[2020 Gib LR 102]

ESTATE OF KENNEDY (DAWSON, sole executor) v. WORCESTER ACADEMY

SUPREME COURT (Yeats, J.): February 20th, 2020

Succession—probate and letters of administration—foreign domicile—starting point that no grant of probate to Gibraltar resident executor if deceased died domiciled abroad with no assets in Gibraltar—executor entitled to grant where funds belonging to estate in Gibraltar at date of application

The applicant applied for a grant of probate.

The deceased had been resident in the United Kingdom and domiciled in the United States at the time of his death. He had left a last will and testament by which he appointed the applicant as the sole executor of his estate. The will provided that the deceased's assets were to be held on trust and disposed of at the discretion of a close friend of his "in whom I have absolute trust and who is fully aware of my wishes." The applicant said the will was executed in the United Kingdom. At the time of his death, the deceased had no assets in Gibraltar, but the proceeds of a foreign property sale which the deceased had agreed to enter into before his death were subsequently transmitted to Gibraltar.

The applicant submitted that (a) s.3(1) of the Trusts (Recognition) Act 1989 provided that the Hague Convention on the Law applicable to Trusts and on their Recognition had force of law in Gibraltar; (b) art. 3 of the Convention applied the Convention to trusts created voluntarily and evidenced in writing; (c) art. 4 of the Convention provided that it did not apply to preliminary issues such as validity of the will or the capacity of the testator; (d) arts. 6 and 7 set out how the applicable law was determined—art. 6 provided that a trust would be governed by the law chosen by the settlor, the choice being expressly set out or implied in the instrument; alternatively, art. 7 provided that if no applicable law had been chosen by the settlor, a trust was governed by the law with which it was most closely connected; (e) the deceased had intended the trust to be administered in England and therefore the implied choice of law was English law; (f) alternatively, the trust was most closely connected with English law as the intended trustee resided in England; the will was executed in England; and the terms and language used in the will and in creating the trust were those familiar to English law; and (g) notwithstanding that there were no assets belonging to the deceased in Gibraltar at the time of his death, probate should be granted because the applicant was the

sole executor and he was resident in Gibraltar; funds belonging to the estate had been transferred to Gibraltar; when a grant was issued, the applicant would collect estate assets from other jurisdictions and then hold them in Gibraltar for the intended trustee; no one had been entrusted with administration of the estate in the United States; and as the applicant was resident in Gibraltar, the testamentary trust created when probate was granted would fall under the Trusts (Private International Law) Act 2015, s.3.

Held, ruling as follows:

(1) The court accepted that the will had been executed in England and satisfied the requirements for a validly executed will under English law. In addition, the court was satisfied that the disposition of the estate in the will created a valid trust. The court was first required to determine which law governed the validity of the purported trust. Section 3(1) of the Trusts (Recognition) Act 1989 provided that the Hague Convention on the Law applicable to Trusts and on their Recognition had force of law in Gibraltar. There was no express choice of law set out in the will. Because the intended trustee was resident in England there was an inference that the intended place of administration was England. The place of administration was also a significant factor in determining the implied intention of the settlor. Although the deceased's last domicile was normally an important consideration, the court was persuaded that it could hold that the inference to be drawn in the present case was that the deceased intended the trust to be administered in England in accordance with English law. Although it was unnecessary to do so, the same conclusion would be reached by applying the factors in art. 7 of the Convention. Although the assets were not located in England, the other considerations set out in that article pointed towards the trust being more closely connected with England than anywhere else (paras. 6–8; paras. 10–13).

(2) Article 8 of the Convention provided that the law specified by arts. 6 or 7 governed the validity of the trust, its construction, its effects, and the administration of the trust. In English law, for a half-secret trust to be valid, the court had to be satisfied of (i) the intention of the testator to create a trust; (ii) the communication of the trust to the legatee; and (iii) the acceptance of the trust by the legatee, which could take the form of silent acquiescence. In the present case, it was plain that the deceased intended to create a half-secret trust. The language was clear that he created a trust, stated that all of his assets were to be held upon that trust and provided that they were to be disposed of at the discretion of his intended trustee who was aware of his wishes. The details of a half-secret trust must be communicated to the trustee before or contemporaneously with the will. In the present case, the court had little difficulty in determining that the details of the half-secret trust had been communicated to the intended trustee before or at the time of the making of the will by which the trust was created. It was also clear that the intended trustee

had accepted the instructions and was happy to act as trustee (paras. 14–17).

(3) The court ordered that a grant of probate of the deceased's last will and testament be issued to the applicant as executor of the will. The starting point was that a grant would not ordinarily issue in respect of a person who had died domiciled abroad but who did not leave any assets in Gibraltar. Being resident in Gibraltar did not of itself entitle an executor to apply for a grant in Gibraltar. An executor was not limited to taking a grant in his place of residence; he could apply elsewhere. The applicant was entitled to a grant because property belonging to the deceased was now in Gibraltar, namely the proceeds of a sale of foreign property which the deceased had entered into an agreement to sell but which had completed after his death. The court had jurisdiction to issue a grant of probate if assets belonging to a deceased were located in Gibraltar at the time that an application was made. It was not a requirement that the assets were present in the jurisdiction at the time of death. Situations such as the present where assets were transferred into the jurisdiction after death in cases where no administrators had been appointed were likely to be rare (paras. 18–26).

Cases cited:

(1) *Aldrich* v. *Att. Gen.*, [1968] P. 281; [1968] 2 W.L.R. 413, considered.
(2) *Chellaram* v. *Chellaram*, [1985] Ch. 409; [1985] 2 W.L.R. 510; [1985] 1 All E.R. 1043, followed.
(3) *Chetty* v. *Chetty*, [1916] 1 A.C. 603; (1916), 85 L.J.P.C. 179; 114 L.T. 1002, *dictum* of Lord Parker considered.
(4) *Coode*, *In re* (1865–69), L.R. 1 P. & D. 449, followed.
(5) *Johnson* v. *Ball* (1851), 5 De G. & Sm. 85, referred to.
(6) *Kasperbauer* v. *Griffith*, [2000] W.T.L.R. 333, applied.
(7) *Rawstron* v. *Freud*, [2014] EWHC 2577 (Ch), referred to.
(8) *Tucker (H.)*, *In re* (1863), 164 E.R. 1402; 3 Sw. & Tr. 585; 34 L.J. (P. M. & D.) 29, considered.

Legislation construed:

Non-Contentious Probate Rules 1987 (S.I. 1987/2024), r.30(3): The relevant terms of this provision are set out at para. 4.

r.44(5): "Any person claiming to have an interest in the estate may cause to be issued from the registry in which the caveat index is maintained a warning in Form 4 against the caveat, and the person warning shall state his interest in the estate of the deceased and shall require the caveator to give particulars of any contrary interest in the estate; and the warning or a copy thereof shall be served on the caveator forthwith."

r.44(10): "A caveator having an interest contrary to that of the person warning may within eight days of service of the warning upon him (inclusive of the day of such service) or at any time thereafter if no

affidavit has been filed under paragraph (12) below, enter an appearance in the registry in which the caveat index is maintained by filing Form 5 and making an entry in the appropriate book; and he shall serve forthwith on the person warning a copy of Form 5 sealed with the seal of the court."

Trusts (Private International Law) Act 2015, s.3(1): The relevant terms of this sub-section are set out at para. 19.

Trusts (Recognition) Act 1989, s.3(1): The relevant terms of this sub-section are set out at para. 8.

Wills Act 1837 (Will. IV & I Vict., c.26), s.5: The relevant terms of this section are set out at para. 7.

Convention on the Law Applicable to Trusts and on their Recognition (Hague Convention), art. 6: The relevant terms of this article are set out at para. 8.
art. 7: The relevant terms of this article are set out at para. 8.
art. 8: The relevant terms of this article are set out at para. 14.

D. Feetham, *Q.C.* for the applicant;
D. Bossino for the respondent.

1 **YEATS, J.:** The late Horton Parmalee Kennedy died on May 24th, 2018, aged 89 years. He was resident in the United Kingdom but was domiciled in the United States. He left a last will and testament dated June 14th, 2017, by which he appointed Jonathan Charles Dawson as the sole executor of his estate. Mr. Dawson (who I shall refer to as "the applicant") is resident in Gibraltar. The respondent, the Worcester Academy, is a private boarding school in the United States. The deceased was an alumnus of the school.

2 On May 23rd, 2019, the respondent entered a caveat against the sealing of a grant in the deceased's estate. The parties then followed the procedure laid out in r.44 of the English Non-Contentious Probate Rules 1987 ("the Probate Rules"). (These rules apply to probate applications in Gibraltar by virtue of r.6(1) of the Supreme Court Rules which, in effect, provides that in the absence of a relevant statutory provision in Gibraltar, the rules of court in the English High Court shall apply.) The applicant issued a warning on June 3rd, 2019 in accordance with r.44(5). On June 10th, 2019, the respondent replied by entering an appearance pursuant to r.44(10), signifying that it had a contrary interest to the applicant. The impasse led to the filing of the originating summons by the applicant on November 20th, 2019. The summons sought an order that the respondent show cause as to why the caveat should not be discontinued and why probate of the will should not be granted to the applicant. The matter was set down for a hearing on December 16th, 2019.

3 On the day of the hearing, the parties informed the court that they had reached a settlement and the respondent sought leave to withdraw the caveat. I granted permission for the caveat to be withdrawn and that brought the respondent's involvement in the case to an end. I then proceeded to hear the applicant's application for a grant of probate.

4 The application is for a grant of probate of a will in respect of a person who died domiciled out of Gibraltar. Rule 30 of the Probate Rules deals with grants to persons domiciled outside of England and Wales (which should be read as being "outside of Gibraltar"). Rule 30(3)(a)(i) provides as follows:

> "(a) probate of any will which is admissible to proof may be granted—
>
> (i) if the will is in the English or Welsh language, to the executor named therein . . ."

The deceased's will is in English and names an executor. Therefore, notwithstanding that the deceased died domiciled outside of Gibraltar, probate may be granted if the will is admissible to proof.

5 The will is a short handwritten will made on a pre-printed template. It identifies the deceased as the testator, revokes any former wills and codicils, appoints an executor and bears an attestation clause with the signatures, names and addresses of two witnesses. As to disposition of property, the will provides as follows:

> "I leave all my assets, wherever they may be to be held on TRUST and disposed of at the discretion of my close friend RONA, LADY DELVES BROUGHTON who also has my power of attorney and in whom I have absolute trust and who is fully aware of my wishes."

(This is said to create what is known as a half-secret trust. It settles property, appoints a trustee but does not identify the objects of the trust.)

6 The applicant says that the will was executed in the United Kingdom. I am unclear as to whether this is something the applicant has personal knowledge of or whether it is an assumption based on the fact that the deceased was residing in England at the time (and set out his London address in the will) and that the witnesses are identified with their addresses in England. Whichever it is, I have little difficulty in accepting that the will was executed in England.

7 Section 5 of the Wills Act 2009 *inter alia* provides that a will is valid if it was executed in conformity with the law of the country where it was executed. In England, validity of wills is governed by s.9 of the English Wills Act of 1837. This provides as follows:

"No will shall be valid unless—

(a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and

(b) it appears that the testator intended by his signature to give effect to the will; and

(c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(d) each witness either—

(i) attests and signs the will; or

(ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness),

but no form of attestation shall be necessary."

All the requirements laid out in s.9 are met in this case and the will was therefore validly executed.

8 Did the disposition of the estate in the will create a valid trust? Daniel Feetham, Q.C., who appeared for the applicant, submitted that it did. To establish this, I must first determine which law governs the validity of the purported trust. This is because the deceased was a citizen of, and was domiciled in, the United States but was resident in England. He had property in France and the United States. Mr. Feetham's submissions on the law governing the trust, which I accept, can be summarized as follows:

(i) Section 3(1) of the Trusts (Recognition) Act 1989 provides that the "Convention on the Law applicable to trusts and on their Recognition agreed at The Hague on 20 October 1984 ["the Convention"] . . . shall have force of law in Gibraltar."

(ii) Article 3 of the Convention applies the Convention to trusts created voluntarily and evidenced in writing. (In this case, the deceased created the trust in his written will.)

(iii) Article 4 of the Convention provides that it does not apply to preliminary issues such as validity of the will or the capacity of the testator to make the will. (I have already determined that the will was validly executed.)

(iv) Articles 6 and 7 of the Convention then set out how the applicable law is determined. Article 6 provides that a trust shall be governed by the law chosen by the settlor, the choice being expressly set out or implied in the terms of the instrument. The text of art. 6 is as follows:

"A trust shall be governed by the law chosen by the settlor. The choice must be express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case."

(v) Alternatively, art. 7 provides that where no applicable law has been chosen, a trust is governed by the law with which it is more closely connected. This article provides as follows:

"Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected.

In ascertaining the law with which a trust is most closely connected reference shall be made in particular to—

a) the place of administration of the trust designated by the settlor;

b) the situs of the assets of the trust;

c) the place of residence or business of the trustee;

d) the objects of the trust and the places where they are to be fulfilled."

9 It is submitted for the applicant that the deceased intended the trust to be administered in England and therefore the implied choice of law is English law. Alternatively, it is said that in any event the trust is most closely connected with the laws of England and the result is therefore the same regardless of whether it is art. 6 or 7 that applies.

10 There was no express choice of law set out in the will. So what are the factors which lead to a conclusion that the implied choice must be English law? Mr. Feetham submits that there are three: Lady Broughton, the intended trustee, resides in England; the will was executed in England; and, to a lesser extent, the terms and language used in the will and creating the trust are those familiar to the laws of England.

11 Because Lady Broughton is resident in England this leads to an inference that the intended place of administration is England. In *Chellaram* v. *Chellaram* (2), the court resolved a dispute on jurisdiction regarding two settlements drawn up in India but worded in English and in a form common to English discretionary settlements. Although the court did not need to determine whether English law or Indian law was the proper law of the settlements, it found that the residence of the trustees provided a strong basis for saying that the administration of the trust was to take place in England. Scott, J. said as follows ([1985] Ch. at 425):

"But most important of all, it seems to me, is the identity of the three original trustees. Two, Mr. Rupchand and Mr. Bharwani, were permanently resident in England. The third, Ram was the member of

> the family, who, in 1975, appeared to have the closest connection with England. The inference is inescapable that the parties to the settlements contemplated that administration thereof would take place in London."

12 The place of administration is, according to the learned authors of Dicey, Morris and Collins, *The Conflict of Laws*, 15th ed. (2012), a significant factor in determining implied intention. They state (at para. 29–019):

> ". . . [W]here all the original trustees are domiciled or resident in one state, and their identity was stipulated in the trust instrument, this may itself lead to an irresistible inference as to where the settlor intended the trust to be administered. That place of administration itself becomes a key factor in the search for an implied intention."

13 Mr. Feetham quite properly points out that the deceased's last domicile is normally taken as an important consideration. (In this case the deceased was domiciled in the United States at the time of his death. Although not specifically referred to in the evidence, it would be a fair assumption to say that he was so domiciled at the time he executed the will.) However, I am persuaded that for the reasons put forward by Mr. Feetham, I am able to hold that the inference to be drawn in this case is that the deceased intended the trust to be administered in England in accordance with the laws of England. Although unnecessary in light of my findings, I would also observe that in applying the factors in art. 7 of the Convention, the same conclusion would be reached. Although the assets are not located in England, the other considerations set out in the article militate towards the trust being more closely connected with England than anywhere else.

14 Article 8 of the Convention then provides that: "The law specified by Article 6 or 7 shall govern the validity of the trust, its construction, its effects, and the administration of the trust."

15 In English law, for a half-secret trust to be valid it must satisfy the requirement of the three certainties. In *Kasperbauer* v. *Griffith* (6), Peter Gibson, L.J., setting out this and the further requirements, said ([2001] W.T.L.R. 333, at 7):

> ". . . [T]he authorities make plain that what is needed is (i) an intention by the testator to create a trust, satisfying the traditional requirement of three certainties (that is to say certain language in imperative form, certain subject-matter and certain objects or beneficiaries); (ii) the communication of the trust to the legatee, and (iii) acceptance of the trust by the legatee, which acceptance can take the form of silent acquiescence."

16 In this case, it seems to me to be plain that the deceased intended to create a half-secret trust. The language is clear in that he creates a trust, states that all of his assets are to be held upon that trust and then provides that they be disposed of at the discretion of Lady Broughton who is aware of his wishes.

17 The details of a half-secret trust must be communicated to the trustee before or contemporaneously with the will (see *Johnson* v. *Ball* (5) and *Rawstron* v. *Freud* (7)). In an affidavit sworn on November 15th, 2019, Lady Broughton stated as follows:

> "I am fully aware of Mr Kennedy's wishes. He frequently discussed his wishes with me and explained how he wanted his estate to be distributed upon his death. He was very clear as to whom he wished to benefit and equally clear as to whom he did not. He identified certain charitable institutions and individuals."

Lady Broughton also confirms that two letters of intent were sent to her some months after the will was executed and that these were "consistent with what I already knew regarding his wishes communicated to me." I also note that the will expressly states that Lady Broughton is "fully aware of my wishes." I therefore have little difficulty in determining that the details of the half-secret trust had been communicated to the trustee before or at the time of the making of the will by which the trust was created. As to her acceptance of instructions, it is also clear from her affidavit that she is happy to act as trustee.

18 The final point which falls for consideration is whether a grant should issue in light of the fact that, at the time of his death, there were no assets in Gibraltar belonging to the deceased. In the oath to lead to the grant, the applicant stated that the value of the deceased's estate in Gibraltar was nil. (No issue fee was therefore payable.) He then sets out the following as the basis upon which a grant should issue to him notwithstanding the fact that there were no assets in Gibraltar when the deceased died:

> "(a) I am the sole executor appointed by the Will and I am resident in Gibraltar;
>
> (b) Funds belonging to the estate were forwarded on the 3rd May 2019 to Gibraltar by the French lawyers acting in the sale of a property. They are currently held in Hassans Client Account pending my ratification as executor;
>
> (c) When a Grant is issued I will be able to take the necessary steps to collect the estate assets from other jurisdictions and will then hold the same in Gibraltar for Lady Broughton to exercise her discretion as set out in the Will;

(d) No one has been entrusted with the administration of the estate of the said deceased by a court in the State of Texas where the deceased died domiciled and I have been advised by lawyers in the United States that it is not possible to apply for a grant in Texas.

(e) Since I am resident in Gibraltar the testamentary trust created when I obtain Probate will fall under section 3 of the Trusts (Private International Law) Act."

19 Being resident in Gibraltar, of itself, does not entitle an executor to apply for a grant in this court. Furthermore, neither paras. (c) nor (d) provide any basis for saying that the applicant is entitled to a grant. An executor is not limited to taking a grant in his place of residence. He could apply elsewhere. As to (e), does the Trusts (Private International Law) Act assist? Section 3(1) of that Act provides as follows: "The Gibraltar courts have jurisdiction where . . . (b) a trustee of a foreign trust is resident in Gibraltar."

20 An executor holds the assets devolving under a will upon trust for the beneficiaries (in this case upon trust for Lady Broughton who herself will hold it upon the half-secret trust established by the will). The applicant would therefore be a trustee. Furthermore, an executor derives his title from the will of his testator and not from any grant of probate—see the Privy Council case of *Chetty* v. *Chetty* (3), where Lord Parker said ([1916] 1 A.C. at 608):

"It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action, vests in him upon the testator's death . . ."

Arguably therefore, the applicant is a trustee, even though he has not yet obtained a grant and he is resident in Gibraltar. Is the English will a foreign trust and, if so, does the jurisdiction conferred on this court by s.3(1) of the Act extend to issuing a grant of probate of a will? These are important questions upon which I have not heard full submissions and I would hesitate before expressing a view. In any case, it does not seem to me that I must determine the points as I consider that the applicant is in any event entitled to a grant because there are funds in Gibraltar belonging to the estate.

21 The starting point is that a grant will not ordinarily issue in respect of a person who died domiciled abroad but who did not leave any assets in Gibraltar. That principle was stated in *Aldrich* v. *Att. Gen.* (1), where Ormrod, J. said ([1968] P. at 295):

". . . [I]t appears to me to be contrary to principle for this court to make a grant of representation in the estate of a person domiciled in

some other country who died leaving no assets within the jurisdiction of this court."

22 The basis for this was identified in the earlier case of *In re H. Tucker* (8), where Sir J.P. Wilde said (164 E.R. at 1403):

"The foundation of the jurisdiction of this Court is that there is personal property of the deceased to be distributed within its jurisdiction."

23 In our case, property belonging to the deceased is now present in Gibraltar. The deceased had entered into an agreement to sell a property of his in France. He died prior to the sale taking place but, as the process had been set in motion, it was completed notwithstanding his death. Funds relating to the sale were transmitted to Gibraltar. I cannot imagine that such a situation would be very common. Other than for personal chattels, a deceased's property would not normally move from one country to another unless an administrator of the estate has been appointed.

24 I observe that in *Tucker* and *Aldrich* v. *Att. Gen.* (1) there were simply no assets in the jurisdiction at any time. Strictly, they do not say that a grant should not issue either in a case where assets are to be found in the jurisdiction prior to the application for a grant being made but which had not been present at the time of death. Indeed, in *In re Coode* (4), Sir J.P. Wilde suggested that this was possible. I reproduce most of the short report of the case (L.R. 1 P. & D. 449):

"The testator made two wills, the one relating to property in Chili [Chile], and the other to property in England, and he appointed separate executors in each. The will as to property in England has been proved, and I find that the terms of the grant include all the property in England, and exclude that which is in Chili. It appears to me that to make another grant to the executor of the will relating to the property in Chili would be improper. The function of the Court is exhausted in having made a grant of probate of the English will. *If any property which at the time of the testator's death was in Chili should hereafter be brought to this country, and it should become necessary to take a grant in respect of it, that may be a reason for making an application to the Court for another grant*; but at present its power is, in my opinion, exhausted by the grant already made. It was intimated at the time when the application was made, that its object was simply to clothe the applicant with the character of executor, with a view to proceedings in Chili. But the object of this Court in making grants is to enable the executor or administrator to administer property in this country, and is not founded on any such considerations as those suggested to the Court." [Emphasis added.]

25 In my judgment, this court has jurisdiction to issue a grant if assets belonging to a deceased are located in Gibraltar at the time that an application is made. I do not consider that it is a requirement that the assets were present here at the time of the death. As I have already said, situations where assets are transferred to this jurisdiction post death in cases where no administrators have been appointed may indeed be rare.

26 I shall therefore order that a grant of probate of the deceased's last will and testament do issue to the applicant as executor of the will. However, it seems to me that the applicant must first pay the issue fee payable on the filing of the application based on the value of the assets presently found in Gibraltar.

Orders accordingly.