In re Le Marquand
Royal Court
9th March 2018

JUDGMENT
15/2018

Application to register a photocopy of a will of real property

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

THE ESTATE OF
BERYL ST. CLARE LE MARQUAND
(née Henderson)

AND

THE APPLICATION OF
ADVOCATE PAUL SIMON NETTLESHIP TO
REGISTER A PHOTOCOPY OF HER WILL OF
REAL PROPERTY DATED 3 MAY 1994

Hearing date: 8th February 2018

Judgment handed down: 9th March 2018

Before: Richard James McMahon, Esq., Deputy Bailiff

Jurats: J Ferguson, P S T Girard, and J M Wyatt.

Advocate for the Applicant: Advocate J A Tee
Advocate representing the potential heirs and unascertained beneficiaries: Advocate R Ashton

Cases, texts & legislation referred to:

The Royal Court (Reform) (Guernsey) Law, 2008
The Royal Court (Non-contentious Applications) Rules, 1988 to 1990
Jersey Society for the Prevention of Cruelty to Animals v Rees 2001 JLR 506
Sugden v Lord St Leonards (1876) 1 PD 154, [1874-80] All ER Rep 21
Williams, Mortimer and Sunnucks on Executors, Administrators and Probate
Theobald on Wills (18th ed.)

Introduction

1. On 8 February 2018, the Court granted the Application dated 28 March 2017 of Advocate Paul Nettleship, in his capacity as Attorney Administrator of the personal estate of the late Ronald Mark Le Marquand, for permission to register a photocopy of the Will of Real Property of the late Beryl St Clare Le Marquand in the Register of Wills. The Court reserved the giving of reasons for its decision, which are now contained in this judgment.

2. The procedure followed has been in accordance with the relevant provisions of the Royal Court (Reform) (Guernsey) Law, 2008. After hearing the submissions of Counsel, the Deputy Bailiff retired with the Jurats and directed them on the law, before the Court returned to inform the Advocates of the outcome. This judgment contains the unanimous findings of the Jurats.

Background

3. The Application was initially submitted to the Court pursuant to the Royal Court (Non-contentious Applications) Rules, 1988 to 1990. That approach was declined on the basis that para. 5 of the First Schedule enables an application for the registration of a will of realty of a deceased person and it must, therefore, refer to the normal procedure of registering the original will. That step is non-contentious and so is made available under those Rules, whereas if an original will cannot be found, about which more will be said shortly, there is the potential for the step of seeking permission to register being contentious. Accordingly, the Court indicated to the Applicant that the Application should proceed in the usual way by being tabled before the Court, at which point directions could be given.

4. Recognising that, if the photocopy of the Will of Real Estate were not to be registered, it would mean that there had been an intestacy under which Mrs Le Marquand's heirs would have inherited the property in question, when the Application was progressed, the Court intimated that the heirs should, if possible, be convened. It became apparent, particularly in the light of the information contained in the Applicant's Second Affidavit, sworn on 19 October 2017, that those heirs could not all easily be ascertained and that none appears to be resident in Guernsey. In those circumstances, the Court decided that appointing a representative of the class, extending to include any unascertained beneficiaries of the estate, to make such submissions as were appropriate would be the optimum solution. Advocate Ashton volunteered to accept such an appointment. The Court understands that he agreed to act *pro bono* and is grateful to him for assisting in the way he has.

5. The evidence in support of the Application comprised Affidavits. There was no desire on the part of Advocate Ashton to cross-examine any of the witnesses and so the Court has proceeded solely on written evidence. The detailed background was set out by the Applicant in his First Affidavit sworn on 21 March 2017 and he supplemented that with his short Third Affidavit sworn on 7 February 2018. That was accompanied by two shorter Affidavits from friends of the Le Marquands (Jill Tanguy (sworn on 28 February 2017) and Linda Le Noury (sworn on 7 November 2017)). From the uncontested Affidavit evidence, the Court was satisfied of the facts that follow. The Court also had the benefit of Skeleton Arguments of Advocate James Tee, on behalf of the Applicant, and from Advocate Ashton, both dated 15 December 2017.

Facts

6. On 2 May 1974, Beryl Le Marquand, the sole devisee of the Will of Real Estate of her late mother, Ruth Annie Henderson, was given permission by the Court to register that Will, executed on 22 May 1970, in the Register of Wills. By clause 2 of that Will, Mrs Henderson left to Mrs Le Marquand the whole of her real estate, also making provision, in the event that Mrs Le Marquand predeceased her, first to any child or children of Mrs Le Marquand or, if none, to Ronald Le Marquand. The same address was given for Mrs Henderson and Mrs Le Marquand, being "Rubermont" in the Rohais.

7. Mr and Mrs Le Marquand made Wills of Real Estate and Wills of Personalty on 3 May 1994. All four of the Wills gave "Rubermont" as the address of the testator. It appears that Advocate Winter had been instructed. The records of the firm of Winter, Palmer & Denziloe show that Mr and Mrs Le Marquand chose to take with them their Wills on the same day, rather than leaving either or both with the firm of Advocates for safe-keeping. The Applicant has caused

the usual enquiries to be made of all Advocates' practices as to whether they hold, or have ever prepared, any Wills of Realty and/or Personalty for Mrs Le Marquand. None of the responses was positive, from which it can be ascertained that the last Wills made by Mrs Le Marquand were in 1994.

8. Mrs Le Marquand died aged 77 on 6 March 2004 at "Rubermont", which is specified on her death certificate as being her usual abode. Mr Le Marquand died aged 87 on 9 June 2014 in the Princess Elizabeth Hospital. His death certificate specifies that "Rubermont" was his usual abode. The couple were childless.

9. When attending to the estate of Mr Le Marquand, it became apparent that Mrs Le Marquand's Will of Realty was not registered. Mr Le Marquand's Will of Personalty appointed Mrs Le Marquand as the Executrix or alternatively Janet Le Tocq, his niece. In the event, Janet Le Tocq appointed Advocate Nettleship as her Attorney, and Letters of Administration with the Will annexed were granted to him by the Ecclesiastical Court on 15 August 2014.

10. The original of Mrs Le Marquand's Will of Real Estate has not been located. A photocopy has been found and the terms of her Wills are in "mirror" terms to the Wills of Mr Le Marquand. This is unsurprising as this appears to have been a joint exercise to make their Wills on the same occasion and they make similar provision depending on which of them should die first. From the photocopy available, clause 2 of the Will of Real Estate that Mrs Le Marquand executed on 3 May 1994 provided:

> "*I give devise and bequeath the whole of my said Real Estate to my husband the said Ronald Mark Le Marquand absolutely and should my said husband fail to survive me then I give devise and bequeath the whole of my said Real Estate to the person or persons who shall be sworn as Executor or Executors of my Wills of Personal Estate or as Administrator or Administrators of my Personal Estate (hereinafter called "my Trustees")* ***IN TRUST*** *to sell and convert the same into money at such time or times in such manner and for such price as my Trustees shall think fit and proper* ***AND IN TRUST*** *pending such sale and conversion to manage and administer my said Real Estate and to receive the revenue and other incomings accruing therefrom and after payment of the cost of maintenance insurance and other incidental outgoings to pay the net proceeds to my Personal Estate – it being my wish and desire that such net proceeds shall be deemed to be part of my Personal Estate and to pass according to my Will of Personalty.*"

Clause 2 of Mr Le Marquand's Will of Real Estate is in the same terms save that his initial gift is to Mrs Le Marquand. When the Wills of Real Estate were executed, they were witnessed by two Jurats of the Royal Court.

11. Jill Tanguy was a close friend of Mr and Mrs Le Marquand for many years. Mrs Le Marquand never mentioned to her any intention that she had changed her mind about how she was leaving her property in her Wills. After Mrs Le Marquand's death, Mrs Tanguy visited Mr Le Marquand frequently at "Rubermont". She understood that Mrs Le Marquand had inherited the property from her side of the family and that Mr Le Marquand believed that he had become the legal owner on his late wife's death.

12. Through a mutual acquaintance, Linda Le Noury got to know the Le Marquands a few months before Mrs Le Marquand died. She quickly got into the habit of visiting Mr Le Marquand on Sunday at tea-time and continued to do so until his death. She formed the impression that the Le Marquands had been a devoted couple. She further explained that the Le Marquands ran their lives in the traditional way, whereby Mrs Le Marquand looked after the finances and provided Mr Le Marquand with adequate cash for his needs. She was not aware of Mr Le Marquand using debit or credit cards in the decade or so that she knew him. She believes she saw Mrs Le Marquand's original Wills two or three years after Mrs Le Marquand died. She

had been talking with Mr Le Marquand about the arrangements he had in mind on his own death or incapacity, for example if hospitalised. Mr Le Marquand told her about a partitioned cupboard in a bedroom and told her where his and Mrs Le Marquand's Wills were to be found in another bedroom. Despite being a very private man, Mr Le Marquand wanted her to know the exact location of the various documents. They went to where the Wills were kept and Mr Le Marquand took them out and held them out to her. She indicated that she did not need to look at them any more closely and Mr Le Marquand put them back. She says that they appeared to be the original Wills to her.

Directions on the law

13. Before dealing with the substantive law, the Deputy Bailiff directed the Jurats on their respective functions and the standard and burden of proof. In doing so, he reminded them that his function was to decide the law and procedure, and that the Jurats must accept his directions on the law and follow them, and their function was to determine questions of fact and consider whether the Court should exercise its discretion to grant the relief sought. In considering the evidence and determining the facts the Jurats were directed to apply the civil standard of proof of the balance of probabilities, meaning that the Applicant, bearing the burden of proof, needed to satisfy them that something is more likely so than not so. Although all the evidence was in written form, the Jurats still needed to decide whether it was credible and reliable.

14 In the absence of any reported case in Guernsey dealing with the issue raised in this case, the Deputy Bailiff directed the Jurats on the principles that he was satisfied apply. They are derived from the position in England and Wales. Those principles have already been adopted as consistent with the law of Jersey and there is no reason why they should not also be adopted as reflecting the legal position in Guernsey.

15. The starting point is found in the *Loi sur les Successions*, which was registered on 3 August 1840. Article 19 provides that:

> "*Après le décès du testateur, les légataires ou l'un d'iceux devront obtenir permission de la Cour Royale de faire enregistrer le testament sur le livre des contrats, laquelle permission leur sera accordée après prevue dudit décès, sans prejudice aux droits d'autrui.*"

An alternative means of depositing a will is for the testator whilst still alive to take that step pursuant to article 17. Article 20 further provides:

> "*Après l'enregistrement d'un testament, le Greffier pourra en livrer copie à qui que ce soit, comme d'un contrat, et pour les mêmes prix; mais l'original restera toujours deposé au Greffe.*"

(The reference to the original remaining at the Greffe indicates why it is that the Non-contentious Applications Rules operate only in respect of an original will.)

16. When a person dies, the operation of the principle *le mort saisit le vif* vests title of Guernsey real property of the deceased in that person's heir or heirs. Where there is a Will, registration affords public notice of the new owner or owners. It enables the heir or heirs to give good title. The Deputy Bailiff drew attention to the way that Mrs Le Marquand herself had registered the Will of Real Estate of her mother, Mrs Henderson. This proved the vesting of "Rubermont" in Mrs Le Marquand. It appears that the property was never transferred into joint names. Where there is no will, on an intestacy the real estate vests in the heirs. The rules for ascertaining the heir or heirs are now set out in the Schedule to the Inheritance (Guernsey) Law, 2011.

17. The position in Jersey is most clearly set out in *Jersey Society for the Prevention of Cruelty to Animals v Rees* 2001 JLR 506 (at para. 17):

> "*There is clear authority for the proposition that the court can order the registration of a photocopy (see In re Hewett 1996 JLR 33) or even a file copy (see In re Filleul 2000 JLR N-65) of a will of immovable property if satisfied that the copy is a true copy of the original will which had been executed with proper observance of all the required formalities.*"

However, where a will has gone missing whilst in the hands of the testator (or testatrix) English law had acknowledged that a presumption exists that it must have been destroyed, albeit that such a presumption is capable of being rebutted. The position, as summarized in the headnote of *Sugden v Lord St Leonards* (1876) 1 PD 154, [1874-80] All ER Rep 21, was set out at page 510:

> "*Where a will which was kept in the custody of the testator has been lost the presumption arises that the testator destroyed the will animo revocandi, but that presumption, although presumptio juris, is not presumptio de jure, and may be rebutted by evidence, written or oral, of the facts. The presumption will be more or less strong according to the character of the custody which the testator had over the will.*"

18. The position is further dealt with in the leading practitioners' works, reference to which the Jurats were directed might be helpful when assessing the evidence. In *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (at para. 14-29), it is stated:

> "*Where a will, or codicil, is last traced into the testator's possession and is not forthcoming at his death after all reasonable search and inquiry, the presumption arises that he has destroyed it with the intention of revocation (animo revocandi). The burden of proving, in these circumstances, that the will was not destroyed animo revocandi is upon the party propounding its contents.*
>
> *"The presumption," said Parke B, in Welch v Phillips, "is founded on good sense; for it is highly reasonable to suppose that an instrument of so much importance would be carefully preserved by a person of ordinary caution in some place of safety, and would not be lost or stolen; and if, on the death of the maker, it is not found in his usual repositories, or else where he resides, it is in a high degree probable that the deceased himself has purposely destroyed it." It cannot be presumed that the destruction has taken place without his knowledge or authority, for that would be to presume a crime.*"

Para. 14-31 covers the rebuttal of this presumption. However, in *Theobald on Wills* (18th ed.), the same principles are helpfully summarised more briefly:

> "*A will or codicil last known to be in the testator's possession but which cannot be found at his death is presumed to have been destroyed by the testator with the intention of revoking it. The strength of the presumption varies according to the security of the testator's custody of the will – the safer the security, the stronger is the presumption. The presumption may be rebutted by evidence of non-revocation, such as evidence that the will was destroyed by enemy action or accident, or evidence showing the testator's continuing goodwill towards the beneficiaries and his intention to adhere to the will. On the other hand the presumption may be supported by evidence showing, for instance, the testator's intention not to adhere to the will. The court decides on the balance of probabilities, having regard to all the evidence, whether the testator destroyed the will with the intention of revoking it; the party propounding the will is not bound to establish an explanation as to why the will was missing at death.*"

19. On the basis that the English law principles are sensible, and they have already been adopted in Jersey, the Deputy Bailiff directed the Jurats that they reflect Guernsey law as well. A will is an important document. It specifies a person's intention for the disposal of his or her property on death. That is why so much reliance is placed on locating and producing the original will and, where more than one will on the same subject-matter is found, identifying which is the last in time, thereby revoking any earlier will, subject to any questions being raised, eg, as to capacity. The safest means of preserving an original Will of Real Estate is to lodge it with the Greffe. Others may prefer to leave their Wills with their Advocate as a means of ensuring safe custody of the document. The Le Marquands, however, appeared to have decided that they would take their Wills with them back in 1994.

20. The first issue for the Jurats was to consider if the required formalities for a Will of Real Estate had been complied with. They might well recognise the signatures, but there seemed no real question, in any event, that those formalities had been satisfied.

21. The next issue was for the Jurats to satisfy themselves that the Will of Mrs Le Marquand remained in her possession during her lifetime. If they were satisfied that what Mrs Le Noury saw when shown documents by Mr Le Marquand in or around 2006 or 2007 included Mrs Le Marquand's original Will of Real Estate, that would suffice to rebut any presumption, because it would necessarily mean that the original Will existed after Mrs Le Marquand's death. She could not, therefore, have destroyed it, and it must have gone missing since her death. The Jurats were reminded that there was no requirement on the part of the Applicant, being the person propounding the Will, to satisfy them of the explanation as to why it had gone missing.

22. If the Jurats were unpersuaded that Mrs Le Noury had seen the original Will of Real Estate of Mrs Le Marquand, they would need to consider whether the evidence they had available for review satisfied them that the Will, having been taken away from Winter, Palmer & Denziloe, had remained in her custody until it went missing and, if so, whether there was sufficient evidence to rebut the presumption of destruction and hence revocation. In considering that issue, they could have regard to the small amount of information about the way the Le Marquands lived and also have regard to the fact that Mr Le Marquand had remained in "Rubermont" undisturbed for approximately ten years following Mrs Le Marquand's death.

Discussion

23. The Jurats noted that Advocate Ashton, on behalf of the class of heirs who would be entitled to the Real Estate of Mrs Le Marquand if she were found to have died intestate, had not advanced any evidence, or even made any submissions, that suggested that there had been an intention on the part of Mrs Le Marquand to destroy her original Will of Real Estate. Indeed, he had fairly acknowledged that he saw no reason for the Court not to grant the Application.

24. The Jurats accepted the evidence of Mrs Le Noury and were satisfied, on the balance of probabilities, that what she had seen when Mr Le Marquand wanted to show her where the important documents were kept included Mrs Le Marquand's original Will of Real Estate. They regarded that as being the most likely position because they also accepted that Mrs Le Marquand had been careful in controlling the finances of the couple and looking after such important matters. It was quite consistent with the couple's arrangements that the original Will had been kept secure during her lifetime. The Jurats found that the Will had not been put into anyone else's custody. Further, having inherited "Rubermont" from her own mother and having no children of her own, it was more likely than not that she intended to leave her real property to her husband, should he survive her. The Jurats did not need to determine what had happened to the original Will; the simple fact that it cannot be found amongst Mr Le Marquand's possessions (or repositories) could have resulted from any number of possible steps having been taken. In an ideal world, somebody would have informed Mr Le Marquand of the need to register the Will of his late wife, but that step clearly has not been taken. With the passage of time, Mr Le Marquand may have thought that what mattered thereafter was what

he was doing with the property he had inherited and he may have thought his late wife's will was of no further interest or relevance. Come what may, the Jurats are satisfied that the original Will existed at the time of Mrs Le Marquand's death and so there is evidence that the presumption of destruction (to the extent it operates in this situation) had been rebutted.

25. If the Jurats were wrong to reach that conclusion, they would have granted the Application anyway, being satisfied that there is sufficient clear and satisfactory evidence that the Le Marquands remained a devoted couple until Mrs Le Marquand died in 2004 and that Mrs Le Marquand intended to adhere to the terms of her Wills. The Jurats had noted that the Le Marquands had executed Wills in like terms on the same day, benefiting each other in the first instance. That was entirely consistent with the circumstances of a childless couple, where the survivor would take the entirety of the estate of the person dying first. As Mrs Le Marquand had predeceased Mr Le Marquand when there was positive evidence of them remaining together and being committed to each other, there was a strong inference that Mrs Le Marquand had not departed from the stance she had taken in 1994 when executing her Wills. Indeed, to have done so, thereby effectively leaving her newly bereaved husband without a home, would have been an extraordinary act on her part. The Jurats would have found that the original Will remained in Mrs Le Marquand's possession until it went missing. Further, there had been no suggestion that Mrs Le Marquand was prepared to benefit anyone else in preference to her husband, in particular those members of her more distant family with whom there is no suggestion that there was any particular contact, and there has been no evidence that a subsequent Will had been executed. The Jurats were readily persuaded that, if the Will had gone missing during Mrs Le Marquand's lifetime, that step had not arisen through her intentional destruction of the document.

Conclusion

26. For the reasons given, the Court was satisfied that permission that the photocopy of the Will of Real Estate of Mrs Le Marquand should be granted to the Applicant so that he could perfect the chain of title enabling him to realise the value of the property and distribute that money in accordance with the terms of Mr Le Marquand's Will of Personalty. Accordingly, the Application had been granted.