

HEIRS - THE FLY IN THE OINTMENT OF A TESTATOR'S WISHES

Govindasamy and Another v Pillay and Others (D7270/2015) [2020] ZAKZDHC 49 (12 October 2020)

This judgment tells a story where the deceased made over the family home to his two children and stated that it may only be sold if both were to agree thereto. It is with reluctance that a court will order that a will must be amended, even where an agreement between the heirs appear impossible to achieve. The application in this matter was successful and the judgment explains the considerations that a court will weigh up before doing so.

The Judgment can be viewed [here](#).

FACTS

Mr Govindasamy is both a testamentary heir and the executor of the estate of his father, the late Soondrarajoo Govindasamy ('the deceased/the testator'). There were only two heirs, the two children, Mr Govindasamy and Ms Pillay.

In his will, the deceased determined that the immovable property in his estate is to be shared equally between Mr Govindasamy and Ms Pillay. The will stipulated that the house should not be sold, unless mutually agreed to by both children.

Initially both children lived on the property. However, at some stage, Mr Govindasamy relocated to Gauteng for work purposes. He returned to Durban in 2010 and moved back into the family home. Living alongside Ms Pillay purportedly became intolerable. As a result, Mr Govindasamy and his family moved out of the house in 2011. Since then, Ms Pillay lived in the house and benefited exclusively in this regard.

Problems arose when it became necessary to sell the property. (This was because the will of the deceased's wife, who pre-deceased him, had not yet been finalized and the half share of the property that devolved upon the deceased, had yet to be transferred. In 2014, the executor of the estate of the late Munniamma Govindasamy, with the concurrence of Mr Govindasamy (in his capacity as executor of the deceased) was authorised to sell the family home pursuant to an agreement which had been reached.)

Ms Pillay however refused to agree to the sale of the property.

HELD

- An order to sell the property to a third party without Ms Pillay's consent, would amount to variation of the will, which impacts on the principle of freedom of testation. Our courts have stated that "not to give due recognition to freedom of testation will, to my mind, also fly in the face of the founding constitutional principle of human dignity. The right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away."
- The freedom of testation is however not absolute. The balance to be struck between freedom of testation and its limitations was formulated as follows by our courts:

"Now the golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained, the court is bound to give effect to them, unless we are prevented by some rule of law from doing so."

- Courts have allowed the variation of a will in limited instances where the directions in the will are practically impossible or utterly unreasonable due to a change in circumstances. The view is that a court's power to authorise a departure from the terms of a will or of a trust deed on this ground is limited to cases where the unforeseen change of circumstances is such as to render the fulfilment of the directions contained in the will or trust practically impossible or utterly unreasonable.
- The test to determine whether to allow an amendment is whether there has been a change in the circumstances which could not have been foreseen by the testator.
- In the present matter, the animosity between the heirs reached the point where they could not live together on the same property, and they could not agree on the value of the property, in the event of one heir wishing, as Mr Govindasamy did, to buy the half share of his sister.
- The current strife could not have been foreseen by the testator and as a result, the Court, in the exercise of its discretion, was entitled to vary the provisions of the will of the late Mr Govindasamy, to permit for the sale of property, despite such sale not being by mutual consent of the heirs.

CONCLUSION

The application succeeded.