

**BARBADOS**

**[Unreported]**

**IN THE SUPREME COURT OF JUDICATURE  
HIGH COURT  
CIVIL DIVISION**

**No. 565 of 2009**

**IN THE MATTER OF KAREN CECELIA CULBARD** (deceased) also known  
as **KAREN CECILIA CULBARD** referred to in her Death Certificate as **KAREN  
CULBARD** late of 79 Upton in the parish of Saint Michael in this Island

**Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High  
Court**

**Dates of Hearing: 2011 March 29<sup>th</sup>,  
2017 June 12<sup>th</sup>,  
Date of Decision: 2017 July 28<sup>th</sup>**

**Appearances:**

**Mr. Amilcar Branche Attorney-at-Law for the Caveator  
Ms. Faye Finisterre Attorney-at-Law for the Estate**

**RULING**

**Background**

- [1] On the 28<sup>th</sup> day of July 2017, I gave an oral ruling in this matter and promised written reasons which are provided hereunder.
- [2] Karen Culbard died on the 5<sup>th</sup> July 2008. She had been ill for some time and on the 25<sup>th</sup> day of June 2008, she executed her last Will and Testament.

- [3] She bequeathed her personal property to various beneficiaries.
- [4] There were two Executors appointed under her Will.
- [5] Her principal asset was her share in KD Inc., a holding company formed by her and her partner in 2005, solely for the purpose of holding title to real estate situate at 79 Upton in the parish of Saint Michael.
- [6] This Company was only authorized to issue two Common Shares, with a minimum of one, and a maximum of two shareholders.
- [7] Those two shares appear to have been issued by Certificate No. 1 under the Common Seal of the Company on the 14<sup>th</sup> day of March 2005. Interestingly, this single share certificate, constituting two common shares, was issued to the Caveator and Karen Cecilia Culbard as the registered holders, as joint tenants. It is noted, however, that the documents seen on the probate file are unauthenticated copies.
- [8] On the 10<sup>th</sup> July 2009 one of the Executors named in the said Will applied for a Grant of Probate.
- [9] The Application for Grant of Probate was duly advertised on June 22, 2009.
- [10] On the 6<sup>th</sup> August 2009 a Caveat was filed in the Registry of the Supreme Court by David Spence, (hereinafter referred to as the Caveator).
- [11] On the 17<sup>th</sup> December 2009 a Warning to Caveator was filed by the applicant for the Grant. This Warning to Caveator was served on the Caveator on

January 11<sup>th</sup> 2010. It is to be noted however, that this was in purported contravention of **Rule 38** which provides that “A person entering a caveat (in these rules called a caveator) shall within seven days serve on the applicant for a grant a certified copy thereof.”

[12] There is no evidence that the Caveator made an Entry of Appearance in accordance with **Rule 42(1)**.

[13] Instead, the Caveator responded to this by filing and serving on the said Applicant a document titled a Summons for Directions in accordance with **Rule 42(2)**, in the following terms:

“ LET ALL PARTIES CONCERNED attend before a Judge in Chambers of the Supreme Court at the Registration Office, Law Courts, Bridgetown on the 23<sup>rd</sup> day of February 2010 at 9.45 in the forenoon for the hearing of an application on the part of the Caveator for the following orders:

1. That the parties do serve on each other a list of documents in this matter within 14 days of the Order herein.
2. That there be inspection of the documents within 14 days of the service of the said list.
3. That the matter be set down for hearing as soon as possible before a single Judge estimated to last 3 days.
4. That the cost of this application be costs in the cause.”

[14] A Summons for Directions filed under **Rule 42(2)** proclaims that the Caveator has no interest contrary to the person warning, but nonetheless “wishing to show cause against the sealing of the grant to that person”.

[15] **Atkins Court Forms Volume 32(1)** provides this explanation of what is meant by “an interest contrary to that of a person issuing a warning” as follows:

“... a contrary interest for this purpose is one which would enable him to bring or defend a probate claim against the person warning as the opposing party (for example the caveator may allege intestacy, whilst the person warning may allege a will exists). It may also include a claim against the estate such as an application under the Inheritance (Provision for Family and Dependents) Act, 1975 for financial provision out of the estate”.

[16] The observation is made here that the format of this document is a Summons for Directions in the continuation of an action before the Court. There is no action/proceeding before the Court.

### **What is the Application before the Court?**

[17] This matter having come before this Court on the 29<sup>th</sup> day of March 2011, the issue that confronted this Court was procedural: what exactly was being set down for hearing before the Court. And more specifically, if this Summons for Directions was purportedly filed under the Non-Contentious Probate Rules, what are the jurisdictional limits of a Summons for Directions filed under these Rules?

[18] By Subsequent document titled Amended Summons For Directions filed on the 28<sup>th</sup> day of June 2011, the Caveator inserted the following words in the Summons for Directions:

“... for directions of the Judge under Rule 43(2) of the Non-contentious Probate Rules and under Order 25 Rule 6 of the Supreme Court 1982 for an

Order that the Caveator be at liberty to show cause against the sealing of the grant by the person warning giving that certain property which was purported to be disposed of by the testatrix in her Will is the property of the said Caveator and that of the Company known as KD Inc. and for the following orders...”

[19] I pause here to observe that **Rule 42(2)** provides as follows:

“A caveator having no interest contrary to the person warning but wishing to show cause against the sealing of the grant to that person may, within eight days of service of the warning upon him exclusive of the day of such service, or at any time thereafter if no affidavit has been filed under paragraph (3) of this rule, issue and serve a summons for directions which shall be returnable before a Judge.”

[20] And, that **Order 25 Rule 6** of the **Supreme Court Rules 1982** was not in effect on that date, but that it is a provision for the filing of a Summons for Directions in the preparation for the trial of an action, not the same ‘animal’ as a Summons for Directions under the **Non-Contentious Probate Rules of 1959**. It is to be noted that this Order applied to all actions begun by Writ (**Order 25 Rule 1. (2)**).

[21] And that **Order 1 Rule 2 (2)(2)** provides:

“(2) These Rules do not, except as expressly provided by these Rules, have effect in relation to the following proceedings:

1. Non-contentious or common form probate proceedings;
- ...
6. Any other proceedings in the High Court instituted under any enactment, in so far as rules made under that enactment regulate those proceedings.”

[22] On the 27<sup>th</sup> January 2012 counsel for the Caveator filed a document titled, Withdrawal of Caveat, effectively withdrawing the Caveat from that date. There however appears from a reading of the file, to have been a refusal by the Registrar to accept this Withdrawal. This is peculiar as **Rule 42** provides as follows:

“42. A caveator who has not entered an appearance to a warning may at any time withdraw his caveat by giving notice to the Registry and the caveat shall thereupon cease to have effect and, if it has been warned, the caveator shall forthwith give notice of the withdrawal of the caveat to the person warning.”

[23] This Court assumes that the Registrar equated the filing of the Summons for Direction by the Caveator with an Entry of Appearance.

[24] What is also interesting is that there appears under cover of letter dated July 4<sup>th</sup> 2013 from counsel for the Applicant, to the Registrar, a Notice of Application which was refused by both the Civil and Probate Registries. This Application, which exhibited the attempted Withdrawal of Caveat, sought to have the Grant issued to the Applicant.

### **Discussion**

[25] Stated simply, there are two regimes for the handling of issues arising on the administration of estates, (1) under the **Non-Contentious Probate Rules 1959**; or (2) under **Rule 67 of the Civil Procedure Rules 2008 (the CPR)**. These represent two completely separate jurisdictions; primarily that of the

registrar and the Court, with the exception of the limited jurisdiction of a judge in chambers under the provisions of the **Non-Contentious Probate Rules 1959**.

[26] **Karen Nunez-Tesheira** in her text **Non-Contentious Probate Practice in the English-Speaking Caribbean** defines ‘Non-Contentious Business’ as follows:

“Non-contentious, or common form probate business as it is otherwise called, is concerned with the business of obtaining probate and administration where there is no contention to the right thereto and includes the granting of probate and administration in contentious cases when the contest is terminated and all business of a non-contentious nature to be taken in court in matters of testacy and intestacy not being proceedings in any suit, and also the business of lodging caveats against the grant of probate or administration.”

[27] In the United Kingdom, the terms commonly used are Common Form Business or Solemn Form Business. This explanation of the two terms is provided by **Gibson’s Probate: Law and practice in Probate**:

“Usually probate or administration is granted merely on the oath of the applicant; this *is common form business*. But sometimes the validity of the will or the applicant’s right to a grant of probate or administration is disputed by another person, in which case an action has to be brought to settle the dispute; this is *solemn form business*.”

[28] *Solemn Form Business or Probate actions*, usually fall into three classes:

“(1) Actions to prove a will in solemn form, i.e., as to the validity of an alleged will.

(2) Actions to settle the right of two contending claimants to obtain a grant of administration. These actions are called “interest actions”.

(3) Actions for the revocation of probate or letters of administration previously granted in common form.”

[29] It is against this backdrop that the procedure for Caveats and Citations exists, and is provided for in the Non-Contentious Probate Rules. Caveats prevent the issue of a grant of probate or administration, as it is usual that the party lodging the caveat is desirous of having the Grant issued to him. In such event, it then becomes necessary for the other party to issue a Citation. See **Williams, Mortimer and Sunnucks on Executors, Administrators and Probate, 18<sup>th</sup> edition Chap 31** Summons for Directions by a Caveator.

[30] A Caveat lasts for 6 months unless renewed. The person applying for the Grant must take steps to clear off the Caveat by warning it, since the purpose of the caveat may not be to oppose a grant, but to obtain notification of it, for example, for the purpose of issuing a writ against the deceased's estate. (See **Gibson page 92 and page 337 of Non-Contentious Probate Practice by Karen Nunez-Tesheira**) where she lists 5 usual purposes for entering a caveat as follows:

- (a) To give the caveator time to determine whether he has grounds for objecting to the issue of a grant to some other person;
- (b) As a preliminary step to commencing a probate action or the issuing of citation proceedings;
- (c) To give the caveator an opportunity to apply to the court for an order that the surety/sureties to an administration bond do justify;
- (d) To permit a person with an equal right to letters of administration as that of the applicant, to obtain the necessary order from the court as to whom the grant should be made;
- (e) To afford any person interested in the estate of the deceased named therein, the opportunity to bring before the court any question in respect of the application for the grant; Rule 42/43 Non-Contentious Probate Rules.

[31] **Gibson’s** speaks to the procedure after Warning at **page 92** as follows:

“The warning will be signed by the registrar, and the original or a copy thereof must then be served on the person who entered the caveat. If the caveator wishes to make opposition his next step depends on whether he has an interest contrary to that of the person warning him, or has no such interest but wishes to show cause against the sealing of a grant to that person. In the former case he must, within eight days of service of the warning, enter appearance in the principal registry by filing the prescribed form, which will set forth his interest, and making an entry in the appropriate book. In the latter case he must, within eight days of service, issue and serve a summons for directions, returnable before a registrar of the principal registry. **In either event the contentious business then begins; the applicant for the grant will have to bring an action to establish his right. The costs of the caveat and warning will then be treated as costs in the cause.**” (my emphasis)

[32] Stated differently, there is no cross-over from non-contentious to contentious by the filing of a Summons for Directions. The only ‘contentious’ business permitted under such a Summons is the determination of which party is best suited to receive the Grant. Once contentious, the matter must commence under the CPR 2008 by the proper filing of a Claim.

### **Argument of Caveator**

[33] Counsel for the Caveator submitted that “By the Summons for Directions it was the Caveator’s intention to show cause against the sealing of the Grant by way of oral application with the result that the Court would order the parties to exchange and inspect documents in support of the cause being shown and for a hearing on cause to be set down for trial on the issue”. (see paragraph 10 of counsel’s written submissions).

- [34] Counsel submits that this Court should try the issue as to ownership under its non-contentious jurisdiction “as a necessary step in its over-reaching objective of finding a balance between litigation, the real issues and costs”.
- [35] He argues that a probate action is not the proper course for a matter such as this to take.
- [36] He relies on the **Rules of the Supreme Court Order 25**. It has already been observed that this Rule is no longer in action, and that it relates to a Summons for Directions filed in an action, the equivalent of a Case Management Conference under the ‘new’ Rules.
- [37] He cited in support **Emery v Emery [1923] P 184; Joyce v The Secretary of State for Constitutional Affairs, the Lord Chancellor [2006] WL 584525; Kurt Herbert Schindler v Bolger Brie, Thilo Brie, Personal Representatives of the Estate of Dorrit Brie Deceased [2004] 21729207; Daniel & Others v Abiola & Others [2004] WL 960841**.
- [38] Several of these cases point in the direction of asserting that it is not the duty of the Caveator to institute proceedings. (See in particular discussion in **Emery v Emery** (above)). But it should also be noted that they make it clear that the filing of the caveat is not for the institution of a suit, but so as to provide an avenue by which notice is given to the caveator of any action taken in these proceedings.

## **Argument of Applicant for Grant**

[39] Counsel for the Applicant's arguments are procedural: that since the Caveator took out a Summons for Directions, his Application is therefore one falling under **Rule 42(2) of the Non-Contentious Probate Rules** under which he is obligated to show why probate should not be granted to the named executors; to show cause against the sealing of the Grant.

[40] Had he pursued a course of action under **Rule 42(1) NCPR** would no longer apply after entry of an appearance and the proceedings, then becoming contentious, would be governed by the CPR 2008. In those circumstances the caveat would remain in force until a [probate] action is commenced and a decision rendered by the Court.

[41] Counsel relied on **Moran v Place [1896] P.214** and **Stoute v Skeete [2000] BBSC 29**. The facts of and ruling in **Stoute v Skeete** were advanced by counsel as being particularly relevant and applicable to the case at hand.

[42] In this case, the Defendant filed a caveat to which a Warning had been issued. No summons was filed and an application was made by the Administratrix for a grant of letters and dismissal of the caveat. The application was successful and the Defendant appealed, alleging that he was the sole owner of the property forming part of the estate.

## Disposal

[43] A Summons for Directions filed pursuant to the filing of a Caveat and Warning to Caveator, is a process devised to enable a person interested in an estate to contest the Application, and affords that person an opportunity to establish, in the case of Letters of Administration, that they are the person best suited to receive same; and in the case of a Will, a challenge to the Will or its contents.

[44] In their Reasons for Decision in the (Unreported) case of **Stoute v Skeete**, our Court of Appeal said this on the 21<sup>st</sup> June 2000 in respect of the jurisdictional limits of an application of this nature:

“... Even if we accept these two paragraphs as parts of the Notice of Appeal, they provide another example of Mr. Stoute’s failure to appreciate the limited scope of this litigation, ie, that its purpose was and is to decide who should be granted representation to the estate and not to adjudicate any dispute over the entitlement of any of the children by reason of contributions made during the life of the deceased...

These complaints can be simply disposed of :-

...

(3) the resolution of any dispute over the acquisition of the property comprised in the estate is not proper to be determined in these proceedings.”

[45] And later, this very relevant and practical advice was given by the Court:

“If there is merit in Mr. Stoute’s claim to have made significant contributions to the acquisition and/or maintenance and improvement of the real property comprised in the estate, he cannot be prejudiced by a grant of letters of administration to Ms. Skeete, since it would still be open to him to take the appropriate legal action against her in the capacity of administratrix in order to establish an equity to which he thinks he is entitled.”

[46] It is clear that, despite the wording of the Summons for Directions, it is not the intention of the Caveator herein to have the Registrar issue a Grant to him,

[47] It does not appear to be his intent to challenge the validity/authenticity of the Will.

[48] His aim is to challenge the ownership of the real estate the subject of a bequest of personal property (shares in a company). It appears that the Caveator is claiming ownership of the shares abovementioned by right of survivorship. Counsel in his written submissions references **section 3** of the **Wills Act 1837**, which enacted that every person may dispose by will of “all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so...disposed of, would devolve ...upon his executor or administrator.” See **Parry: The Law of Succession 6<sup>th</sup> edition at page 13; Parry and Kerridge: The Law of Succession 12<sup>th</sup> edition 1-02 to 1-03.**

[49] The Applicant/Executor is playing his cards close to his chest, but what is clear is that this has become a Contentious Matter, (he does not accept that the shares have passed to the Caveator by Right of Survivorship) and in this regard, the Rules are clear. **Rule 43(1)** provides:

“... Proceedings subsequent to the entry of appearance shall be deemed contentious business and the Rules of the Supreme Court shall apply”.

[50] Prior to 2008 this would have signaled the filing of a Writ, but **Part 68** of **The Supreme Court (Civil Procedure) Rules, 2008** under the rubric ‘Contentious Probate Proceedings’, now governs this procedure commencing

with the filing of a Fixed Date Claim Form, although it is observed that the procedure under this Part appears more relevant to challenges to/revocation of grant, and/or challenges to the validity/ authenticity of the Will.

- [51] It is noted however that proceedings, also commencing with the filing of a Fixed Date Claim Form, can also be brought (and perhaps more appropriately in these circumstances) under **Part 67** entitled Administration Claims and this matter can probably be brought under **Rule 67.1 (1)(b)**, that is,

“(b) claims for the determination of any question or to obtain any relief relating to the administration of the estate of a deceased person or the execution of a trust.”

- [52] On the subject of Administration Actions, the learned authors of the legal text **The Law of Succession 12<sup>th</sup> Edition: Parry and Kerridge** state as follows:

“Administration proceedings are often non-contentious, in the sense that they are commenced so as to obtain the guidance of the court on difficulties arising in the administration of the estate. A personal representative is always entitled to seek guidance of the court in matters of difficulty.” 25-24 page 607.”

- [53] It appears that it is the case for the Applicant for the Grant (the Executor under the Will), that the testatrix’s shares in KD Inc. form part of her personal estate capable of being disposed of at her death, pursuant to **section 59** of the **Succession Act**.

- [54] It appears to be the case for the Caveator that the testatrix’s beneficial interest in her shares did not pass/devolve to her personal representatives as the shares were held on a joint tenancy.

[55] This is a highly contentious matter which cannot be dealt with under the Non-Contentious Probate Rules. Both parties must be given an opportunity through their pleadings to properly set out their claim and evidence in support, if agreement cannot be reached by them.

[56] Is it the case that the Caveator is entitled to the legal and beneficial interest by right of survivorship?

[57] Was there in fact a joint tenancy?

[58] If there was a joint tenancy, was it converted to a tenancy in common before the death of Karen Culbard? In other words, was there severance of the joint tenancy, and if so, when?

[59] Does beneficial ownership exist separate and apart from the legal ownership?

[60] Is this a case of property held in trust?

[61] All of these are unanswered questions which can only be addressed by agreement between the parties or contentious proceedings.

### **Final Disposal**

[62] It is the view of this Court that the wrong procedural steps were taken by the Caveator. It was appropriate in these circumstances that the Caveator enter an appearance, after which the Applicant/Executor would have been forced to commence an action if it is indeed his position that ownership of the shares held jointly by Karen Culbard and the Caveator passed into her Estate.

- [63] All authorities on the procedural aspects of a matter of this type suggest that the action should be commenced by the Applicant/Executor. See **Tolley's Administration of Estate under rubric Caveats; Tristram and Coote's Probate Practice 13<sup>th</sup> edition paragraph 23.65.**
- [64] Nonetheless, I see nothing in law which precludes a Caveator from himself commencing an action in the event that the Applicant/Executor fails to do so.
- [65] The Summons for Directions as filed is dismissed.
- [66] On the issue of costs, I adopt the position taken by our Court of Appeal in **Stoute v Skeete**. In that case, the Court of Appeal took the position that since they could find no justification for Mr. Stoute's intervention in the proceedings in the way he had done so, there can be no question of burdening the estate with the costs occasioned thereby. The Caveator is hereby ordered to pay the Applicant/Executor's costs of this Summons for Directions, to be agreed or assessed.

**MARGARET A. REIFER**  
Judge of the High Court

November 6<sup>th</sup>, 2017