REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
(Sub-Registry Tobago)

Claim No. **CV 03587-2011**

BETWEEN

SAMANTHA BRATHWAITE

Claimant

AND

DOLLY CHARLES
MARCIA CAMPBELL
GEORGIA CAMPBELL-MC FARLANCE

Defendants

AND

INGRID BRATHWAITE

Third Party

****

Before the Hon. Madam Justice C. Gobin

Appearances:
Ms. Allison E.L. Roberts for the Claimant
Ms. Deborah Moore-Miggins for the Defendants

REASONS

The Claim

1. The Issues in this case all arose out of the terms of the will of Albert Cowie who died on 12th June 1974.

2. The terms of his undisputed Will dated 9th August 1969 are as follows: -

> **"THIS IS THE LAST WILL AND TESTAMENT of me ALBERT EDWARD COWIE of Carnbee in the Island of Tobago which I make this 9th day of August One Thousand Nine Hundred**

and Sixty Nine AND I hereby revoke all former testamentary documents made by me.

I appoint ABALDO LAWRENCE, school master of Riseland Settlement, Bethel and Quinton Williams, farmer or Riseland Settlement, Bethel to be the Executors of this my WILL.

I devise my freehold dwelling house and the property on which it stands known as "The Bower" comprising THREE ACRES more or less to my wife LUCY IRENE COWIE for the duration of her life she paying all rates and taxes and other outgoings payable in respect of the same and keeping the same in good repair and condition reasonable wear and tear excepted.

To all or any of my sons Harrison, Beresford, Brunswick and Alford, if they or any of them shall survive my said wife Lucy Irene Cowie, I devise the said freehold dwelling house and property known as "The Bower" aforesaid for his or their life or lives (as joint tenants should more than one survive my said wife as aforesaid.

I devise the said freehold house and property known as "The Bower" aforesaid to all the lawful grandchildren of Lucy Irene Cowie and Albert Edward Cowie who may be living at the date of death of the last devisee of the estates for lives hereinbefore granted absolutely as joint tenants.

3. Samantha Brathwaite, the Claimant, Marcia Campbell, the second Defendant, third Defendant, Georgia Campbell Macfarlane are all granddaughters of Albert. Marcia and Georgia are the product of a lawful union between Aldris Cowie Campbell (Albert's daughter) and her husband George Frank Campbell. During the course of these proceedings, Samantha obtained a declaration paternity regarding Alford Cowie (one of Albert's four sons). She was born out of wedlock.

4. The Claimant, Samantha first brought this claim in her capacity as Executrix of the Estate of Alford for possession of a parcel of land which formed part of Alberts' estate, referred to as "the Bower" in the will. She relied on a Deed of Assent date 9th October 2010 which recited inter alia that Alford Cowie was upon the date of his death on 24th March 2002 entitled to possession of the subject parcel of land. Further, by the terms of his will, Alford demised the subject land to her.

5. The Claimant claimed the Defendants were bare licensees of Alford whose license terminated upon his death. It is in their defences that the will of Albert was introduced. The claim was filed on 21st September 2011. At a very early stage in the proceedings I identified a legal issue which I thought would determine the claim, that is whether having regard to the terms of Albert's will any interest in the subject land survived Alford's death. On 15th July 2013 I determined this issue against the Claimant and struck out the claim.

6. Upon the urgings of Counsel for the Claimant I suspended my ruling and allowed further time for submissions. Counsel introduced an alternative argument that the Claimant may have acquired a title by possession. That argument was rejected and the Claimant's case was again dismissed on 6th February 2014. The Claimant appealed the ruling but later withdrew the appeal.

7. In October 2014, the parties indicated that the Claimant had filed an application for a declaration of paternity. They subsequently asked for the determination of the counterclaim to be adjourned to a date after that matter was concluded in the family court. In correspondence to the Court the Claimant indicated the decision would "impact the case before me" or that there was "potential impact."

8. At no time did the Defendants' Counsel expressly indicate what that impact would be. I did not understand that a determination of paternity would necessarily put an end to the case. The Defendants were at all times clear in their pleadings that they Marcia and Georgia were among the class of persons entitled to the remainder of Albert's estate as "lawful" grandchildren. On 15th July 2013, when I urged the parties to try to get on with the matter I advised that the grandchildren "properly entitled" to the estate should take steps to regularise their position. I was simply suggesting that other persons entitled should perhaps join in the action. I made sure to say persons "properly" entitled. (The audio digital record confirms this). This was well before the paternity application was filed.

9. Almost three (3) years elapsed between the filing of the proceedings before the Family Court and the grant of the declaration in the claimant's favour. On 30th January 2017, before the delivery of that decision I warned the parties that I would proceed with my matter whether or not a ruling was rendered in the family court. I did not consider that it was necessary to await the outcome. I was unaware of whether there were any agreements between the parties as to the impact. There were no indications on the record.

10. The Claimant's declaration of paternity did not resolve the dispute. I again gave directions for the filing of submissions on two legal issues raised by the Claimant. On 30th July 2018, I rejected the Claimant's submission and because of time constraints adjourned the matter to 8th October, 2018 only to more closely consider what reliefs on the counterclaim I should granted.

11. The Claimant's submission was essentially that the Claimant having been declared to be a child of Alford's and therefore a grandchild of Albert was entitled to a share in "the Bower". I then

had to determine what indeed was the impact of the declaration of paternity on the undisputed terms in Albert's will? Did the declaration effectively and automatically now include her in the class of persons identified by Albert as his "lawful" grandchildren?

12. **S. 3** of the **Status of Children act** provides: -

> ***Status of Children Act 46:07***
>
> ***3.*** *(1) Notwithstanding any other written law or rule of law to the contrary for all the purposes of the law of Trinidad and Tobago—*
> *(a) the status and the rights, privileges and obligations of a child born out of wedlock are identical in all respects to those of a child born in wedlock;*
> *(b) save as provided in this Act, the status and the rights and obligations of the parents and all kindred of a child born out of wedlock are the same as if the child were born in wedlock; but this provision shall not affect the status, rights or obligations of the parents as between themselves.*
> *(2) The rule of construction whereby in any Will, Deed, or other instrument words of relationship, in the absence of a contrary expression of intention, signify relationship derived only from wedlock is abolished.*
> *(3) For the purpose of construing any instrument words denoting a family relationship shall, in the absence of a contrary expression of intention, cease to be presumed to refer only to*
> *relationship by marriage and for the purpose of construing any instrument, in the absence of a contrary expression of intention, reference to a child or children includes a child or children whether or not born in wedlock.*
> *(4) Subsections (1) to (3) shall apply with respect to every person, whether born before or after the commencement of this Act, and whether born in Trinidad and Tobago or not, and whether or not his father or mother has ever been domiciled in Trinidad and Tobago.*
>
> ***4.*** *(1) This Act does not affect rights which became vested before its commencement.*
> *(2) Save as provided in subsection (1) this Act applies to persons born and instruments executed before as well as after its commencement.*

13. I am mindful of the statutory policy behind the passage of the Status of Children Act. But testamentary freedom trumps legislation where the intention of the testator is clear as I found it

to be in this case. The duty of the Court as to give effect to the intention of the testator. It is not open to a Court to rewrite the Will of the testator. It is not open to me for example to say that this testator discriminated on the basis of the sex of his children making no specific provision for his daughters.

14. I came to the conclusion, albeit reluctantly, that Mr. Cowie by qualifying the term grandchildren with the word "lawful" intended that only children born within a lawful union of his children and their spouses were to benefit from his bounty. When the will is read in its entirety it is clear that Mr. Cowie was deliberate in his approach to what should happen to his property upon his death. The clauses were not general. He left first a life interest in "the Bower" for life, he named his sons, benefiting them if they survived his wife, limiting their interest to a life interest. He did not name his daughters. He specifically referred to his "lawful" grandchildren There is an obvious correction in manuscript (initialled) by which he changed their interests from tenants in common to joint tenants.

15. In the circumstances, I could not simply ignore what I consider to be an express intention of the testator. I daresay even today so many years after the operation of the Status of Children Act it is still open to a testator to make distinctions between persons born within a marriage or outside. It is not for the Court to impose its own notions of what is fair and just in such circumstances.

16. As for the submission that some sort of estoppel arose by the conduct of the defendants because they joined in the paternity application, the defendants did not at any time expressly indicate what if any impact the outcome of that case would have. There was never any indication that

the defendant intended to abandon its pleaded case that the claimant was not one of the class of "lawful grandchildren of Albert Cowie". But in any case, the defendant's being only two of several grandchildren, could not in my view have compromised the action so as to reduce entitlement of any other "lawful grandchildren" who were not parties to the proceedings. These were the persons who would have been "property entitled" to the remainder in "the Bower". In the circumstances, the Defendants were not estopped from proceedings with their pleaded case on the counterclaim.

Dated this 26th day of September 2018

CAROL GOBIN

Judge

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