

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2016 - 02593

IN THE MATTER OF THE WILLS AND PROBATE ACT CH. 9:03

AND

IN THE MATTER OF PART 72 OF

THE CIVIL PROCEEDINGS RULES 1998 AS AMENDED

BETWEEN

SIANA MARCIANO-RAMDIAL

Claimant

AND

SHARON BEVERLY-ANN ACHONG

(As Executrix in the Estate of Peter Achong)

Defendant

Before The Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr Gregory Delzin and Ms Diane Mano for the Claimant

Mr Mark Seepersad for the Defendant

Date: 9 June 2020

JUDGMENT

1. The claimant used to work at Risk Protection Services Limited for Mr Peter Achong. As time passed they became close. He employed her. She performed business services. He began to operate his business from his home. When he became ill, she began to live in his house and she helped him out with both personal and business matters. The defendant is Peter Achong's daughter and executrix of his Estate. A codicil was made making provision for the claimant.
2. The claim concerns a property owned by Mr Achong at 116, Bonito Street, Lange Park, Chaguanas. She lived in the downstairs of the property with her husband at his invitation from August 2014. She did the work of the business and also did various chores for him. He became seriously ill towards the end of his life and she performed various services for him. Mr Achong died in January 2015 and the claimant has continued to live on the property.

3. The claimant had moved out of an apartment with her husband in San Juan and they went to live with him. This was an apartment owned by her husband's parents and where they were allowed to stay. She gave evidence that this apartment was essentially theirs to use.
4. Mr Achong was grateful to her. He made a codicil to his Will. That codicil provided that a sufficient amount of money is to be given to the claimant to purchase an apartment. The amount to be given to her "I leave in the discretion of the Executrix".
5. The Will was probated. That Will also gave a benefit to the claimant's son. The Executrix gave to the claimant's son his benefit under the Will. Also, the business was transferred to the claimant.
6. From the evidence, the executrix's approach was to have the property sold and to give the claimant an amount of money she could use to purchase an apartment.
7. Based on the claimant's own evidence and that of her witnesses, it is clear that Mr Achong was generous to her and her family members, including her husband. It was not as if the claimant was performing services to him on the basis that only after his death she would benefit in equity from all of the prior acts. She had already benefitted before as did her husband.

8. Nothing was provided in the Will or Codicil that first preference on the sale of the house was to be given to the claimant even though she lived there and continued to reside in the house after Mr Achong's death.

9. Certain aspects of the evidence was not controversial. The claimant gave evidence. Her husband gave evidence. One Rishard Singh and Cynthia Carr-Hosten gave evidence. There was acceptance by the defendant that the claimant assisted her father and that her father wanted to make some provision for the claimant. Her position is that those arrangements are reflected in the Codicil.

10. The defendant gave evidence on her own behalf as executrix. Of critical importance she gave evidence that there was no promise to her knowledge to give the claimant the downstairs apartment. She negotiated with the claimant and offered her the sum of \$300,000.00 from the sale of the house, whenever that was done, to give effect to the equity. There were discussions about the sale of the house to the claimant but the parties could not agree on a price.

11. There were certain aspects of the evidence that I found the claimant and her witnesses to have exaggerated. First, while I accept the claimant cared for Mr Achong, I did not conclude that he was as incapacitated as she claimed for as long as she said. Second, while I accepted that various services were performed, it seemed as though there was a bit of padding

about what was done and the extent of it. Third, I accepted the defendant's evidence that she was involved in her father's life, but her ability to do things for him was limited at times. The claimant, I found, unfairly minimised Mr Achong's daughter's involvement. On the whole, I preferred the defendant's evidence as being an accurate account of the events which occurred.

12. The law on equitable interest is not in dispute. Submissions were filed by the claimant. The defendant addressed essentially factual matters in her submissions. I accepted the law as stated in the claimant's submissions.

13. The real issue is how can Mr Achong's promise to the claimant be best satisfied.

14. The claim is for an equitable interest. Assuming that a promise was made that once she looked after Mr Achong he would provide her with a benefit, and the claimant performed various services, the court has to consider, what is the minimum necessary to satisfy the equity.

15. The claimant in cross-examination has accepted that the Codicil reflects what Mr Achong intended and that this satisfies the equity. She ought to allow that process to go forward. This would be for the sale of the

property and to take it from there. If there is an issue as to how that is being done, that is a matter for challenge then.

16. I do not accept there was ever a promise that the claimant would be entitled to the downstairs apartment of the house. It was for a sum of money so that she could acquire an apartment. More than that, it was for the executrix's discretion. Unless the court concludes that the executrix has or is acting unconscionably in this regard, the appropriate position is for that promise as reflected in the codicil to go forward. It cannot be, based on the evidence, that the claimant could be entitled to the entirety of the property or substantially to the property, bearing in mind that there remained a mortgage on the property. The claimant has also benefitted from the business moving to her. Her son has benefitted from a gift in Mr Achong's will. There is no evidence that the defendant and Mr Achong were estranged.

17. The equity cannot be satisfied by essentially giving the claimant all of the proceeds of the house. That would be the effect of the reliefs she seeks in this claim. The valuation provided puts the value of the house at approximately \$1.8 million. The balance on the mortgage is approximately \$400,000.00. Assuming the house can sell in the present market at 90 to 95% of the value, it cannot be that the equity would result in her getting all the proceeds after the repayment of the mortgage which is what she seeks in her claim.

18. The claimant has put a *lis pendens* on the house so it cannot be sold. That is preventing the codicil being put into effect. This claim also does that, which is contrary to the promise as found. I was fortified in my view that the codicil represented whatever promise there was because Mr Achong made arrangements for this to be prepared by an attorney at law. The codicil provided for the claimant to live in the property until it is sold. The claimant is not acting conscionably by standing in the way of the property being sold by having the *lis pendens* in effect.
19. I also considered relevant that the claimant moved in to the property in August 2014. Mr Achong died in January 2015. He had been diagnosed with cancer in August 2014. Thus the full time care arrangements as spoken of by the claimant had to be for this period of 5 months or so. That must also be considered in factoring what would satisfy the equity.
20. I did not believe the claimant when she said they were to benefit from living in that apartment at San Juan in any other context than as a licence arrangement. There was no evidence, that I accepted, that the claimant had any right or interest in the apartment at San Juan beyond being allowed to live there. The evidence was that her husband had other siblings. In fact, as they moved out, another one occupied it. There was no issue of any loss to the claimant by moving out. At best, it was a transfer from one rent free accommodation to another.

21. The claimant has also benefitted from rent free accommodation of the house since the death of Mr Achong in January 2015. This is for the past 5 years. Assuming a modest rental value of \$4000.00 to \$5000.00, this would mean that she has benefitted to the extent of \$240,000.00 to \$300,000.00 since then. This also has to be factored in. The claimant has contributed to the delay in moving the Estate forward.

22. I do not accept that the claimant had any right to an apartment at her husband's "adopted" parents' home. At best she and her husband were allowed to occupy a place there. I do, however, find that she did various services for Mr Achong, and this was pursuant to a promise that she would benefit from the house being sold. In fact the codicil expressly provided for the house to be sold and for the claimant to be provided with a sum of money from the proceeds of sale. The Codicil embodied the promise and agreement. It is that which has to be given effect to.

23. The claimant took care of Mr Achong under the promise from August to his death in January. This was for the maximum period of 6 months. This was obviously of significance to Mr Achong that he would have assistance in the last, as it turned out, few difficult months of life. This certainly is worth something. This was reflected in his making provision in the Codicil to his will.

24. There was no evidence provided by the claimant of the cost of an apartment. The court cannot use its knowledge or seek to investigate this matter itself. The cost of an apartment will depend on several factors including location, materials used, furnishings, local cost of labour, size and other considerations. There is no basis for the court to assess that based on the evidence.

25. Clearly there was some negotiation between the parties. However this did not result in a resolution. The correct solution to this impasse really has to be to give effect to the codicil. This requires the house to be sold, the mortgage paid off and then for a sum to be worked out as the appropriate equity. It may well be that the defendant will have to get information on the cost of a basic apartment which can give effect to the equity. But that is not for the court to get into at this stage. In any event, the codicil provided for the executor's discretion. The executor must, of course, exercise her discretion reasonably.

26. Further, evidence was given of a value of approximately \$1.75 million for the property. There is a mortgage on the property of just under \$400,000.00 on the property. The claimant is asking for a declaration or the amount of \$1.3 million. This, is, in effect, the value of the property after the mortgage is paid off. It cannot be conscionable by any stretch that the realisation of the claimant's equity could result in nothing being left to the estate after.

27. The claimant was specific in the reliefs claimed. The first was a declaration as to ownership of the downstairs portion of the property with an interest in the land. This cannot be realised. There is no evidence that the property can be sold in that manner. This is not a building with a collection of apartments that one apartment can be separated from the whole. There is also no evidence of the value of that apartment separately from the property. This is so because it is one property.
28. The second option was for the property to be sold and the amount of \$1.3 M be paid. There is no basis upon which the court can quantify that figure as being the value of the equity.
29. The third option asked for is for the claimant to be allowed to purchase the property but be credited for the sum of \$1.3 M. Again, there is no basis for the quantification in this amount.
30. A party is tied to her pleadings and the case as set out and the reliefs claimed. It is not for the court to quantify an alternative amount given that a specific case has been pleaded and specific reliefs claimed.
31. Based on the evidence presented I am not satisfied that the evidence has been sufficient to make an order for the satisfaction of the claimant's equity in the terms she has claimed in her reliefs either for a

declaration of her right to the property or for the sum of \$1.3 million. In those circumstances she has not succeeded on the claim as framed. The claim is therefore dismissed.

32. It really is a matter for the executrix to come up with a reasonable figure. I have noted that an offer of \$300,000.00 has been made and rejected. In effect this offer is probably 25% of the value of the house after the clearing of what is due on the mortgage. While the court cannot make an order based on the pleaded case and the reliefs sought, as an aside, I observe, and perhaps in the interests of another claim not having to come before the court, given the approximate value of the house, and what is owed, it would seem to me that a sum of somewhere between one quarter and one third of what is left after expenses would be reasonable in all of the circumstances.

33. There was a specific sum claimed in the claim form of \$1.3 million. This was an alternative relief. Given all of the circumstances I will make an order that the claimant must pay half the prescribed costs of this claim calculated on the sum of \$1.3 million. There is a stay of 28 days on the payment of costs.

Ronnie Boodoosingh (E-signed)

Ronnie Boodoosingh

Judge