

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION : PORT ELIZABETH

REPORTABLE

CASE NO. 257/11

In the matter between:

RAYMOND MARK TAYLOR

1st Applicant

LISA ANN BLAIN

2nd Applicant

ZANNE ELIZABETH TAYLOR

3rd Applicant

and

HILDEGARD TAYLOR

1st Respondent

THE MASTER OF THE HIGH COURT

2nd Respondent

BARRY PAUL DAISLEY N.O.

3rd Respondent

JUDGMENT

GRIFFITHS, J.:

INTRODUCTION

[1] The three applicants in this matter are the children of Patrick James Taylor ("the deceased") who died on 24 October 2006. Prior to his death, the deceased was married to the first respondent. The second respondent, the Master of the High Court, Port Elizabeth, and the third respondent who is a co-executor in the estate of the deceased, have had no involvement in this matter contenting themselves, in the case of the third respondent, with a notice to abide and in the case of the Master, with a report in which he indicated that he is not aware of any facts which might benefit the court and that he abides the decision of the court.

[2] The applicants launched this application seeking an order that a certain document referred to as a "wish list" of the deceased be accepted as an amendment to his last will and testament, together with ancillary relief. The application has been opposed by the first respondent.

THE ISSUES AND THE APPLICABLE LAW

[3] Section 2(3) of the Wills Act 7 of 1953 reads as follows:

"If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act, 1965 (Act 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in

subsection (1)."

[4] Accordingly, before a court will order the Master to accept the document as a will, it must be shown that the document in issue was *"drafted or executed by a person, since deceased, who intended the document in issue to be his or her will, or an amendment of his or her will..."*¹

[5] In the present matter it is manifest from the papers and accepted in argument by Mr. Dyke (counsel for the first respondent) that the document in issue was indeed drafted by the deceased and that, since the drafting thereof, he has passed on. Accordingly, the central issue in this matter is: when he drafted the wish list did the deceased intend it to be an amendment of his existing will as contemplated by section 2(3) of the Act, or not?

[6] In determining whether or not the deceased had such intent at the time he drafted this document, the court is not bound to apply the established principles of documentary interpretation but to examine the content of the document itself and the document in the context of the surrounding circumstances which prevailed when it was executed.²

¹Per Seriti AJA in *Smith Parsons* 2010 (4) SA 378 (SCA) at paragraph 7

² *Van Wetten & Another v Bosch and others* 2004 (1) SA 348 (SCA) at paragraphs 15 – 16; Cf. *KPMG v Securefin Ltd.* 2000 (4) SA 399 (SCA) at paragraph 39

BACKGROUND

[7] The deceased died on 24 October 2006. Approximately 1 year before his death he became aware of the fact that he was suffering from terminal lung cancer and this knowledge spurred him to undertake certain estate planning exercises. This is evidenced by the fact that approximately 7 months prior to his death, and on 23 March 2006, he executed a last will and testament in terms of which he bequeathed his fixed properties to his children (first to third applicants), his personal effects to the first respondent and the residue (subject to her surviving him for a period of 10 days) to the first respondent. No evidence was placed before this court as to the extent of such cancer or as to whether the deceased had been informed as to how long he might have expected to live.

[8] In addition, the deceased sold a fixed property owned by him to a Close Corporation, the members of which are the first to third applicants. The sale price was the sum of R360,000 which was payable on demand. There is some dispute on the papers as to whether it was intended that such payment would ever be demanded and whether in administering the deceased's estate the first respondent agreed that the wish list be honoured, but this need not be pursued any further as the applicants did not rely on any form of waiver in this regard, contenting themselves with the argument that the deceased intended the wish list to stand as an amendment of his existing will.

[9] On 6 September 2006 the deceased drafted the aforementioned "wish list", a copy of which was annexed to the founding affidavit. Because of the

importance of this document it is reproduced in full hereunder.

"My wishes regarding the fixed property;

The property known as 11 Cathcart Rd, Humewood, P.E. (which I have bequeathed to my 3 children) consists of the main house, on street level, a downstairs 3 bedroom flat and an upstairs 2 bedroom flat. It is my wish that in the event of my death, my wife, Mrs. Hildegard Taylor be allowed to remain living in the main house. The 2 flats can be rented out to generate income, to cover the normal day-to-day running expenses of the property. Any surplus to be paid into a bank account for the benefit of my three children.

It is suggested that a 3 person "committee" be formed to take joint decisions relevant to the property. The three persons should be;

Mrs. Hildegard Taylor (my wife)

Mr. Raymond Taylor (my son)

Mrs. Shirley Pelser (my sister)

At any stage, should any one of the above persons not be able to fulfill their duties, then my daughter Mrs. Lisa Blain is to replace that person. Should it become necessary to replace a second person, my younger daughter Mrs. Zanne Taylor is to be appointed.

My wishes regarding my personal effects and the residue of my estate;

My personal effects and the residue of my estate have been bequeathed to my wife for the sake of simplicity. It is my wish that the furniture and household effects be left in the house and used until their eventual disposal or replacement. Other more specialized items such as; power and hand tools, model trains,

stamp collection, postcard collection, aircraft and ship models, built and unbuilt, paintings and pictures, cameras, binoculars, telescope, slide projector and slides, books, puzzles, and motor vehicles, can be distributed through my 3 children, in time, for their own personal use or that of their families, given or sold to interested parties or collectors, or just sold out of hand. Any cash, shares or overseas investment remaining after estate expenses and taxes have been paid should be divided among my three children. The attached list are items in the house which belong to my wife and as such do not form part of these wishes. In the distribution of all of the above please be as fair and equitable as possible and ensure that my wife and children are all aware and involved in the process."

[10] It should be added that the document was signed at the end by the testator and dated "6.9.06"

[11] No real evidence has been placed before us as to the precise circumstances the deceased found himself in at the time when he drafted this document, save for an allegation by the applicant that he made it with the knowledge that his death was imminent. This allegation appears to have been denied by the first respondent but we can safely assume that if he was aware that he had terminal lung cancer one year prior to his death, it is at the very least likely that as at the time of executing this document (which was done approximately one half months before his death) he was aware that he would pass away in the then relatively near future. No further evidence has been placed before us as to who found this document, where it was found or to whom it was given or as to whether any instructions were given by the deceased to such person.

THE DECEASED'S INTENTION

[12] It is as against this background that we must attempt to divine what the deceased had in mind when he drafted the wish list. When analyzing the document itself, the relevant surrounding and background circumstances of which we are aware should be taken into account. These are;

- the deceased became aware that he had terminal cancer approximately a year before his death;
- as a consequence, and with this knowledge, he went about regulating his affairs as best he could and conducting an estate planning exercise;
- on 23 March 2006 he executed a formal and uncontestable last will and testament in terms of which he bequeathed his fixed properties to the first to third applicants and the residue of his estate to the first respondent;
- he sold a fixed property to a Close Corporation owned by the first to third respondents, presumably for their benefit;
- on 6 September 2006 he executed the "wish list" at a time when he must have been aware that he would probably pass away in the near future as a consequence of the cancer.

[13] With these facts in mind, it is necessary to examine the language of the document itself. It is of importance to note that the two bold headings referred to "*My wishes*" regarding, in the first instance, the fixed property and, in the second instance, his personal effects and the residue of his estate. Peppered throughout the document are statements such as "*it is my wish*"; "*the two flats can be rented*"; "*It is suggested that*". It is so that when dealing with the cash, shares or overseas investment, the deceased changed the language slightly by stating that these items "*should be divided among my three children*." However, this sentence also comes under the general heading "*My wishes regarding my personal effects and the residue of my estate*" and in my view is therefore to be governed thereby. In addition, shortly thereafter the deceased stated "*in the distribution of all of the above please be as fair and equitable as possible and ensure that my wife and children are all aware and involved in the process*." In so doing, he was clearly referring to all that went before, including his wishes regarding the cash, shares and overseas investment.

[14] Mr. Scott, who appeared for the applicant, has argued that these apparently discretionary words are qualified by certain other words employed by the deceased later in the document, such as "*is to be appointed*" and "*should be divided among my three children*". This change of language, so he has submitted, must point to an intention on the part of the deceased to qualify the earlier words quoted.

[15] In my view, the language employed by the deceased in this document does not demonstrate an intention on the part of the deceased to amend his last will and testament. On the contrary, what it would appear to indicate is

that the deceased intended that his last will and testament should stand but that it was his desire, notwithstanding the bequests made therein, that his family should stand together when it came to the administration of the estate and the distribution of the assets and that they should be distributed equitably amongst all the parties involved. In this regard, it seems to me, he had faith in both his children (first to third applicants) and his wife (first respondent) to, notwithstanding the bequests made in his will, distribute his personal effects and the residue of his estate fairly and equitably and in accordance with his wishes as expressed in the wish list which was executed subsequent to his will. In addition, the words quoted above "*in the distribution of all of the above please be as fair and equitable as possible and ensure that my wife and children are all aware and involved in the process.*" by no means evince an intention on the part of the deceased to amend the will and tend rather to support the view that he trusted his family with the task of distribution.

[16] On this basis, and accepting that he had such trust in his family, it seems clear that his intention could only have been that the will was to remain extant as it stood and that he intended to leave to his family the responsibility of distributing his personal effects and the residue of his estate fairly and equitably and in accordance with his expressed wishes. Thus the deceased could not have intended the wish list to stand as an amendment of his formally executed will.

[17] The fact that such trust on his part was, as it turns out, ill-founded, cannot alter the situation as to his intention at the time of executing this document. The situation can be likened in reverse to that which prevailed in

the Van Wetten case³. In that matter the SCA found that the relevant document was in fact executed by the deceased in that matter with the intention of it being his final will. At the time it was executed, he had been troubled by certain problems that he had experienced with his wife and, as a consequence, had in the disputed document excluded her as a beneficiary. It appears that subsequent thereto he had made up with his wife but had not destroyed, or given contrary instructions regarding, the disputed document in that matter before he died. It was argued on her behalf that because of this reconciliation and other factors he had changed his mind with regard to her disinheritance. With regard to this argument Lewis JA stated;⁴

"These factors are not, in my view, relevant in determining what the deceased's intention was at the time of writing the contested will. Evidence as to subsequent conduct is relevant only insofar as it throws light on what was on the mind of the deceased at the time of making the contested will (as in *Schnetler NO v Die Meester en Andere*⁵). There is no such evidence in this case."

[18] In the present matter, had a dispute arisen between his children and his wife before the deceased died which indicated that they were unlikely to agree with regard to his expressed desires relating to distribution of the estate, and had he died without destroying or withdrawing the wish list, these facts could not have been taken into account in determining what his intention was in drafting it. Likewise, after his death, the fact of such disagreement cannot be taken into account for such purpose.

³ Supra, footnote 2

⁴ At paragraph 21

⁵ 1999 (4) SA 1250 (C)

[19] When the document is measured against the surrounding circumstances enumerated above, it seems to me that the matter is put beyond doubt. It is obvious that the deceased was fully alive to the fact that he needed to regulate his affairs prior to his death and that he had performed certain acts to that end. In particular, he had executed a will seven months before his death and at a time when he must have been aware that his death was not too far away. This demonstrates that he was clearly possessed of the knowledge that, in order for a will to have effect, it has to be executed in accordance with certain formalities. There is simply no explanation as to why he did not do this if he in fact intended to amend his will. This, coupled with the language employed in the wish list, leads inescapably to the conclusion that he did not intend thereby to amend his will but that he was of the belief that the parties concerned would work together in distributing his estate in accordance with the wish list.

[20] Whilst it may be so that when the wish list was drafted the deceased was aware that his death was not far away, there is no indication that he believed that his death was so imminent that he was unlikely to have an opportunity to have the document formally executed. In this regard, this case differs materially from the *Smith* and *Van Wetten* matters in that the court in those matters found that the respective deceased had the intention of committing suicide, or contemplating suicide, when they drafted the respective documents concerned and that this was a compelling factor in favour of their intending such documents to be, in the one instance, a final will, and in the other, an amendment of an earlier will.

[21] In addition, during the interim period after he made his will and

before he drafted the wish list, there is no evidence whatsoever that the circumstances in his life changed to such an extent to have persuaded him to change his will in any way.

[22] I am accordingly not persuaded that the applicants have established that in executing the document referred to as the deceased's "wish list", he intended this to be an amendment of his last will and testament.

[23] In the circumstances, I would propose that the application be dismissed with costs.

ZILWA, A.J. : I agree

ACTING JUDGE OF THE HIGH COURT

GRIFFITHS, J. : It is so ordered

JUDGE OF THE HIGH COURT

HEARD ON : 04 AUGUST 2011

DELIVERED ON : 15 NOVEMBER 2011

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INSTRUCTED BY

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