ROYAL COURT
(Probate Division) 51.

18th March, 1997

Before: F.C.Hamon Esq., Deputy Bailiff,
Jurat Mrs. B. Myles and Jurat E.W.Herbert

Between	Advocate J.E.P. Perrier and Mrs. Verena Drouin Née Ryser	Representors
And	Maurice George Minchinton	First Respondent
And	The Jersey Society For The Prevention of Cruelty to Animals Inc.	Second Respondent
And	The Jersey Wildlife Preservation Trust	Third Respondent
And	Advocate Steven Alexander Meiklejohn, as Representative of the principal heir of the estate of the late Elspeth Mackenzie Boyd	Fourth Respondent

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Advocate R.A. Falle for the Representors
Advocate A.D. Hoy for the First Respondent,
in relation to costs
Advocate J. Speck for the Second and Third Respondents
Advocate S.A.Meiklejohn

JUDGMENT

THE DEPUTY BAILIFF: This is a representation by the surviving executor of the will of Elspeth Mackenzie Boyd who died at the General Hospital on 22nd May, 1988.

Prior to her death, Miss Boyd had executed four testamentary documents in due form. They were a will of moveable estate dated 30th November 1979, with codicil to that will dated 7th December 1979 and a further codicil to that will dated 12th August 1987. There was a will of immoveable estate dated 1st May, 1979.

These matters would never have concerned the Court had there not been produced following the death of the testatrix a document made two days before her death on 20th May, 1988.

The executors presented both the wills and the codicils and the later document to the Registrar Substitute and Probate issued to the executors on 11th November 1988 of the last will and testament with two codicils and "testamentary writing".

The validity of that "testamentary writing" is now called in issue.

It is necessary for us to set out "the testamentary writing". It reads as follows. The words underlined are handwritten:-

" *Friday, 20th May. May 1988*

Elsbeth Mackenzie Boyd.
Bois de Chene.
Langley Park
St. Saviour.

C. 30129

"I, Elsbeth M. Boyd. wish to leave my house known as Chant de la Mer, and it's contents to Maurice Minchinton... This is to include the cupboard in the hall, which was to go to Mr Guest but he has now stated that he will not now want it.

My cat, Buffy, is to stay with Maurice and Lill.

Any other bequests are to remain the same as in the old Will. Any money left after the bequests, is to go to Maurice Minchinton so that Chant de la Mer can be put in good order.

Should my mind go at any time. I want Maurice Minchinton to have Power of Attorney. My office business to remain the same, but my day to day business to be run by Maurice Minchinton.

I have given some bequests out of late because I did not want the people to have to wait a year and a day for them. I do not want them called in. They are not loans. I do not want Chant de la Mer to remain closed for a year.

Elspeth M Boyd
Elsbeth M. Boyd

***Witness** Harold Minchington*

H. Minchington.

Witness

L.M.R.Brown
Mrs. L.M.R.Brown"

There are certain matters of immediate interest in the document itself.

1. The document is partially typewritten. Miss Boyd was unable to type.

2. The document is witnessed by Mr. Harold Minchington who is the brother of Mr. Maurice Minchinton. The other witness was the co-habitee and is now the wife of Mr. Maurice Minchinton. It is perhaps surprising that Mr. Harold signs his surname with a "g".

3. The Christian name of Miss Boyd, twice typed on the document, once just below her signature, is stated to be "Elsbeth". Her Christian name was "Elspeth".

There are three papers within the filed bundle that were specially referred to us:

1. A diary sheet which noted that the testatrix had been admitted to Hospital and died there on the night of 22nd/23rd May. The diary sheet is made by the remaining executor who was at the time an Advocate's clerk at Perrier & Labesse. It reads in part:

> *"Mr. Minchinton also informed me that on Friday last she had signed some instructions relating to her Will which were witnessed by his brother Harold and girl-friend Mrs. L. Brown which instructions he had delivered to Adv. Slater - Adv. Slater had an appointment to see Miss Boyd at his house on Wednesday the 25th May 1988 at 2.30"*

2. A pro-forma of the document dated 30th December 1987 was found. There are some slight variations to the document signed. That pro-forma reads like this:

> *"I wish to leave my house, known as Chant de la Mer, and it's contents to .....this is to include the piece in the hall which was to go to Mr. Gueest but he has now informed me that he will not want it.*

The cat BUFFY is to stay with Mo and Lill.

Any other bequests are to remain the same as in the old Will but any money left after the bequests, is to go to .....so that Chant de la Mer can be put in order.

Should my mind go at any time. I want .....to have Power of attorney. My office business to remain the same, only my day to day business to be run by .....

I have given some bequests out of late so that people would not have to wait I do not want them called in."

3. A note from Advocate Slater's diary which shows that his firm having received the document, he had arranged to visit Miss Boyd at 2.30 on Wednesday, 22nd May, 1988. That was the afternoon of the day that she died.

There are further problems that might arise out of the document. Not only is Harold "Minchington" the brother of Maurice Minchinton, the principal beneficiary under the terms of the document, but Mrs. L.M.R.Brown, the other signatory, is also a beneficiary under the codicil of 12th August 1987. She was the testatrix's nurse and the testatrix was living with Mr. Minchinton and Mrs. Brown, who were to become man and wife. There is no doubt that according to a letter from her G.P. she was well looked after by Mr. Minchinton and Mrs Brown.

At best, in our view, the document could only be interpreted as an act preliminary to making a fresh will or codicil. If the doctrine of dependent relative revocation applied, it would not make the dispositions contained in the document valid but it could make the document effective in revoking the testatrix's earlier will and codicils.

There are on the bundle of documents several authorities. These are of little real assistance because every case in this situation must depend on its own particular facts.

In <u>In Re Southerden (1925)</u> P 177 at 185, Atkin LJ said ***"The question in each case is, had the testator the intention of revoking his will? The intention may be conditional and if the***

revocation is subject to a condition which is not fulfilled, the revocation does not take effect."

As Roskill L.J. said in Re Jones (deceased) (1976) 1 All ER 593 at 603.

> *"In short in a case where the revocation purporting to be effected by mutilation or some other method of destruction is "conditional" in the sense that I have described and the "condition" is not fulfilled, the act of revocation is itself not fulfilled; it is ineffective because it was subject to an unfulfilled condition. But if the revocation is "absolute" in the sense in which I have used that word, then that revocation takes immediate effect, even if the result may subsequently bring about an intestacy, or some other result which it is difficult to believe the testator can have intended in his or her lifetime."*

As to "conditional" and "absolute", his Lordship earlier said at page 602:

> *"By "conditional" is meant that the efficacy of the revocation was to be dependent on the bringing into existence subsequently of a valid testamentary disposition, or of the existence or future existence of some fact. By "absolute" is meant that the revocation was to take effect at once, irrespective of the bringing into existence subsequently of a valid testamentary disposition, or of the existence or future existence of some fact".*

As was said by this Court in Re the Will of John Gerald Beaugie (1970-1971) JJ 1579 at 1594:

> *"In the case "In the Will of Russell" (1963) JJ 259 the Court said at page 263*
>
> > *".....it is the duty of the Court, in so far as it is possible to do so, to give effect to the wishes of a testator"*
>
> *"We concur; and because the doctrine of dependent relative revocation is designed to assist a Court in the discharge of that duty, we consider that, on the basis of the authorities before us, that doctrine is part of the law of Jersey and we are entitled to apply it to this case, if it is appropriate to do so."*

As argument developed, it became apparent that this representation was based on the particular application of the principle that the revocation of the will might be conditional in

which case it would not take effect unless the condition is fulfilled. The whole tenor of the document in our view is to finalise instructions for a possible new codicil: *"any other bequests are to remain the same as in the old will"*. The document is not a holograph will, it is not a testamentary document and the diary sheet of Mrs. Drouin makes it very clear that Mr. Minchinton himself did not regard the document as anything other than instructions. The advice given later to Mr. Minchinton and Mrs. Brown by Advocate Slater as recorded in the same diary sheet is in our view particularly apposite:

> *"Subsequently attending Adv. Slater's office when he explained to Mr. Minchinton and Mrs. Brown that this paper did not constitute a valid Will for the following reasons:*
>
> *That the paper had been witnessed by Mr. Minchinton's brother and girl friend -*
>
> *That any Will relating to Realty had to be signed before an Advocate and that the Testator had to live for 40 days for the Will to take effect - and from the information available to him Harold Minchinton was the brother of Mr. Maurice Minchinton and Mrs. Brown was the girl friend, and that these two witnesses were to* [sic] *close to the beneficiary for the instructions to be valid.*
>
> *Mr. M. Minchinton was instr. to take separate advice and he decided to consult Adv. D. Le Cornu -*
>
> *Mr. Minchinton was informed that we did not act or would not act for the Charities concerned - that the Executors had to sit back until the situation had been resolved."*

In our view the wills and codicils stand and the "testamentary writing" was not intended to achieve the absolute revocation of all or any part of those wills and codicils. If any intention can be inferred then that intention was to alter certain matters contained in those earlier wills and codicils conditional upon a new codicil being made. It was not made and we hold, in consequence, that the document in question has no legal validity.

JUDGMENT COSTS

Rule 13 of the Probate (General) (Jersey) Rules 1949 states as follows:

"The costs recoverable and extraordinary of and incidental to all proceedings in the court shall be in the discretion of the court and the court shall have power to determine by whom and to what extent the costs shall be paid."

That to my mind gives virtually an absolute discretion to the court as to how the costs shall be awarded commensurate with common justice.

Mr. Hoy has given an explanation this afternoon because I did not want an order to be made against his client without hearing him first. I say against his client, because although Mr. Hoy has given us the explanation that he has it must be noted that under Rule 15(4) of the Royal Court Rules 1992, any party may change his advocate or solicitor at any stage of the proceedings but until notice of any such changes filed by the new advocate or solicitor, and copies of the notice are served on every other party to the action not being a party in default, the former advocate or solicitor shall be considered to be the advocate or solicitor of the party.

Now, we must say in deference to the order that we are going to make now, that Mr. Hoy appeared before the Bailiff's Secretary when the case was set down for hearing as it was yesterday and Mr. Hoy had a bundle of documents delivered to him by the executors. We do not say this by way of criticism; we merely say it in order to establish the fact on the record.

So, in the circumstances the order that we shall make after some consideration is as follows:

The fourth respondent, that is Mr.Meiklejohn representing the principal heir, shall have his costs on a full indemnity basis from the estate.

The executors shall take 75% of their costs - and Mr. Falle I am talking about the costs post-dating the £6,500 bill that was submitted because that presumably is where the costing starts - from the estate in accordance with the charging clause which is in the will, and 25% on a taxed basis shall be paid by the First Respondent and the First Respondent shall also pay the costs of the Second and Third Respondent - that is to say the two charities - again on a taxed cost basis.

The First Respondent who was not represented in court, asked for his costs, incurred at the David Place Veterinary Hospital, for surgical operations and for prescribed drugs dispensed for the testatrix's cat, Buffy, to be met from the estate. That is refused. Those costs shall be met by the First Respondent.

Authorities

Report of the Commissioners appointed to inquire into the Civil, Municipal and Ecclesiastical Laws of the Island of Jersey (1861) (Command Papers, First Series, No 2761) Pt III at xx.

Falle -v- Godfray (1888) HL 70.

Falle -v- Falle (1951) 1 P.D. 56.

In the Will of Russell (1950-1966) JJ Vol 1 Part 1 259.

Re the Will of John Gerald Beaugié; Thomas Messervy Beaugié v John Douglas Messervy Beaugié, Arthur Sidney Beaugié and Joy Geraldine Beaugié (1970-1971) JJ Vol 1 Part 3 1579.

Re Jones (deceased); Evans -v- Harries and others [1976] 1 All ER 593.

Trigg -v- Crapp [1984] JJ 21.

In re Mansell [1990] JLR N21.

In re H.J. Parker (née Cashman) and R.J. Parker [1992] JLR N13.

In the matter of the Estate of Michael James Forbes deceased (6th September, 1995) Jersey Unreported.

Representation of Kathleen Lillian Wills (née Blampied) (16th February, 1996) Jersey Unreported.