IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

COMMONWEALTH OF DOMINICA

(CIVIL) -

DOMHCV2016/0320

IN THE MATTER OF AN APPLICATION BY BENTLEY ROYER FOR THE GRANT OF PROBATE IN THE ESTATE OF VITALIN VIDAL ALSO KNOWN AS VITALINE VIDAL, DECEASED

IN THE MATTER OF THE ILLS ACT CHAPTER 9:01 OF THE LAWS OF THE COMMONWEALTH OF DOMINICA

IN THE MATTER OF RULE 62 OF THE NON-CONTENTIOUS PROBATE RULES 1954

Before: The Hon. Justice M E Birnie Stephenson

Appearance: Miss Cara Shillingford for the applicant

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2016: December 19

2017: (Written Submissions

filed on March 6)

March 20

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RULING ON WRITTEN SUBMISSIONS

[1] **STEPHENSON J**.: This is an application brought by Mr. Bentley Royer, School teacher of Salisbury, in the parish of St Joseph, for an order declaring that the last will and testament of Vitalin Vidal also known as Vitaline Vidal dated April 1st, 2009 is valid; also that the Registrar of the Supreme Court be ordered to sign the probate of the said will, and finally, for an interpretation of the said will and declaration as to who is or who are the beneficiaries of the land at Brush.

[2] This application is supported by the affidavit of testamentary script sworn by Bentley Royer, the named executor in the will.

[3] Mr Vitalin (Vitaline) Vidal died on the 10th February 2015 leaving a last will and testament dated the 1st April 2009. Mr Bentley Royer was duly appointed as the executor of the said will.

[4] The executor has applied for and has been unable to obtain probate to the said will on the grounds that the Registrar has stated that the said will contain alterations, and that the affidavits of Messrs Royer and Ambo presented by the executor dated the 29th February 2016 and 21st April 2016 respectively, does not meet the legal requirements.[1]

Court's considerations

[5] Section 22 of the Wills Act[2] provides

> *"No obliteration, interlineations or other alteration made in any will after the execution there shall be valid or have any effect, except so far as the word or effect of the will before such alteration shall not be 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 by 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 next 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."*

[6] When considering an alteration appearing on the face of a will, Rule 16 of the 1987 - Non-Contentious Probate Rules is applicable and provides that where there is an obliteration, interlineations or other alteration, and where that alteration has not been authenticated in the manner dictated by section 21 of the Wills Act or by re-execution of the will or by execution of a codicil, the judge must require evidence to show whether the alteration was present at the time the will was executed and must give directions as to how the will is to be proved.

[7] It is the burden of the person seeking to prove the will that the alterations in the will were valid alterations, albeit on a balance of probabilities[3]. It is noted that where there are alterations to a will which have not been attested by the testator or the witnesses, the presumption is that the

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[1] See Registrar's note reproduced and exhibited at exhibit "BR3" of the Affidavit of Bentley Royer filed on the 18th October 2016

[2] Chapter 9:03 of the Laws of Dominica

[3] *Re Hawkins Estate, Carlson and Pendray v Hawkins and Ellery[1941] 2 WWR 469*.

unattested alterations were made after the execution of the will. However, as has been applied in the Bahamian Case of **Archer –v- Bodie**[4] **"***The burden of proving that they were made before execution is upon the person seeking to rely upon them …. However, even the slightest evidence will rebut the presumption"*

[8] The evidence of the person drawing the will regarding the alterations has been accepted by the court. Re: ***Keigwin v Keigwin***[5].

[9] Mr James Royer swore to an affidavit where he averred that it was he who wrote the will at the dictation of the testator. Mr Royer further stated that he made some mistakes in the will and corrected those mistakes by crossing them out and replacing the words with the right words as directed by the testator. Mr Royer also averred that those alterations were made by him and initialed by him. It is important to note that Mr Royer averred that he read over the will with the corrections to the testator who was unable to write, and the contents were approved by him before he placed his mark on the will.

[10] An examination of the will shows that while Mr Royer did not sign the will as one of the attesting witnesses, his signature does appear beneath the "x" mark of the Testator "per James C Royer Snr."

[11] The first issue to be decided is whether or not the alteration was made before or after the will was executed. The affidavit evidence of one of the attesting witnesses before the court is that he has no recollection whether or not there were any alterations on the will when he signed as witness. His evidence does not clearly say that there were no alterations, it is that he cannot recall seeing any alterations on the will at the time the document was signed, and in the circumstances, he is unable to confirm or deny that the alterations were there before he signed the will[6].

[12] The court has before it two statements regarding the alterations which are different though not diametrically opposed. Mr Ambo, the witness, cannot remember whether the alterations were there when he signed the will, and that evidence of Mr Royer who was the author of the will and who averred with particularity the alterations made and stated that they were made prior to the execution of the will.

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[4] BS 1990 SC 32

[5] *(1843) 3 Curt 607 Mentioned in Williams on Wills Chapter 14.11*

[6] Affidavit of Garfield Ambo dated the 19th April 2016

[13] In the face of evidence to the contrary and considering that this evidence is not tested as this is not a contested application, I will accept that the alterations were before the execution of the will and were, therefore, valid.

[14] There is to my mind no question of the will being invalidated by the alterations. Having decided that the alterations are valid, what is the next step available to the executor?

[15] The case of **Archer-v- Bodie**[7] is instructive in this regard. The court, in that case, was called on to decide *inter alia* the issue of delineations and alterations in the will, if they were validly made. The evidence of the writer of the will who gave evidence regarding the alterations to the will was accepted and the court found that the alterations were validly made. The court went on to order that the alterations of the will could be included in the probate of the will. The court then granted the decree of probate of the will in solemn form according law. Likewise, I will order that the executor, in this case, proceed to probate the will in solemn form according to law.

[16] It is noted that in his prayer the applicant is seeking an interpretation of the will and a declaration regarding the beneficiary of the land at Brush. Having decided that the alteration was validly made it is hereby declared that the gift of the land at Brush is "*given to Martin and Joseph in equal parts".*

[17] The costs of the application to be paid by the estate.

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M E Birnie Stephenson

High Court Judge

[7] Op cit