

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No 1797 of 2011

ANNETTE G. HARPER

CLAIMANT

AND

**SHAKA GLYNE HARPER
GLYNE LEON HARPER, JR
FAITH LEANNE L. HARPER**

DEFENDANTS

Before the Honourable Mr. Justice William J. Chandler, Judge of the High Court

2015: August 14

Mr. Edmund R. King Q.C. Attorney-at-Law for the Claimant

DECISION

[1] This matter concerns an application filed 4th November, 2011 by the widow of Glyne Harper deceased for an order to have the last will and testament of the deceased dated 25th day of September, 2007 (the will) established.

[2] A statement of claim filed 4th November, 2011 sets out the following, *inter alia*:

- a. The Claimant is the named executrix in the Will of the deceased who died on 31st December 2008 in New York USA.

- b. The deceased was a Barbadian National having been born in Barbados and held a valid Barbados passport at the date of his death.
 - c. The Will was executed in New York, USA and was witnessed by three persons Fabian Harper, Lloyd Knight and Muriel Harper who were present at the same time as testified to in an affidavit duly sworn in the United States of America (the USA) on 25st September, 2007.
 - d. The immoveable property of the deceased is in Barbados. The Second and Third Defendants are the infant children of the deceased and the First Defendant is an adult child of the deceased. The executrix and the children are entitled to a share in the estate of the deceased in the event of an intestacy.
 - e. The Claimant prayed that the Court would decree probate of the said will. An affidavit in support of the application for probate was filed on even date with the previously mentioned documents and appears to be in the form of affidavit under the Non-contentious Probate Rules of Barbados.
- [3] In this affidavit the Claimant deposed that the deceased carried on a practice of Law as an attorney-at-Law at 41 Lily Drive, Wanstead in the parish of Saint James in Barbados and details the immoveable property of which the deceased was the estate owner at the time of his death.

- [4] A witness statement of testamentary scripts was filed on behalf of Shaka Glyne Harper on the 12th January, 2015. An affidavit of counsel for the Claimant was filed 29th March, 2012 in support of an application filed 29th March, 2012 for the appointment of a next friend on behalf of the Second and Third Defendants who are minor children.
- [5] On 13th September, 2012 Beckles J. (ag.) made an order appointing Esther Marita Forde as next friend of the Second and Third Defendants.
- [6] At the Court's request Mr. King Q.C. filed submissions in relation to his application on 12th July, 2013 and addressed the Court on 19th February, 2015. The submissions may be summarized as follows:
1. The original Will was deposited in the Surrogate Court of the USA awaiting probate in the County of Queens but the executor [sic] was advised that the only property the deceased had of any substance was real property situate in Barbados. Consequently, she obtained a certified copy of the Will which she is seeking to have probated in Barbados so as to be able to deal with the deceased's assets in Barbados.
 2. Counsel submitted that the preliminary point is raised whether the form of the Will complies with the substantive law of Barbados

having regard to the fact that the original Will was not executed in Barbados?

3. That, he posited, necessitated the application to the High Court to pronounce on the force and validity of the Will. Hence the question was raised whether the application ought not to be made to the Registrar of the Supreme Court (RSC) under the **Supreme Court (Non-Contentious) Probate Rules, 1959 (the Non-contentious Probate Rules)**.
4. The Non-Contentious Probate Rules do not provide for applications for grants in estates of persons who died domiciled outside of Barbados nor do they give the RSC any jurisdiction the pronounce for or against the validity of any document purporting to be a Will or how to deal with grants in respect of Wills presented for probate where the original is not available.
5. He noted that the English Non-Contentious Probate Rules provide at **Rule 54** under the caption grants in respect of non-cupative Wills and copies of Wills.

“Subject to paragraph (2) below, an application for an order admitting to proof a nuncupative will, or a will contained in a copy or reconstruction thereof where the original is not available, shall be made to a registrar.

In any case where a will is not available owing to its being retained in the custody of a foreign court or official, a duly authenticated copy of the will may be admitted to proof without the order referred to in paragraph (1) above.”

6. No such provisions are found in our **Rules**, however, the **Evidence Act, Cap. 121 of Barbados** at **Sections 122** and **123** sets out the circumstances under which a party may adduce evidence of the contents of a document in question that is unavailable.
7. In the opening paragraph of the Testator’s Will he claims to be “resident in and domiciled in the state of New York”. This application is for the Court to pronounce for the force and validity of this Will and to have this Will established. It is a preliminary step to grant in common form, a step not provided for in our Non-Contentious Probate Rules.
8. **Section 86** of the **Succession Act Cap. 249** provides that a “testamentary disposition” will be valid as regards form if its form complies with the internal law –
 - (i) of the place where the testator made it; or
 - (ii) of a nationality possessed by the testator either at the time when he made the disposition or at the time of his death; or
 - (iii) of a place in which the testator had his domicile either at the time when he made the disposition or at the time of his death; or

(iv) of a place in which the testator had his habitual residence either at the time when he made the disposition or at the time of his death; or

(v) so far as immovable are concerned, of the place where they are situated.

9. A Will complying with any of the formal requirements mentioned in **section 86** of the **Succession Act** will have the same effect as if it were a Will executed in compliance with **section 61** of the same Act.

10. Where however a Will purports to dispose of immovable property, its form must comply with the *lex situs* i.e. the law of the place where the freehold is situated.

11. The evidence as disclosed by the affidavits shows that the testator was a citizen of Barbados at the time when he made the will and at the time of his death; and except for a motor car which the testator used in Barbados, all the rest of his property is immovable and is situated in Barbados. Once, therefore, the form of the Will complies with **section 86 Cap. 246** of the **Laws of Barbados** the Court can pronounce for its force and validity.

[7] Mr. King submitted that the only order which he is presently seeking is a declaration that the Will complies with the Law of Barbados with respect to

form. If the application is successful, then the relevant application for probate will be filed.

The Issue

[8] The sole issue at this juncture is whether the Court ought to grant the declaration sought. I have looked closely at the submissions and have indicated to Mr. King my concerns with respect to the substantive relief relating to probate of the Will in Barbados especially those concerns relative to the fact that probate of a will which has been proved in a foreign jurisdiction may be resealed in Barbados under the **Letters of Administration (Resealing) Act, Chapter 247** of the **Laws of Barbados**.

[9] There are issues of jurisdiction which I consider are raised by the Will itself but those will have to be dealt with when the substantive application comes on for hearing and the issues raised are fully ventilated.

[10] The Court has jurisdiction to grant the declaratory relief pursuant to **section 17** of the **Supreme Court of Judicature Act, Cap. 117A** of the Laws of Barbados which provides:

“17. (1) No action or other proceeding is open to objection on Declaratory the ground that a merely declaratory judgment or order is sought thereby.

(2) The High Court may make binding declarations of right in any action or other proceeding whether or not any consequential relief is or could be claimed therein.

(3) Notwithstanding that the events on which a right depends have not occurred, the High Court may in its discretion make a binding declaration of right, if it is satisfied that

- (a) the question for decision involves a point of general public importance, or that it would in the circumstances be unjust or inconvenient to withhold the declaration; and
- (b) the interests of persons not parties to the proceedings would not be unjustly prejudiced by the declaration.”

[11] In the circumstances, I see no valid reason not to grant the declaration sought. Accordingly, it is hereby declared that the form of the Will complies with the law of Barbados where the deceased had a nationality at the time when he made his will. This is not, however, to be regarded as evidence that the substantial relief may be granted.

William J. Chandler
High Court Judge