Judgment 23/2010 **Le Tissier v Tostevin and de Carteret – In re David Tostevin (deceased) – Royal Court – 20 May 2010**

Will of Personalty – application to rectify – Jurats satisfied that there was clear and compelling evidence that a mistake had been made in the drafting of the will – application granted.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 20th day of May, 2010 before Sir Geoffrey Rowland, Bailiff.

BETWEEN

DAVID LE TISSIER

Applicant

And

STEVE TOSTEVIN

First Respondent

And

KAREN DE CARTERET (née Tostevin)

Second Respondent

In the matter of an application by DAVID LE TISSIER (as Executor of the Personal Estate of the late David Tostevin) ("the Applicant") against STEVE TOSTEVIN ("the First Respondent") and KAREN DE CARTERET (née Tostevin) ("the Second Respondent") [to rectify the Will of Personalty of the late David Tostevin signed on 9 November 2000];

THE COURT on the 16th day of March, 2010 having heard Advocate G.K. Bell and having granted the said application, this day handed down the written Decision of the Court in the attached terms.

S M SIMMONDS
Her Majesty's Deputy Greffier

Approved Judgment
20 May 2010

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between:

DAVID LE TISSIER	**Applicant**
and	
STEVE TOSTEVIN	**First Respondent**
KAREN DE CARTERET (née Tostevin)	**Second Respondent**

IN THE MATTER OF AN APPLICATION TO RECTIFY THE WILL OF PERSONAL ESTATE OF THE LATE DAVID TOSTEVIN

Before:

Sir Geoffrey Rowland, Bailiff
and Jurats A.C. Bisson, D.O. Le Conte and N.D. McCathie

Date of Hearing: 16 March 2010
Decision handed down: 16 March 2010

The Applicant was represented by Advocate G K Bell
The Respondents were unrepresented and not present

Cases cited

Re Vautier 2000 JLR 35 (in the Royal Court of Jersey)
The William Willoughby-Winlaw Trust (2002, 30th September) (in the Court of Alderney)
Wright & Westcott v Evans & O'Donnell re Middlebrook deceased 2005-6 GLR Note 16
In the matter of the Estate of Florian Carr (née Winslow) Judgment of the Royal Court, 22nd December 2009

1. David Tostevin (the Testator) died on the 8th October 2009 a widower and without issue.

2. The Respondents are the heirs at law of the Testator. They had been notified of the intention of the Applicant to make the application to the Court. They had consulted an Advocate who had notified the Applicant's Advocate that his clients had been served with the Application and the evidence in support of it. The Advocate had advised that

> *"the Respondents would not appear on the Hearing of the Application and have no submissions to make to the Court; and they will abide with an Order of the Court in relation to the Application".*

3. It would appear that sometime in October 2000 the Testator had confided in the Applicant his intention to make Wills of Realty and Personalty. On the instruction of the Testator, the Applicant prepared a typed letter detailing the Testator's instructions and it was sent to

Advocate Green in anticipation of a meeting when the Testator would formally instruct Advocate Green. The letter, dated 31st October 2000, was received by Advocate Green on or about 1st November 2000.

4. (i) The letter set out detailed instructions as to the disposition of his estate of Personalty which was to be supplemented, following the Testator's death, by the sale of his estate of Realty in the event that his wife had predeceased him.

   (ii) The instructions in respect of the Will of Personalty listed the intended beneficiaries. Twelve beneficiaries were to receive stipulated proportions of the estate (other than chattels) varying from 25% to 2.5%. Both names and addresses were provided in respect each beneficiary. The named twelve beneficiaries would between them receive 100% of the estate other than chattels.

   (iii) Two other beneficiaries were to share the chattels.

   (iv) Zion Christian Fellowship of Route des Bordages, St. Saviours, Guernsey was listed to receive 5% of the estate (other than chattels).

5. On 1st November 2000, Advocate Green met with the Testator and he was accompanied by the Applicant. The Testator gave instructions to Advocate Green and they replicated the intended disposition of his estate as set out in the letter sent by the Applicant on behalf of the Testator.

6. Notwithstanding what was set out in the letter it is apparent that Advocate Green with care wrote down the instructions in an attendance note. The instructions mirrored the list of beneficiaries listed in the letter. The attendance note was then typed up which contained inter alia the intention to benefit Zion Christian Fellowship.

7. A will of Personalty was prepared. It would appear that there was an error on the part of the person who typed the will and subsequently by Advocate Green because reference to a bequest of 5% to Zion Christian Fellowship was somehow omitted. The list of bequests stipulated in the draft will totalled 95% and not 100%.

8. The Applicant was named as the Executor of the will of Personalty. The prepared wills of Real Estate and Personalty were sent by Advocate Green to the Testator under the cover of a letter of 7th November 2000. The Testator was expressly asked to:

> *"Please read through them carefully and inform me of any required amendments."*

9. On 9th November the Testator attended at Advocate Green's office where he signed the will of Personalty in the presence of Advocate Green and an employee of the firm without any amendment having been made. It would appear that the omission of the intended bequest to Zion Christian Fellowship had not been noted.

10. In an affidavit sworn on 18th February 2010 Advocate Green at paragraph 12 deposed as follows –

> *"The draft and executed versions of the Will of Personalty of the deceased contained a drafting error in that it omitted to include the bequest of 5% of the deceased personal estate to Zion Christian Fellowship."*

11. As matters currently stand, as a result of the drafting error, this 5% share of the deceased's estate of Personalty is due to be paid in equal shares to the First and Second Respondent under the applicable intestacy rules.

The Applicant as executor now seeks to rectify the Will in order that the said 5% share is paid to Zion Christian Fellowship and not to the First and Second Respondents.

12. Advocate Green's affidavit and the skeleton argument advanced by Advocate Bell referred to the Jersey case of *Re Vautier 2000* JLR .35, the Alderney case of *The William Willoughby-Winlaw Trust* (2002) 30 September and the Judgment of Lieutenant Bailiff Carey, as he then was, in the case of *Wright & Westcott v Evans* & *O'Donnell re Middlebrook deceased* (2005-2006 GLR Note 16).

    Lieutenant Bailiff Carey stated as follows:

    > *"If I decide that as a matter of law the rectification application should be entertained then it will be for the Jurats to decide with me whether as a matter of discretion the Court should grant it."*

    Lieutenant Bailiff Carey adopted the reasoning set out in the Jersey case of *Re Vautier* and set out the judicial test that must be applied by the Court in the exercise of its discretion.

    > *"where [the Court] is satisfied by clear and compelling evidence that a mistake has been made and that the words used do not reflect the testator's intentions, the court may grant the discretionary remedy of rectification so as to alter the wording (whether by deletion, substitution or addition) so as to carry out those intentions."*

    On 22nd December 2009 in the matter of the *Estate of Florian Carr née Winslow*, the Royal Court (Judge of the Royal Court J R Finch sitting with Jurats) had reviewed that Royal Court authority and he directed the Jurats that the Court had a discretionary power to rectify a will. The Court, at the direction of the Judge of the Royal Court, followed similar principles to those expounded by Lieutenant Bailiff Carey and exercised its discretion in order that the will be rectified.

13. The Bailiff briefly directed the Jurats on the law and the facts of the application made by the Applicant.

    He invited the Jurats to determine whether there was clear and compelling evidence that a mistake had been made by Advocate Green in reflecting the Testator's wishes and that the bequest of 5% to Zion Christian Fellowship should be added to the Testator's will of Personalty.

    The Jurats concluded that there was clear and compelling evidence and that the will of Personalty of the Testator should be rectified by the addition of a bequest of 5% to the Zion Christian Fellowship.

14. The application of Advocate Bell was granted.