In the Royal Court of the Island of Guernsey

The 16th day of March, 2000 before de Vic Graham Carey, Esquire, Bailiff

IN THE MATTER OF AN APPLICATION BY THE EXECUTOR OF LILLY KURZSCHENKEL, DECEASED,

between

PEARL FUNK	Claimant
and	
ANNA KROMBACH	Beneficiary

THE COURT having considered the attached application for orders regarding a preliminary point of law and having heard Advocate PA Allen counsel for the claimant and Advocate St JA Robilliard counsel for the beneficiary ISSUED this day judgment in the terms attached hereto.

Her Majesty's Deputy Greffier

CL (MGAD)
10.12.99

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

IN THE MATTER OF

THE ESTATE OF THE LATE

LILY KURZSCHENKEL, formerly Priaulx, née Ogier

IAN HALDEN BEATTIE, Advocate of the Royal Court of Guernsey of 7 New Street in the parish of Saint Peter Port in the Island of Guernsey, Executor of the Estate of the above-mentioned late Lily Kurzschenkel

APPLIES TO THE COURT

for orders that:-

1. The dispute which has arisen between the two daughters of the late Lily Kurzschenkel, Mrs P Funk and Mrs A Krombach, as to whether or not gifts by a parent inter vivos to their child must be taken into consideration when determining the calculation of legitime be determined.

2. A hearing date for determination of the above as a preliminary point of law be set down.

3. Any consideration as to whether such a calculation should take place on the particular facts of the instant matter be stayed until after determination of the preliminary point of law set out in 1 above.

4. The Executor be excused from attendance at the hearing on the preliminary point of law on giving an undertaking to comply with whatever ruling is given.

The whole in accordance with the attached Affidavit of Advocate Mark Gideon Andrew Dunster sworn on the 29th day of November 1999.

Dated this 29th day of November 1999

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M G A Dunster
Advocate

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IN THE ROYAL COURT OF GUERNSEY

IN THE MATTER OF AN APPLICATION BY THE EXECUTOR OF

LILY KURZSCHENKEL, DECEASED

B

Between

PEARL FUNK **Claimant**

and

ANNA KROMBACH **Beneficiary**

C

JUDGMENT OF THE BAILIFF ON A PRELIMINARY POINT OF LAW

Advocate for the Claimant: P. A. Allen

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Advocate for the Beneficiary: St. J. A. Robilliard

The Executor with leave of the Court did not appear and was not represented at the hearing.

Date of Hearing: 24th January, 2000.

Date Judgment handed down: 16th March, 2000.

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The deceased had two daughters, the claimant Mrs. Funk, who is the elder one, and the beneficiary, Mrs. Krombach who is the younger one.

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I do not need to go into the family background except to say that despite the fact that all three appear to have German names they are very much a Guernsey family. Mrs. Kurzschenkel died resident and domiciled in Guernsey where she made her Will in 1996 appointing Advocate Ian Beattie as her executor. This Will was made a few days before her death but there is no claim that she was other than of sound mind when she made it. In the Will she gave the disposable share of her estate to Mrs. Krombach. As is not unusual this upset Mrs. Funk and there has been a considerable amount of acrimony between the parties and it is not for me at this stage to review the way in which the executor dealt with the enquiries Mrs. Allen made on behalf of Mrs. Funk. In the result it emerged from this correspondence that in addition to leaving the disposable share to Mrs. Krombach Mrs. Kurzschenkel had also during her lifetime made a number of substantial cash payments to Mrs. Krombach.

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A Accordingly a dispute arose between the daughters as to whether these payments should be taken into account in valuing the deceased's estate for the purposes of legitime..

Mr. Beattie therefore asked for an order that

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> "1. The dispute which has arisen between the two daughters of the late Lily Kurzschenkel, Mrs. P. Funk and Mrs. A. Krombach, as to whether or not gifts by a parent inter vivos to their child must be taken into consideration when determining the calculation of legitime be determined."
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> .....

C Although this particular application was only lodged on the 10th December 1999 two earlier matters came before me in November 1998. These were a general application for directions from Mr. Beattie and an application from Mrs. Funk asking that Mr. Beattie as Executor do certain things and give certain information in connection with the estate. In November 1998 D I directed that skeleton arguments be furnished by Mrs. Allen on behalf of Mrs. Funk and in response by Mr. Peter Ferbrache who then represented Mrs. Krombach and Mr. Beattie on behalf of himself. As is not unusual in these kinds of cases the time limit imposed in November 1998 was not observed. However, Mrs. Allen lodged a full skeleton argument with authorities in January 1999. Mr. Robilliard on behalf of Mrs.Krombach responded to E this in April of that year. Rather unusually he filed an affidavit from Mrs. Krombach addressing a number of the facts, which were in dispute. I cannot investigate the facts at this stage. I am merely asked to decide as a preliminary point whether the presumption that gifts to children have to be brought into account in determining legitime still exists.

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In addition Mr. Robilliard put in a fairly short skeleton argument suggesting that whatever may have been the position in the past with regard to advancement our law has moved on. He says that now there is no such presumption. He developed these arguments more fully in G argument before me at the hearing.

I emphasise that my role here is to decide what the law is as a matter of principle and not to form views on the merits of the particular circumstances of this case. In particular I must not H get involved in inferring what may or may not have been the intentions of Mrs. Kurzschenkel.

Mrs. Allen rightly takes me back to the Customary Law and she takes me to Basnage 1776 Edition and Article 434 of the Coutume Reformée.

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As emerged at the hearing we have to go back one stage further and look at what Terrien had to say because in Guernsey our first domestic codification of Customary Law is to be found in the Approbation des Lois of the late 16th century and that of course referred to various chapters in Terrien.

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Book 6 of Terrien makes it clear that there is indeed a rule that one heir cannot be preferred to another and the Approbation as recorded in Le Marchant page 202 confirms that in Guernsey the provisions of chapter 5 apply save that different rules apply in the case of gifts

C to daughters on marriage. (This latter point does not arise in the circumstances of this case.)

The principle is more clearly restated in Article 434 of the Coutume Reformée as recorded in Basnage reads as follows

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> "Le pere & la mere ne peuvent advantager l'un de leurs enfans plus que l'autre, foit de meuble ou d'héritage, parce que toutes donations faites par le pere ou mere à leurs enfans font reputes comme avancement d'hoirie, réfervé le tiers de Caux."

Guernsey not being within the Pays de Caux we need not concern ourselves with the last five

E words.

Basnage goes on to comment in considerable detail as to the meaning of this provision. There emerged a number of exceptions to the rule that payments to children during the

F deceased's lifetime were to be treated as advancements.

Costs of education and apprenticeship are not to be treated as advancements and neither is money spent on books, weapons and courses. Reference is made to the old Athenian

G principal that children were under a duty to maintain parents in old age.

Whilst Basnage's comments are an interesting study into family relationships in 18th Century Normandy they can hardly be regarded as definitive statements of law in 21st Century Guernsey. Just because money spent to buy horses is not to be brought back into account

H does not mean to say that money advanced to buy an expensive sports car will be treated in the same way. If Mrs. Allen is right that the Rule still applies it has to be accepted that the fortuitous absence of recent litigation in this field could lead to argument as to where the line is to be drawn between advances that are to be brought into account and those which are not.

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A In practice I think these difficulties may be more imagined than real. The problem is not peculiar to Normandy in that similar issues arise under English law when deciding what advances should be brought into hotchpot.

B Mr. Robilliard invites me to look at the way in which the law developed in France following the codification. I accept that when faced with filling lacunas, which have developed in Guernsey law as a result of the law in a particular area, falling into disuse or having become obscure through non-examination it is helpful to see what French law now makes of the issue concerned. In this matter I am not persuaded to take on board developments in French C law that have come about as a result of changing social circumstances in that country.

There has not been a history of inactivity so far as the law of inheritance is concerned Mrs. Allen in her skeleton argument carefully reviewed the various changes in the law of D succession and personalty that occurred in the 19th and 20th centuries. Whilst these changes clearly open up the opportunity for parents to prefer one child to another by making gifts of the disposable share of the estate, these laws are silent on the principle at issue here as to whether lifetime gifts have to be treated as advancements for the purposes of calculation of E légitime. In making provision that the disposable share can go to one child as opposed to the other there is nothing inconsistent with the old law. The amount of advancements are brought back into the estate and are then credited to the beneficiaries in accordance with the provisions of the will and the law of légitime.

F The most compelling evidence against the argument that Mr. Robilliard raised that Guernsey law no longer recognises the principle of Article 434 of the Coutume Reformée is to be found in section 11A Trusts (Guernsey) Law, 1989, as amended. This section was in fact inserted by the Trusts (Amendment) (Guernsey) Law, 1990.

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Section 11A reads as follows:-

> ""*Validity of trusts and dispositions thereto.*
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> 11A. (1) Where a person (the "settlor") creates a Guernsey trust, or during H his lifetime makes any transfer or disposition of property or any interest therein to a Guernsey trust –
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> (a) neither the trust nor the transfer or disposition is invalidated by any foreign rule of forced heirship or by reason of the fact that the concept of trusted is unknown to or not admitted by the law of a jurisdiction other than Guernsey;

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(b) the settlor shall be deemed to have had capacity to create the trust or to make the transfer or disposition if he had capacity to do so under –

(i) Guernsey law;
(ii) the law of his domicile or nationality; or
(iii) the proper law of the transfer or disposition.

(2) In subsection (1) "foreign rule of forced heirship" means any rule of law of a jurisdiction other than Guernsey which, in order to protect or give effect to the rights of any person or class of persons to inherit, succeed to or share in the settlor's property or any interest therein on his death, purports to remove or restrict the settlor's right to encumber, alienate or otherwise deal in his property or any interest therein during his life-time and includes any judicial or administrative order of a jurisdiction other than Guernsey intended to enforce or implement any such rule.

(3) This section applies –

(a) whenever the trust, transfer or disposition in question arose or was made;
(b) notwithstanding any other provision of this Law";"

What this section is attempting to do is to provide that foreign rules as to forced heirship can be overridden by a Guernsey Trust whereas Guernsey Rules cannot. If there were no Guernsey Rules then it is hard to see why section 11A was drafted in the way it was. Alternatively, if it had been the intention to remove the protection that children had against being disinherited by their parents the legislature had the opportunity of doing so when they enacted the amendment law of 1990.

Mrs. Allen has therefore satisfied me that under the law of this island there is still a presumption that payments made to one child by way of advancement should be brought into account when calculating the value of the estate of the deceased for purposes of examining the amount of légitime. Whether Mrs. Krombach can produce evidence to rebut that presumption is a matter for her and a matter for this Court on another day.

Before leaving the matter Mrs. Allen in her skeleton argument raising two other matters. First she complains of the provision of a house by Mr. and Mrs. Kerzschenkel for Mrs. Krombach in 1981 for an express consideration of £100. I rule that this is not a matter, which can be considered as an advancement. We are only concerned here with advances of personalty as opposed to interest in realty. The position concerning gifts of realty to a child is something quite different from the issues I have been considering in this case. Here we

are not even dealing with a gift of realty. What we are dealing with is a sale at a low price. Mrs. Funk could have sought to "retrait" the sale.

Secondly, Mrs. Allen raises the issue of money paid to Mrs. Krombach or her first husband to settle their debts many years ago. I have not heard very much about the circumstances of these payments and in any event I am not here to draw a line between items that are to be treated as advancements and therefore the subject of account within the administration of Mrs. Kurzschenkel's estate and those which are not. As far as I can see these payments could be by way of advancement and a similar presumption would apply in respect of them. However, in view of the time that has elapsed I am not at all clear as to how one establishes what the amounts involved were in the event that Mrs. Krombach has no record of them at this stage. There are factual issues here, into which I do not propose to delve now. It may be an issue where the executor will have to come back for further directions.

Costs reserved.