REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2009-01852

BETWEEN

IN THE MATTER UNDER THE WILLS AND PROBATE ACT CHAPTER 9:03 OF THE LAWS OF THE REPUBLIC OF TRINIDAD AND TOBAGO

AND

IN THE MATTER UNDER THE CONVEYANCING AND LAW OF PROPERTY ACT CHAPTER 56:01 OF THE LAWS OF THE REPUBLIC OF TRINIDAD AND TOBAGO

AND

IN THE MATTER OF AN APPLICATION BY EMMANUEL JOSEPH

Before the Honorable Mr. Justice V. Kokaram

Appearances:

Mr. Prem Persad Maharaj for the Claimant
Ms. R. Hosein for the Registrar General

JUDGMENT

1. The Applicant Emmanuel Joseph is the grandson of the late Henry Smith, who died testate on May 22, 1945.

2. The Applicant seeks the following relief inter alia:

a. An interpretation of the last Will and Testament of Henry Smith (deceased);
b. An Order to expunge various Deeds of Assent from the records of the Registrar General; and
c. An Order to expunge a Power of Attorney from the records of the Registrar General.

The last Will & Testament of Henry Smith

3. At the date of his death the deceased was the owner of that parcel of land situate at St. Julien Village, in the Ward of Savana Grande (North) Trinidad comprising Three acres One Rood and Nine Perches be the same more or less bounded on the North by lands now or formerly of W Smith, on the South by the St George East Road, on the East by lands now or formerly of J Harriot and on the West by lands now or formerly of W Smith or howsoever the same may be butted bounded or otherwise described and which said parcel of land is assessed as Number V8 in the Rolls of the District Revenue office, Princess Town, Trinidad and further described in the Schedule to deed Number 268 of 1917 (hereinafter referred to as "the said parcel of land")[1].

4. The said will of the late Henry Smith is a simple one. It contained only one main provision for the distribution of the testator's estate. The will provided as follows:

> "I give devise and bequeath to my sons Gustavius Smith, Caiaphas Smith, Peter Smith, Rasha Smith, Elijah Smith, Nathan Smith and Benjamin Smith and to my daughters Mrs. Henrietta Cooper and Mrs. Drusilla Alexander, all my real and personal property, of which I may die seised or possessed, to their own use, *share and share alike as joint tenants.*" (emphasis mine)

5. It is this description of the beneficiaries' interest in the said parcel of land "share and share alike as joint tenants" that is the subject of this claim. The phrase "*to share and share alike as joint tenants"* is contradictory as it purports to give to the beneficiaries an

[1] Mr. Henry Smith's title to the said parcel of land was obtained by a Warrant of Transfer No. 268 of 1917 dated 24th January 1917.

interest in the same property at the same time both as tenants in common and as joint tenants. Thus the main issue before the Court is whether the beneficiaries held the said parcel of land as tenants in common or joint tenants.

6. The children of the late Henry Smith and beneficiaries under the will have since died. The applicant's father, Nathan Smith, was the last beneficiary under the will to depart this earth. If the devise created a tenancy in common it would mean that the estate of each of the beneficiaries would be entitled to a share in the said parcel of land. However if the words in the will properly constructed created a joint tenancy, then by the principle of survivorship, the said parcel of land would have been vested in the estate of the applicant's father as he was the last surviving beneficiary. Accordingly the applicant, who has since obtained a grant of probate for the estate of his father on 13th September 2001, and is the sole beneficiary named in his father's will, would if this construction prevails, be entitled in law to the said parcel of land.

7. The Court is therefore being asked to properly construe the words "*to share and share alike as joint tenants"* used in the said will. Churaman JA in ***Miller v Wallace***[2] lamented the difficult position in construing ambiguous terms in a will, when the ill advised choice of terms or general usage of language used by the testator to express himself in his will may, by the operation of lay, defeat his real intention:

> "returning to the special category of home made wills, I wonder how many people in the Bahamas, lay people that is, have the slightest idea that a gift to several children or people without more does not confer upon each or her issue or devisees? But that is the law and if such are the words by which the testators express themselves the devisees take as joint tenants with the result that the survivor takes all. Yet I suspect that the great majority of Bahamians, and indeed lay persons within the wider Caribbean, would immediately say "but that is not what I intended. If I intended only one to enjoy the property, I would have said so. If I did not want some of my children to have part of the property separately and equally I would not have included his name."

[2] (2002) 67 WIR 1

8. In that case the Court of Appeal, with a notable dissent by Ibrahim JA, resolved the issue of the ambiguity in the words used in the will to describe the interest in the property, by reliance on an equitable doctrine that leans in favour of construing a tenancy in common unless there is the clearest intention showing that the principle of survivorship applies. Equally however there is the ancient and well known doctrine that "the first word prevails in a deed but the last in a will"[3]. In this case therefore, do the clear words "joint tenants" negative the words "share and share alike"? To answer that question I turn to the well known principles of construction of wills to resolve this ambiguity in the said will of the late Henry Smith.

Principles of Construction

9. A testator is entitled to dispose of his property as he sees fit. Shadwell VC in ***Vaughan v Marquis of Headfort***[4] underscores that freedom of the testator to dispose of his property:

> "By the laws of this country, every testator in disposing of his property is at liberty to adopt his own nonsense."[5]

10. What did the testator intend when he devised all his real and personal property to the beneficiaries "*share and share alike as joint tenants*"? There is no other devise in the will and no other clause which can be of any assistance whatsoever in ascertaining the intention of the testator in this devise. The Court must sit in the "armchair of the testator" and try to determine as best as it could what was his intention from the words used to express that intention. Would he have said "certainly each of my children take a several and separate share" or would he have said "but of course all take as joint tenants, that is what I have said?"

11. To answer this question, the Court has to ask itself what do the written words used by the testator mean in the particular case. In construing the testator's intention, the Court must as a first rule give effect to the words as declared by the testator. According to

[3] Williams on Wills 9th ed para 52.7
[4] (1880) 10 Sim 641
[5] See also HCA 1685 of 1995 Pond v Pond

Viscount Simon in ***Perrin v. Morgan***[6] the fundamental rule in construing the language of a Will is to put on the words used the meaning which, having regard to the terms of the Will, the testator intended. Equally the Court must resolve any ambiguity by relying on well established principles of construction of wills. Although there are certain rules of construction which are common to both deeds and wills a certain degree of indulgence is allowed in wills. This indulgence is granted to testators who are regarded as "*inopus cosilii*" resulting quite unfortunately in the will being the subject of the "*caprices of language*"[7].

12. The Court must therefore rely upon general principles of construction as a compass to navigate through the maze of words used by the testators to ascertain the true meaning of the words used. Some of the general principles of construction on the interpretation of wills[8] which are useful in this case are as follows:

a. The Court must give effect to the intention of the testator as expressed in the words used in the will.

b. The intention is to be gleaned from the entire will.

c. All the parts of a will are to be construed in relation to each other and so as far possible to form one whole but where several parts are absolutely irreconcilable the latter must prevail.

d. Where a testator uses technical words he is presumed to employ them in their legal sense unless the context clearly indicates the contrary.

e. The words in general are to be taken in their ordinary grammatical sense unless a clear intention to use them in another can be construed and they together can be construed, to receive a construction which will give to

[6] Jarman on Wills 8th ed Vol 3 p 2065.
7 [1943] A.C 399
[8] See Halsbury Laws of England 4th ed. reissue Volume 50, Williams on Wills 9th Ed. Vol. Ch. 49, Jarman on Wills 8th ed. Ch. 57.

every expression some effect rather than one that will render any of the expressions inoperative.

f. Settled rules of construction should not be departed from upon a finding of minute differences in language. It can be departed from only where the testator has expressed a different intention by the words which he has used.

Concurrent Gifts

13. Where property is given to several persons concurrently, two questions arise: (1) whether those persons take as joint tenants or tenants in common, and (2) in the latter case in what shares do they take. An answer to these questions will depend on the context of the entire will. It is accepted that when a gift is made to two or more persons the use of the words "share and share alike" and other similar words of severance create among them a tenancy in common[9]. However, where property is given to several persons concurrently, *prima facie* they take as joint tenants[10].

14. Past decisions of the Courts suggest that anything in the slightest degree indicating an intention by the testator to divide the property negatives the idea of a joint tenancy. In cases of ambiguity, equity leans in favour of creating a tenancy in common due in part to the principle of survivorship which operates in a joint tenancy. The issue of concurrent gifts are, however, matters of construction of the words used by the testator in their context. In ***Re Wooley***[11] for instance the mere fact that the interests were to be divided was not sufficient to create a tenancy in common.

15. Churaman JA also recognized the prima facie rule of inferring a joint tenancy in ***Miller v Wallace,*** although he held that the devise in that case to be a tenancy in common. In ***Miller v Wallace*** the Court of Appeal was called upon to interpret the following devise:

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[9] ***Christian v Mitchell Lee (1969) 13 WIR 392***
[10] ***Re Nancoo {1917} Vol 2 SC Trinidad and Tobago***
[11] supra

> "I give and bequeath to my beloved sons, Horace Sir Brian, Vivian Bernville and Walter, my beloved daughters Florrie Myra and Eugenia and my grandson Harrison all my lands … *but they are not to be divided or sold except all the children concerned are in full agreement.*"

16. The Court of Appeal held that, had the latter words not been included, it would have been impossible to come to any other conclusion than the devise created a joint tenancy. Resorting to the principles that equity leans against a joint tenancy, Churaman JA stated that in considering the context of the devise, anything which in the slightest degree indicates an intention to divide the property, negatives the idea of a joint tenancy.[12] However, in arriving at this conclusion, Churaman JA in effect, used the latter qualifying words in the clause "*but they are not to be divided or sold except all the children concerned are in full agreement*" as the dominant words which characterized the nature of the devise and was sufficient to defeat any presumption of a joint tenancy.

17. Osadebay JA also relied upon the principle enunciated in ***Re Wooley v Wooley***[13] and the general principle that the will must be construed as a whole. Interestingly, the authority of ***Oakley v Wood***[14] relied upon by the Court of Appeal, also placed reliance on the latter words used in the clause to characterize the nature of the devise. In that case the Court held that the words: "All the rest and residue of my property…I give to my two sons, Williams and Samuel Wood to be held jointly or divided equally at their pleasure" created a tenancy in common. Malins VC construing the devise to the sons said:

> "The word "jointly" used here is not inconsistent with a tenancy in common, for tenants in common might properly be said to have joint enjoyment of the property. *There was therefore no repugnance between the words "to be held jointly" and the subsequent words expressing division and if there had been any repugnance the last words would of course prevail*; but as in his opinion there was none and the words must have some effect, the learning of the court

[12] Halsbury Laws of England 2nd ed Vol 34 para 398.
[13] [1903] 2 CH 206
[14] (1968) 37 LJ Ch 28

enable him to declare that a tenancy in common had been created." (emphasis added).

18. In the present case, however, there is repugnance between the words "share and share alike" and "joint tenants." It would seem therefore, that in those circumstances as Malins VC recommended, the last words would "of course prevail" or dominate as it did in ***Oakley v Wood***.

19. Even if resort is to be had to the equitable doctrine in favour of tenants in common, the Court of Appeal in ***Miller*** recognized that it is of course subordinate to the clear expression of intention made by the testator. Lewis CJ in ***Christian***[15] usefully observed:

> "It is clear from the authorities that the words "Share", "respective" and "respectively" are usually interpreted as words of division or allocation amounting to a severance of the estate and resulting in the creation of a tenancy in common, though they may occasionally be controlled or overridden by other words which show a clear intention that the survivor is to have the whole estate. The Court must, in each case, taking the words in the context in which they occur and against the background of the instrument as a whole, decide what their meaning and effect is in the instrument which it is construing."

20 In ***Re Schofield***[16], the Court held that the use of the word "Share" was insufficient to displace the natural construction of the gift as a joint tenancy. These authorities therefore underscore the point that ultimately, the words used in a will must be taken in their proper context and to this end, previous case law should serve only as a guide, not as the ultimate answer to questions of interpretation of wills.

The "last word" override

[15] Christian v Mitchell Lee (1969) 13 WIR 392
[16] [1918] p 64

21 Returning to the said Will of the late Mr. Henry Smith, the words "to their own use share and share alike as joint tenants" contain three separate descriptions. If the devise had ended "to their own use" arguably there would not have been a clear expression of the testator to defeat a presumption of a joint tenancy. Those words are followed, however, by a clear expression which of itself, reflect an intention to create a tenancy in common: "share and share alike". Immediately following that expression, is the equally clear and unambiguous expression "as joint tenants" creating a joint tenancy. The latter two descriptions "share and share alike" and "joint tenants" are all clear and unambiguous but taken together are conflicting expressions. Unfortunately there is no other clause in the will that can be of any assistance in construing this provision and the Court must do the best it can relying on the traditional rules of construction.

22 One particular useful rule is that normally the use of those words which has a primary or ordinary legal meaning ought not to be departed from unless there is evidence to the contrary. See ***Re Cook*** [1948] CH 212. In this case, it is clear that the testator had clearly used the legal terminology to describe a joint tenancy with the phrase "joint tenants".

23 Equally there is that ancient and well known doctrine that "the first word prevails in a deed but the last in a will" discussed above.[17]. If in the same will there are two inconsistent and irreconcilable gifts, if the court can find nothing else to assist in determining the question, the later clause is to prevail as being the last expression of the testator's wish.[18] In such a case the last word or description overrides the expression of intention made previously in the will and is regarded as the dominant description. The justification for the rule is on the basis that to do otherwise would lead to an absurdity or repugnance to the intention of the testator or that the earlier words were made in ignorance.

24 The history of this rule was discussed in ***Sherrat v Bentley*** (1834) 2 MY&K 149. The Court held that if the general intention of a testator can be collected upon the whole

[17] Williams on Wills 9th ed. para. 52.7. See also the cases of ***Sherrat v. Bentley (1834) 39 ER 901***
[18] See Williams on Wills paragraph 52.7th

will, particular terms used which are inconsistent with that intention may be rejected as introduced by the testator's mistake or ignorance of the force of the words used. The Lord Chancellor traced the history of the rule:

> "The rule has often been cited though seldom made the ground of judicial determination, which requires us to give effect to the last of two repugnant clauses in a will, though in a deed the first shall prevail. It is indeed as old as the time of Lord Coke who states it in the first Instance (Co. Litt 112 b)…It must be then admitted that the great weight of authority, both of Lord Coke and of the modern decisions is in favour of regarding a subsequent gift in a will as revoking a prior one to which it is repugnant and not rendering it all void for uncertainty."

25 This principle has been applied in two local decisions. In ***Re Rajwantie*** (deceased) HCA 797 of 1956, Watkins Williams J construed the words in the will "Unto my three sons, for their own use and benefit absolutely *share and share alike as joint tenants*" (emphasis added) meant that the sons took as joint tenants as the words "share and share alike" did not necessarily import division and were not an entirely inapt way of emphasizing the ingredients of a joint tenancy.

26 In ***Erwin Moore v Eileen King*** HCA 939 of 1997, R. Armor J (as he then was) construed the following clause in a will: "I give devise and bequeath to my three children Theoplhilus Moore, Andrew Moore and Eileen King *in equal shares as joint tenants*…" The Court referred to the rule of the "last word override" as follows:

> "In a case such as that at bar, where words are used which might by themselves be said to have created a tenancy in common, but could be negatived by other words in the very will showing a clear intention to create a joint tenancy, the potential dilemma is solved by the application of the quaint rule that the first words prevails in a deed but the last in a will."

Accordingly the Court held that the devise was a joint tenancy.

Interpretation

27 This Court is also of the opinion that in the said will of the late Henry Smith, the words "share and share alike as joint tenants" convey the meaning that the devise of the said parcel of land to the named beneficiaries were made as joint tenants. This is consistent with the clear expression used in the will of the words "joint tenant". Further, the words "share and share alike" are insufficient to displace the devise of a joint tenancy. As a last resort, the said words "share and share alike" are conflicting, repugnant and creates an absurdity with the latter description "joint tenants." Accordingly the latter words "joint tenants" prevail. Ultimately, in my opinion "share and, share alike as joint tenants" was an inelegant expression used by the testator to convey his intention that all the named beneficiaries will share the property as joint tenants.

28 As a result of the principle of survivorship, the said parcel of land passed on to the last surviving heir of Henry Smith, which is Nathan Smith after the death of the other named beneficiaries. Upon his death the parcel of land vests in his estate and the Applicant is entitled to the said parcel of land by virtue of the devise and bequests of the Will of the late Nathan Smith dated 13th September 2001. By that Will the entire estate of Nathan Smith was devised unto the Applicant.

The Deeds

29 The three (3) instruments that are the subject of this claim and which purport to deal with the interests in the said parcel of land are all defective.

Deed of Assent dated 28th March 2002.

- The Applicant was described in the Deed as the lawful attorney of Caiaphas Smith. However, at the date of executing the Deed, Caiaphas had already died on 19th June 1977. The Applicant could not be described as the LPR of Caiphas Smith. See also section 59 of the Conveyancing and Law of Property Act.

- The said Caiaphas Smith is wrongly referred to in the Deed as Amos Smith, Gustavo Smith and Nathan Smith. These are his brothers and father respectively.

- The Applicant and one Elson Smith were wrongly described as beneficiaries.

- The description of Caiaphas Smith as the last survivor Nathan Smith is wrong.

For these reasons this Deed is declared null and void and is hereby ordered to be expunged from the Records of the Registry.

The Power of Attorney

30 Based upon the facts that are not in contest in this matter, Caiaphas Smith also called Amos Smith died on 19th July 1977. He could not have therefore executed a Power of Attorney in 2002. This Power of Attorney is invalid.

Deed of Assent dated 11th May 2007

31 The Applicant is entitled to the said parcel of land as the sole beneficiary under the Will of Nathan Smith, the last surviving beneficiary of Henry Smith's estate. This said Deed must be rectified to reflect the following:

- That the said parcel of land was conveyed to the named beneficiaries as joint tenants.

- That the beneficiaries have all died with Nathan Smith being the last sole surviving beneficiary who died on 28th February 2005.

- The Deed must also reflect the fact that the Applicant is the LPR and beneficiary under the Will of his father Nathan Smith and entitled to the said parcel of land.

Conclusion and Order

32 The Applicant is entitled to ownership of the said parcel of land. The Court hereby orders:

a. That the words used to describe the devise or gift of the testator Henry Smith in his last Will and Testament dated the 9th April, 1945 who died on the 22nd day of May, 1945 of all his real and personal property to his nine children "share and share alike as joint tenants" is construed as a devise or gift as joint tenants and not as tenants in common and that the words "share and share" alike be struck out and that his last surviving child Nathan Smith, the father of the applicant, Emmanuel Joseph who died on the 28th February, 2003 was the last surviving joint tenant.

b. That deed of Assent dated the 28th March, 2002 and registered as Number De200200739083 be expunged and or struck out from the Records of the Registrar General Department.

c. That the Power of Attorney dated the 11th day of March, 2002 and registered as Number 200200539708D001 be also expunged and struck out from the Records of the Registrar General Department.

d. That the deed of Assent dated the 11th May, 2007 and registered as Number De200701236021D001 be rectified to recite:

(a) the death of the joint tenants owners leaving the last survivor Nathan Smith;

(b) to include a recital that the Applicant is the Legal Personal Representative and the beneficiary under the will of his father Nathan Smith and entitled to the estate of the deceased (grandfather).

2. It is also hereby Declared that the Claimant Emmanuel Joseph is the surviving beneficiary and entitled to ownership and possession of that parcel of land situated at St. Julien Village, in the Ward of Savana Grande (North) Trinidad comprising Three Acres One Rood and Nine Perches be the same more or less

bounded on the North by lands now or formerly of W. Smith, on the south by the St. George Estate Road, on the East by lands now or formerly of J. Harriot and on the West by lands now or formerly of W. Smith or however the same may be butted, bounded or otherwise described and which said parcel of land is assessed as Number V8 in the Rolls of the District Revenue Office, Princes Town, Trinidad and further described in the Schedule to deed Number 268 of 1917 (hereinafter called "the said parcel of land").

3. There shall be no order as to costs.

Dated this 12th day of May, 2010.

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Vasheist Kokaram
Judge