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Judgment
18/1965

IN THE PRIVY COUNCIL No. 20 of 1964

ON APPEAL

FROM THE FEDERAL SUPREME COURT OF THE WEST INDIES

BETWEEN:

SHEILA PRESCOD and BENJAMIN JACOB JAMES (Defendants) — Appellants

- and -

ELAINE REECE (Plaintiff) — Respondent

CASE FOR THE RESPONDENT

RECORD

1. This is an appeal from an Order, dated the 16th March, 1962, of the Federal Supreme Court of the West Indies (Lewis, Marnam and Jackson, JJ.) dismissing with costs an appeal from a judgment, dated the 24th May, 1961, of the Supreme Court of British Guiana (Probate) (Gordon, J.) pronouncing for the force and validity of the Last Will and Testament of Jacob James, deceased. — p. 117; pp.110-116; pp. 80-90; pp. 92-93

2. The Respondent who was a daughter of the deceased, was the Plaintiff in a Probate Action commenced by Writ, dated the 11th May, 1959. — p. 6
In her Statement of Claim, dated the 23rd May, 1959, she alleged that she was the executrix appointed under the last Will and Testament of Jacob James late of Mahaicony East Coast, Demarara, who died on the 17th December, 1958, — p. 9
the said Will bearing the date the 30th August, 1958, and that she was a specific legatee and the residuary legatee under the said Will. — p. 9, ll.15-18
The Respondent claimed (i) that the Court should — p. 9, ll.19-20

p.9, ll.21-24 decree probate of the said Will in solemn form of law, and (ii) costs.

pp.12-14 3. By their Defence, dated the 17th June, 1959 the Appellants, who were a son and a daughter of the deceased, and the second and third Defendants in the said action, alleged that the execution of the said Will was obtained by the
p.12,ll.15-16 undue influence of the Respondent and others acting with her. They alleged, in the alternative, that the deceased at the time that the said Will purported to have been executed was
p.13, ll.35-38 not of sound mind, memory and understanding. At the trial the allegation of undue influence was abandoned and the Appellants relied on the said alternative allegation. The Appellants claimed (i) that the Court should pronounce against the
p.14, ll.17-20 said Will propounded by the Respondent, and (ii) costs.

4. Clarabel Pickett, who was a daughter of the deceased, and the first Defendant in the said
pp.15-16 action, by her defence, dated the 1st March, 1960, alleged that the said Will was not duly executed
p.15, ll.19-20 according to the Wills Ordinance, Chapter 47, and that the deceased at the time of the execution of
p.15, ll.26-27 the said Will neither knew nor approved of the contents thereof. Clarabel Pickett was not a party to the appeal to the Federal Supreme Court, nor is she a party to this appeal.

5. Esther James, the widow of the deceased, who was a Person Cited,
pp. 17-18 appeared in the said action, and at the trial adopted the defence of the Appellants. Esther James was not a party to the appeal to the Federal Supreme Court, nor is she a party to this appeal.

6. The action was tried by Gordon, J. on the 2nd and 23rd March, 1960, and on the 3rd, 4th, 5th, 7th, and 9th January, and on the 20th February, 1961. On the last mentioned date judgment was reserved. The Appellants put in no material documents.

7. The Respondent put in the following material documents.

(i) the last Will and Testament of Jacob James, deceased, bearing the date the 30th
pp. 92-93 August, 1958 (Exhibit "A").

(ii) a Power of Attorney executed on the 11th November, 1958 by the said Jacob James in favour of the Respondent (Exhibit "B"). pp. 94-96

8. Evidence was given on behalf of the Appellants as follows:

(i) the first Appellant said that she had been on good terms with the deceased, and that in 1945 to 1946 he had destroyed a previous Will in her presence. p.52, ll.14-36 p.59, ll.7-8

(ii) the second Appellant said that he had been on good terms with the deceased. He gave an account of the state of health of the deceased in 1958, and said that the deceased was very sick on the 30th August, 1958. On that day the deceased insisted on going to Georgetown to do business with one Fraser. The witness said that he drove the deceased to the house of Fraser, and at various times the deceased required assistance and had appeared ill during the journey. The witness said that he subsequently drove the deceased and Fraser to find one Wong (a barrister), and after they had found Wong he (the witness) had stood a short distance away while the deceased, Fraser and Wong sat in the car for 5 to 10 minutes. He said that subsequently he drove Fraser to his house, and then took the deceased home. p.54, ll.23-25 p.54, ll.32-36 p.55, ll.8-31 p.55, l.32 p.56, l.22

(iii) Lambert Harold James, Government Medical Officer in charge of Mahaicony Medical District, said that he had treated the deceased on occasions for 9 to 10 years, and that the deceased had suffered from diabetes from some time prior to 1956. The witness said that he visited the deceased on the 27th August, 1958, and treated him for fever. He had noticed nothing abnormal about the mental condition of the deceased in 1958. p.60, ll.6-11 p.60, ll.21-25 p.61, ll.14-16

(iv) Frank Williams, at one time senior physician at Georgetown Hospital, gave evidence of a condition in diabetes known as hypoglycaemia. He gave a detailed account of one case treated by him, when the patient had an attack of hypoglycaemia which had caused the witness to p.65, ll.12-33 p.65, l.34 - p.66, l.27

think that the patient's judgment and behaviour were not normal. The witness said that repeated attacks of hypoglycaemia could cause profound changes in a patient's personality, but he had no personal experience of such a case. He said he considered it possible that the deceased had had attacks of hypoglycaemia, but at no time had he seen the deceased either professionally or otherwise.

p.68, ll.6-18
p.67, ll.24-38
p.70, ll.6-7

(v) Evidence was also given by the deceased's granddaughter as to the state of health of the deceased. She said that he had given himself injections and consumed a large quantity of condensed milk.

p.62, ll.8-21
p.61, l.33 - p.62, l.7

9. Esther James, the Person Cited, gave evidence to the same effect as the deceased's said granddaughter as to the habits of the deceased and his condition on the 30th August, 1958, and at other times.

p.63, ll.5-20

10. Evidence was given on behalf of the Respondent as follows:-

(i) Clinton Wong, a barrister in practice, and Thomas Bedford Fraser, formerly a barrister's clerk, both said that they were present when the Will was executed by the deceased on the 30th August, 1958, in a motor car in Georgetown; and that Wong read the said Will to the deceased, who said that it was what he wanted and appeared to understand the contents. The witness Wong said that at no time either before or after the execution of the said Will did the deceased appear weak and feeble in his understanding. He said that the deceased gave him lucid instructions to draw up the Power of Attorney executed by the deceased in November, 1958 (Exhibit "B"). The witness Fraser said that he had prepared documents for the deceased for many years, and in July 1958, he took the deceased's instructions for the said Will at the request of the said Wong. The witness Fraser said that the deceased gave his instructions intelligently, and at no time did he observe any change in the mental powers of the deceased. He said that he did not

p.22, ll.12-27
p.28, ll.1-19
p.23, ll.9-10
p.22, ll.32-39
pp. 94-96
p.27, ll.20-27
p.27, ll.29-36
p.28, ll.27-28
p.27, ll.33-34

preserve the note of the instructions he received from the deceased, neither did he preserve the first draft of the said Will, which had been corrected by the said Wong. The witness Fraser said that he had been indebted to the deceased at the time of his death but had subsequently paid the balance of the debt to the estate.

p.27, ll.37-40

p.28, ll.23-26

(ii) Leopold Paliandy Kerry, Acting Deputy Registrar of the Supreme Court, said that he had known the deceased for a considerable time, and the deceased signed and executed the Power of Attorney (Exhibit "B") before him on the 11th November, 1958. The witness said that the mental powers of the deceased were not failing at that time.

p.21, ll.12-27

pp. 94-96

p.21, l.27

(iii) Balwant Kashinatu Schenolikar, Surgeon Specialist at the Mercy Hospital, said that he had examined the deceased on the 1st December, 1958, and found he had an inoperable carcinoma. He said that the deceased had a good memory as far as his disease was concerned, and the witness concluded the deceased had no mental abnormality. The witness said that an attack of hypoglycaemia lasts for minutes, and the patient dies if not treated. He was of opinion that transient loss of memory could result from hypoglycaemia.

p.44, l.32-
p.45, l.8

p.46, ll.19-20

p.46, l.31

(iv) The Respondent gave evidence as to the deceased's attitude to the Appellants, herself and his other children, and of gifts he had made in his lifetime. She said that he was mentally normal during August. 1958.

p.37, l.6-
p.39, l.42
p.40, l.6

(v) Three other witnesses gave evidence of seeing the deceased both before and after August, 1958, and of discussing business matters or doing business with him. The witnesses said that the deceased retained his mental alertness.

pp.34-37
pp.49-52

11. Gordon, J. delivered a reserved judgment on the 29th May, 1961. After summarising the different grounds urged by the first Defendant and the Appellants for rejecting the validity of the said Will, he set out the facts which were not in dispute. These included the facts

pp.80-90

p.81, ll.8-22

p.81, ll.23-42

that the Will was prepared by Mr. Fraser, executed before Mr. Wong and witnessed by the said Wong and Fraser, and that the Will replaced an earlier Will prepared by Mr. Fraser, which had been destroyed between 1945 and 1946. The
pp.82-83 learned Judge set out the terms of the Will (Exhibit "A"), and went on to refer to the contention that the deceased had developed in his
p.83, ll.35-38 mind a complex of dislike for his children due to hypoglycaemia or hyperglycaemia. He said
p.84, ll.25-33 that the Court had been asked to infer from the evidence given by the second Appellant that the deceased was suffering from an attack of hypoglycaemia when he executed the Will, and it was urged that this contention was supported by the fact that for no apparent reason the deceased had excluded most of his children from his bounty, favouring one child. The learned Judge accepted the evidence given by Mr. Wong and Mr. Fraser and found as a fact that the deceased
p.85, ll.34-36 could read, and that the Will was executed in accordance with the Wills Ordinance, Chapter 47.
p.86, ll.4-8 He accepted the evidence of Mr. Wong and Mr. Fraser that the deceased was mentally alert both before and at the time he executed the Will, and
p.86, ll.9-13 he rejected the evidence of the second Appellant as to the deceased's state of health after he left home on the 30th August, 1958, observing that as a witness the second Appellant was often found to be unreliable, untruthful and evasive. The learned Judge rejected the evidence that the mind of the deceased had not been functioning
p.86, ll.41-44 properly for some years or that it had deteriorated as a result of illness. He was unable to draw the conclusion that the deceased
p.87, ll.18-20 was suffering from hypoglycaemia when he executed the Will. The learned Judge then considered the
p.87, ll.21-35 allegation that the circumstances in which the Will was made were suspicious, and the matters relied on in support of that allegation. se
p.87, ll.36-39 circumstances had to be scrutinised carefully by the Court as any suspicion had to be removed by the person propounding the Will. He was satis-
p.90, ll.1-6 fied that the deceased knew and approved the contents of the Will, that the deceased was of sound memory and understanding when he executed it, and that such suspicions as might have arisen
p.90, ll.7-14 had been dispelled. The learned Judge pronounced the Will to be of full force and effect and ordered that it be admitted to probate. He ordered that the costs of the first Defendant, the Appellants and the Respondent and half the costs of the said Esther James he paid out of the estate.

12. The Appellants appealed to the Federal Supreme Court of the West Indies. In their notice of appeal, dated the 15th September, 1961, they complained that Gordon, J. had erred in law and misdirected himself on two points, and that the decision of the learned Judge was erroneous and could not be supported having regard to the evidence as a whole for a number of reasons. The appeal was heard before Lewis, Marnan and Jackson, JJ. on the 13th, 14th, 15th and 16th March, 1962. pp. 2-5 p.2, l.28- p.3, l.4 p.3, l.5- p.4, l.18

13. The judgment of the Federal Supreme Court was delivered on the 16th March, 1962. Marnan J. (in whose judgment the other learned Judges concurred) referred to the fact that the Appellants had been supported in attacking the Will at the trial by the first Defendant and the Person Cited, but those parties had not appealed. Arguments had been addressed to the Court on the hearing of the appeal as to whether the Appellants should be permitted to rely on points pleaded in the action by other parties when no amendment to the Appellants' Defence had been made. The Court had ruled that the case might be argued on the basis of the notice of appeal and the evidence. The true case of the Appellants was that the findings of Gordon, J. were against the weight of evidence, and the only point of law was that the Judge had failed to appreciate the particularly heavy burden of proof placed on the Plaintiff in a case where a testator was suffering from a debilitating disease. Marnan, J., after stating the facts which were not in dispute, said that after the execution of the Will the deceased returned home and continued to take an active part in his business affairs. There was no evidence that the deceased ever had second thoughts about his Will. There was no evidence from anyone with whom the deceased had had a medical or business relationship that the deceased's mental capacity appeared to be impaired at any time, but there was abundant evidence to the contrary. The Appellant's real case was that, however mentally normal the deceased was in the second half of 1958, Gordon, J. was wrong in holding that the deceased was normal when he executed the Will, because, it was said, the proper inference was that the deceased on that occasion was deprived of testamentary capacity by an attack of hypoglycaemia. This involved the proposition that the deceased had a similar attack about a month earlier when he gave pp.110-118 p.110, ll.27-28 p.111, ll.1-15 p.111, ll.31-32 p.111, ll.32-35 p.111, l.40- p.112, l.15 p.112, ll.17-18 p.112, ll.20-26 p.112, ll.27-41

instructions for the preparation of the Will.

p.113, l.18 — The cases cited in argument in support of the proposition that Gordon, J. had failed properly to appreciate the burden of proof on the Plaintiff were distinguishable on the facts.

p.113, ll.13-16 — The test to be applied was whether any malady had in fact debilitated the testator's mental powers prior to or at the time of the execution of the Will. On the evidence as to the deceased's mental capacity it was impossible

p.113, ll.34-38 — to say that Gordon, J. came to the wrong conclusion. Marnan, J. agreed that evidence of suspicious circumstances should be taken into

p.113, ll.40-43 — account if any cause for genuine suspicion could

p.113, l.47- p.114, l.3 — be found. The admitted fact that a previous Will had been destroyed by the deceased animo revocandi indicated that the deceased had decided

p.114, ll.3-6 — to make different dispositions. The destruction by Mr. Fraser of his notes and draft would have been suspicious only if it had been suggested that the Will conflicted with the deceased's instructions. Counsel did not persist in putting forward the indebtedness of Mr. Fraser to the

p.114, ll.6-9 — deceased as being suspicious, and no reason had been advanced for regarding the semi-literacy of the deceased as suspicious. Conflict in the

p.114, ll.9-13 — evidence of Mr. Wong and Mr. Fraser as to the times and sequence of the visits of the deceased only reflected, at most, on the reliability of the memory of one or other of the witnesses.

p.114, ll.13-15 — The execution of the Will in a motor car was not suggestive of malpractice, nor was the suggestion that the deceased and Mr. Fraser failed to appreciate the value of the residuary bequest. Marnan, J. regarded the disparity of the provisions made for the children of the deceased

p.114, ll.15-24 — in the Will as the only matter which could prima facie be regarded as suspicious, but this suspicion was dispelled by an examination of the details of the Will and the evidence as to the attitude of the deceased towards the members of

p.114,ll.26-27 — his family. Marnan, J. regarded the findings of fact by Gordon, J. as entirely justified. The appeal should be dismissed with costs, and the

p.115, ll.34-35 — cross appeal dismissed, but with no order as to costs.

14. Gordon, J. found that the deceased was of sound mind, memory and understanding when he executed the Will, and the learned Judges of the Federal Supreme Court agreed with him; so that on this point there are concurrent findings of fact in the Respondent's favour.

15. The Respondent respectfully submits that Gordon, J. correctly appreciated the onus of proof upon the Respondent. He found that any suspicions that might have arisen had been dispelled, and the learned Judges of the Federal Supreme Court agreed with him; so that on this point also there are concurrent findings of fact in the Respondent's favour.

16. The Respondent respectfully submits that the Order of the Federal Supreme Court was right and ought to be affirmed for the following (among other)

R E A S O N S

(1) BECAUSE the Will was duly executed in accordance with the Wills Ordinance, Chapter 47 of the Laws of British Guiana:

(2) BECAUSE the Respondent's evidence proved that the deceased fully understood the contents of the Will, fully appreciated the extent of his property, and was of sound mind, memory and understanding, when he executed the Will:

(3) BECAUSE there are concurrent findings of fact in fact in favour of the Respondent:

(4) BECAUSE of the other reasons set out in the judgments of the Federal Supreme Court and the Supreme Court of British Guiana.

J.G. Le QUESNE

R.N. TALBOT

No.20 of 1964

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL SUPREME COURT
OF THE WEST INDIES

B E T W E E N :

SHEILA PRESCOD and
BENJAMIN JACOB
JAMES ... Appellants

- and -

ELAINE REECE Respondent

CASE FOR THE RESPONDENT

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