Last Will and Testament of the Deceased for want of formality.
2. On the 30th December 1991 Harry Ferdinand of River Doree in the Quarter of Choisuel appeared before Notary Royal Callistus Vern Gill at Vieux Fort and executed his Last Will and Testament. Also present were Joseph Mathurin and Roger Dickson, the two witnesses named in the said Will. Though named, the witnesses were not described.
3. On the 6th October, 2006, the Deceased passed away at St Jude Hospital. On the 28th December, 2011 Albert John, the sole Executor petitioned the Court to grant

probate of the Will. The petition was refused on the ground that witnesses were not described in the said Will as is required under Article 782 of the Civil Code.

4. Article 782 of the Civil Code states that the witnesses to a notarial Will must be named and described in the Will.

Article 793 states:

"A will is invalidated by failure to observe the formalities prescribed in this section. But a will purporting to be made in one form which would be void if in that form alone, may yet be valid if fulfilling the conditions required for another form."

Article 795 states "The Court has a discretion as to what evidence is necessary to establish the validity of a Will."

5. Counsel argues that the Will was made in the Notarial Form which is one of three acceptable forms by virtue of Article 780 of the Civil Code. Witnesses to such must be named and described
6. Counsel argues and cites in his support the writing of William DeMontmollin Marler, 1932 in his book Law and Real Property which interprets the Civil Code of Saint Lucia, where the learned author states that the formality must be observed "on pain of nullity, unless there is some particular exemption on the subject , Civil Code 855."
7. Counsel goes on to argue that Article 855 of the Quebec Civil Code is duplicated in the second sentence of Article 793 of the Civil Code of Saint Lucia effectively allowing a Will deemed invalid in the notarial form for want of formality to be validated as a Will in the English form where it contains all requisites of the latter.
8. Counsel argues that the Will is in the English form having complied with all of the formalities in that form save that one of the witnesses must be a Justice of the Peace. The requirements of an English Will are set out in Articles 789 - 792
9. Counsel submits that the Notary Royal is competent to stand in the place of a Justice of the Peace given that powers of the former specifically under succession law includes and extends beyond that of the latter.
10. Counsel does not state how the powers of a Notary Royal in succession matters extend beyond that of the Justice of the Peace.
11. Counsel asks the court to exercise its discretion under Article 795.
12. Counsel argues that alternatively the Court may exercise its discretion and allow the Will to stand in its notarial form for the following reasons:

- i. The names of the witnesses are clearly indicated in the said Will

- ii. There is no difficulty in identifying which signature belongs to each witness, as both signed their full name.
 - iii. Regardless of the witnesses not being described there exists no conceivable difficulty in identifying or tracing them then, now or any time in the future.
 - iv. Subject to description of the parties, all other formalities for a Will in notarial form are met and satisfied.
13. It appears to me that these formalities laid down in Articles 782 and 793 are required to reduce the likelihood of fraud being committed. While it may have been possible to exercise some discretion if there had been a partial description of the witnesses for example setting out where the witness as resided even though not stating a trade or profession.
14. Where the comparison between the Notary Royal and the Justice of the Peace is concerned. I am of the view that the Notary's role is to identify the persons who signed as witnesses by the names and descriptions that they gave and to identify the Will itself. His role does not go beyond this. The identification provided is merely by names, descriptions and signatures.
15. It is my view as well that a Justice of the Peace would be expected to validate the entire proceeding by his mere presence. He/she would identify the deceased, the witnesses and be able to say that there was no duress no undue influence at the time of the signing of the Will. Being a judicial officer his powers in relation to making such judgements are greater than a Notary Royal in my view.
16. As an illustration of the extent of the powers of the Justice of the Peace, in Fourth Edition of Halsbury's Laws of England, Vol. 29 Para 224, the learned author of the text states:
- "A justice of the peace has the power to issue a summons or a warrant in any case where it appears to him necessary or expedient, with a view to the better administration of justice, that the person charged should be tried jointly with, or in the same place as, some other person who is charged with an offence and who is in custody, or is being or is to be proceeded against, within the county for which the justice acts,..."
17. This extract sets out the judicial powers of the Justice of the Peace which in the UK equated with that of a Magistrate. Although this may no longer be the case in Saint Lucia, it seems to me that the purpose for having a Justice of the Peace present at the execution of the Will goes beyond merely witnessing names and signatures of witnesses and identifying the document.
18. The Fourth Edition of Halsbury's Laws of England volume 34 paragraph 201, states:

"A notary public is a duly appointed officer whose public office it is, among other matters to draw, attest or certify, usually under his official seal, deeds and other documents, including conveyances of real and personal property, and powers of attorney relating to real and personal property situate in England and Wales, other countries in the Commonwealth or in foreign countries; to note or certify transactions relating to negotiable instruments; to prepare wills or other testamentary documents; to draw up protests or other formal papers relating to occurrences on the voyages of ships and their navigation as well as the carriage of cargo in ships. "

19. I note that the latter description portrays the Notary as an individual who may actually have an interest in the transaction that he witnesses. The Justice of the Peace would not be expected to have any such interest.
20. In the circumstances I do not find it possible to exercise my discretion to validate the Will of the deceased Harry Ferdinand in the absence of descriptions of witnesses or a Justice of the Peace.


Francis H V Belle
High Court Judge