



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
IN THE PROBATE AND ADMINISTRATION DIVISION**

PROBATE AND ADMINISTRATION CAUSE NO. 129 OF 2019

IN THE ESTATE OF EVERITT MAUD DELL, DECEASED

BETWEEN:

**(1) DAVID DELL
(2) JOAN EBANKS**

APPLICANTS

AND:

DELROY SMICKLE

RESPONDENT

IN CHAMBERS

Appearances:

**Mr. Clayton Phuran of CP Attorneys on behalf of the 1st
Applicant**

**Mr. James Kennedy of KSG Law on behalf of the 2nd
Applicant**

**Ms. Kimberly Wood of Wood Law Associates on behalf of
the Respondent**

Before:

The Hon. Justice Kawaley

Heard:

18 March 2021

Date of decision:

18 March 2021

**Draft Reasons
circulated:**

19 April 2021

Reasons delivered:

5 October 2021



HEADNOTE

Competing applications for the grant of letters of administration-whether deceased's children should be appointed in preference to her estranged husband- allegations of unfitness-scope of Court's power to vary the statutory order of priority for grants- Probate and Administration Rules (2008 Revision), rule 33-Succession Act (2006 Revision), sections 12(2), 42(1)-Senior Courts Act 1981 (UK), section 116(1)

REASONS FOR DECISION

Introduction

1. On March 18, 2021, the Court was required to adjudicate essentially two competing applications for the grant of letters of administration in respect of the Estate of Everitt Maud Dell (the "Deceased"). The Applicants, by Summonses dated September 23, 2019 and March 2, 2020, respectively, sought appointment jointly or severally. Counsel for the 1st Applicant substantively addressed the Court supported by counsel for the 2nd Applicant.
2. The Respondent, by his Summons dated September 7, 2020 initially primarily sought his own appointment. However, at the hearing he advanced the fall-back position that an independent professional should be appointed.
3. The background facts prove the homily that 'fact is stranger than fiction'. I can do no better than to reproduce the helpfully clear and concise summary of the factual matrix which is set out in the opening paragraphs of Mr Phuran's Submissions:

"1. The factual background of this case takes it far from the normal. Everitt Dell died 6th September 2019 intestate leaving two potential spouses, 5 adult children and a child who predeceased her leaving two issues. Concerning Mr Delroy Smickle, now the adjudged surviving spouse, the deceased, Everitt Dell took all reasonable steps to have a divorce and was provided with a document purporting to be a decree of dissolution. [Believing] that document to be valid, she proceeded through a ceremony of marriage to Mr Leiton Sewell. At the time of her death, she was potentially facing prosecution for bigamy.



2. *Mr David Dell, the son of Everitt Dell made an application for Letters of Administration on 23rd September 2019. Mr Smickle relying on the order of priority in the Probate and Administration Rule 33 contests this. Mr Dell and his sibling Ms Joan Ebanks assert that the rules are guidelines and that it is in the overall interests of the beneficiaries [as] a whole that letters of administration [are] granted to them.”*

4. At the end of the hearing, I appointed the 1st and 2nd Applicants jointly after refusing the Respondent’s application for an adjournment in order to seek to obtain a settled residence within the jurisdiction. The Respondent ultimately did not challenge the jurisdiction of the Court to pass over him and depart from the prescribed priority rules on the basis that no adverse findings of unfitness were recorded against him. I ordered that all parties’ costs should be payable out of the estate. Because the right to grant such relief raised novel points of law, I now give reasons for that decision.

Legal Findings

The jurisdiction to depart from the statutory order of priorities

5. The threshold issue of whether the Court had legal jurisdiction to depart from the statutory priorities for appointing administrators in cases of intestacy which enunciated in rule 33 of the Rules was ultimately not disputed. In the face of Mr Phuran’s cogent written submissions, and my provisional indication that there seemed irresistible, Ms Wood astutely decided to contest her opponent on more favourable terrain. How the Court should exercise its discretion was ultimately in controversy at the hearing; the jurisdictional point, despite its novelty, was ultimately an uncontentious one.
6. Rule 33 has traditionally been read, consistently with its terms, as conferring an automatic priority on a surviving spouse over the children of the deceased to receive a grant of administration over the estate. However, Mr Phuran submitted that the “*central question is to whom Letters of Administration should be granted?*” He argued:



“3. *In the Cayman Islands, like the United Kingdom, this may be granted to one or more persons taking a beneficial interest. I quote from Tristan and Cootes at Chapter 6 section 17 (6.17)...:*

‘The general rule applicable to the grant of letters of administration is that where possible administration is granted to one or more of the persons taking a beneficial interest in the estate of the deceased, but the court may also exercise discretion to pass over the rights of these persons in suitable circumstances (see the reference to the probate rules in s 116(1) of the Senior Courts Act 1981 and NCPR SI 1987/2024 r 22(1).

...

5. *The English Probate Rule 22 is significantly mirrored in the Cayman Islands Rules 33 in respect of priority.’ However, there does not seem to be a similar provision like section 116 of the Senior Court Act 1981. However, section 11 of the Grand Court Law states...:*

‘11. (1) *The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any other law for the time being in force in the Islands, shall possess and exercise, subject to this and any other law, the like jurisdiction within the Islands which is vested in or capable of being exercised in England by-*

(a) *Her Majesty’s High Court of Justice; and*

(b) *the Divisional Courts of that Court, as constituted by the Senior Courts Act, 1981 [which replaces the Supreme Court of Judicature Act 1925], and any Act of the Parliament of the United Kingdom amending or replacing that Act.’*

6. *Further Section 42(1) of the Succession law (2006 Revision) reads:*

‘42. (1) *In any matter of practice for which no provision is made by this or any other law or by any rules or other regulations made thereunder, the law and practice in similar matters of the Supreme Court of Judicature in England as nearly as may be applies, so far as local circumstances permit and subject to any directions which the Court may give in any particular matter.’*

7. *Our submission is that Section 11 of the Grand Court law read with Section 11 and 42 of the Succession Law means that the Grand Court like the senior Court in the UK can pass over the rights of persons in priority where the circumstances make it necessary and expedient in the instant case.”*

7. Mr Dell’s counsel pivotally relied on my own decision in *Justin Uzzell et al-v- Andrea Sam*, FSD 2020(IKJ), Judgment dated August 7, 2020 (unreported) where I held:



“17. The language of section 42(1)...clearly demonstrates an intention to enact a succession equivalent to section 11 of the Grand Court Law...”

18. This provision, carefully construed in its wider statutory context, incorporates the ‘law and practice’ of the English Supreme Court of Judicature (i.e. the High Court, in modern parlance)...”

8. In *Uzzell*, I applied section 50 of the Administration of Justice act 1985 (UK) to remove an executor otherwise than for cause in circumstances where the Succession Act only itself provided the power to remove an executor for cause. Mr Phuran rightly submitted that the reasoning in that case applied by analogy to the situation where an English probate statute conferred a broader jurisdiction to appoint administrators than was conferred by the Caymanian Rules:

“10. The submission of Mr Dell is that whilst the principles in relation to passing over is not to be found in the Cayman Islands Succession Law or Probate and Administration Rules, by virtue of Section 42 of the Succession Law Section 116 of the English Senior Courts Act 1981 forms part of the Cayman Islands Law as applied by section 42 of the Succession Law.

11. Section 116 of the Senior Courts Act 1981 reads:

‘(1) If by reason of special circumstances it appears to the High Court to be necessary or expedient to appoint as administrator some person who, but for this section, would in accordance with probate rules have been entitled to the grant, the court may in its discretion appoint as an administrator such person as it thinks expedient.’”

9. Care must obviously be taken when applying English statutory provisions as a gap-filling measure, in the probate context, to ensure that one does not subvert the primacy of the Succession Act and Cayman Islands law. In *Uzzell*, section 42 was applied to incorporate not a minor and context-laden provision of English; rather a broad jurisdictional provision was applied, consistent with the notion that this Court’s general jurisdiction corresponds to that of the English High Court by virtue of section 11 of the Grand Court Law. Section 116 of Senior Courts Act 1981 (UK) is also a broad supervisory power delineating the important and basic jurisdiction to appoint administrators, which is clearly a jurisdictional competence closely linked to the power to remove administrators or executors.
10. More importantly still, it is crucial to ensure that there is nothing in the Succession Act itself which precludes the incorporation of English law through the gateway provided by section 42. It must be remembered, that section 42 provides that English law and practice applies:



- (a) *“In any matter of law or practice for which no provision is made by this or any other law or by any rules or other regulations..”*; and
- (b) *“so far as local circumstances permit...”*

11. In the present case I was satisfied that there was no statutory provision in the primary or subsidiary legislation which expressly addressed whether and/or in what circumstances the priorities prescribed by rule 33 could be overridden. What the phrase *“so far as local circumstances permit”* did not receive the benefit of full argument in *Uzzell* or in the present case. Be that as it may, due to the nature of statutory provision sought to be imported into local law, this limb of section 42 did not appear to me to be engaged. More important was the need to ensure that the provision of English law relied upon did not in substance merely deal with a matter which was in reality dealt with by the local statute or Rules, but in a different way. In other words, was there really a legal gap or vacuum which actually needed to be filled through the application of section 42 at all?

12. Mr Phuran’s submissions dealt with what I would consider to be a primary point as a secondary, alternative, submission under the heading *“Supporting Considerations”*:

“19. Further or in the alternative the court with which the estate vests until grant has an inherent discretion to pass over the parties set out in Rule 33 of the Probate and Administration Rules if based on the circumstances they are considered person(s) that are unsuitable. The wording of Rule 33 itself makes it clear that it is not a mandatory provision but a guideline to ensure equity.”

13. Rule 33 provides so far as is relevant as follows:

“33. Where the deceased died wholly intestate, the persons having a beneficial interest in the estate entitled to a grant of administration are, in order of priority-

- (a) *the surviving spouse;*
- (b) *the children of the deceased including any persons entitled by any enactment to be treated as the children of the deceased born in lawful wedlock, or the issue of any such child who has died in the lifetime of the deceased;...”*

14. In my judgment the rule on its face suggests a mandatory order of priority so I was bound to reject the submission that the rule itself, on its face, conferred a discretion to depart from the



prescribed priorities. But far more pertinently, Mr Phuran relied upon the Succession Act itself, as subsidiary legislation is always circumscribed by the primary legislation which confers the power to make the relevant rules. Firstly, Section 12 of the Act provides:

“(2) The Court shall, in granting letters of administration, have regard to the rights and interests in the estate of the persons making application therefor and the rules shall provide guidance as to priorities.” [Emphasis added]

15. Although the position is not entirely free from doubt, on balance I found that the power to make rules as to priorities only empowered the rule-making authority to make priority rules which were non-mandatory in character. Counsel rightly emphasised the deployment of the term “*guidance*”, the natural and ordinary meaning of which is quite distinct from the making of prescriptive rules.

16. It was submitted that:

“22...Section 36(4) of the Probate and Administration Rules (2008 Revision) is also helpful. The Section reads:

‘(4) No rule of priority shall operate to prevent a grant being made to any person to whom a grant may or may not be required to be made under any law.’

17. Sub-paragraph (4) of rule 36 must be read in the context of the rule as a whole. Even if one is not entitled to take into account the marginal note to construe the rule (“*Two or more persons entitled in the same degree*”) it is clear from paragraphs (1)-(3), that rule 36 is concerned only with disputes between persons entitled to a grant “*in the same degree*”. Rule 36(4) provides no assistance in construing rule 33 for the purposes of determining whether the order of priorities set out are mandatory or merely recommendatory.

18. Although in my judgment this inquiry should have been the first step in assessing whether or not it was permissible to apply section 116 of the Senior Courts Act 1981 (UK) through section 42 of the Act, the order in which the points were advanced did not affect the final analysis. While it might be possible to find that the Court must have the inherent jurisdiction to depart from the guidance provided by rule 33 as to what the order of priorities should be, it is clear beyond argument that there is no express provision made by the Act or the Rules in this regard. Any such conclusion would beg the question of what the nature and scope of that jurisdiction should be.



19. Section 42 of the Act provides that where any matter is not provided for, English law and practice shall “*so far as local circumstances permit*” apply. In summary I found that:
- (a) rule 33, read in conjunction with the rule-making provisions of section 12 of the Succession Act, sets out an order of priorities for the grant of letters of administration in cases of intestacy in non-mandatory terms;
 - (b) neither the Act nor the Rules expressly confer a statutory discretionary power to depart from the prescribed priorities. The content of this jurisdictional power is accordingly a “*matter of law or practice for which no provision is made by this or any other law or by any rules*” opening the gateway to the application of “*the law and practice in similar matters of the Supreme Court of Judicature in England*” (section 42(1) of the Act);
 - (c) accordingly the flexible discretionary power conferred on the High Court of England and Wales to depart from the usual priorities which apply to applications for grants on intestacy apply (section 116 of the Senior Courts Act 1981(UK)).

How the discretion to depart from the usual order of priorities should be exercised

20. Although Mr Dell’s counsel cited examples of English cases where grants had been refused to spouses on grounds of unfitness, it was not necessary for these cases to be considered in light of the way the hearing evolved. It therefore suffices for me to simply adopt the following submissions as to the nature of the discretion conferred by section 116(1) of the 1981 UK Act:

“12. The consideration of the rules applicable to passing over is dealt with in Tristan and Cootes Probate Practice paragraphs 25.96 to 25.160. At paragraph 25.101...the learned authors said ‘Under s 116 of the Act of 1981 the discretion of the court is practically unlimited. Each case is dealt with on its merits ...’”

Exercise of discretion to pass over a spouse in favour of two of the deceased’s children

21. Ms Wood for Mr Smickle was primarily seeking to obtain an adjournment. As the deceased had died on September 6, 2019 and Mr Dell had acted promptly from the outset, entering a Caveat on September 9, 2019 and applied for the grant of letters of administration September 23, 2019, I



was reluctant to permit the substantive hearing of his and Ms Ebanks supporting application to be further delayed.

22. The initial delay was occasioned by a dispute between Mr Smickle and a Mr Sewell as to who should be declared to be the deceased's lawful spouse. After that dispute was resolved in his favour, directions were ordered on September 4, 2020 for him to file an application for letters of administration and for the other parties to file responsive evidence. He filed that application promptly, by Summons dated September 7, 2020, supported by his Affidavit of September 11, 2020. He was at that time represented by Brooks and Brooks. Responsive evidence was sworn by Mr Dell and Ms Ebanks on September 17, 2020 and October 16, 2020 respectively. The hearing was eventually fixed for March 18, 2021, by which time Mr Smickle had (seemingly belatedly) instructed Wood Law Associates. I declined a request to adjourn the hearing administratively and Ms Wood appeared with written submissions clearly prepared, if necessary, to deal with the hearing on its merits.
23. The application to adjourn was renewed at the hearing. When pressed as to the reason for the adjournment, Ms Wood properly disclosed that Mr Smickle's Immigration status in the Cayman Islands was presently uncertain and it was hoped that could in due course be regularised. I found that the fact that Mr Smickle was not a resident of the Cayman Islands was a compelling reason for not appointing him as administrator and that seeking an opportunity to regularize his position did not constitute grounds for granting an adjournment. There was no reliable evidence as to how long the process would take and what the prospects of success were. I refused the adjournment application.
24. Ms Wood sensibly conceded that the Court had jurisdiction to pass over her client, but astutely focussed her submissions on persuading the Court not to summarily adjudicate the contested allegations about his unfitness for appointment. I was satisfied that I could not summarily resolve the disputed matters on the basis of the Affidavits without having a lengthy and costly hearing with cross-examination. I also discounted the viability of appointing an independent professional administrator on commercial grounds. There was no indication that the Estate could bear such costs.
25. When I indicated that I considered there was a sufficient basis to decline to appoint Mr Smickle as administrator on the grounds that he was not suitable for appointment by virtue of his

Immigration status, Ms Wood again (after taking brief instructions) sensibly decided not to oppose the grant of letters of administration to Mr Dell and Ms Ebanks jointly. As I observed at the end of the hearing, the administrators will be officers of the Court and obliged to administer the Estate in a way which is consistent with the interests of all beneficiaries.

26. I did articulate the view that Mr Smickle's rights as surviving spouse could not be violated by the successful applicants. To the extent that I implied that those rights are fixed in law and unaffected by the fact that he was an estranged spouse, this was merely an intuitive observation in an area of the law in which my instincts are not well refined. However, it must be right that administrators cannot use their representative office to alter the basis of distribution prescribed by law and I was satisfied that the Applicants are ably legally represented and can reasonably be expected to discharge their duties in a proper manner. The main purpose of my remarks was to encourage warring parties to disarm and work together to achieve the most efficient and fair administration of the deceased's Estate.

Conclusion

27. For the above reasons, on March 18, 2021 I appointed Mr David Dell and Ms Joan Ebanks as joint administrators of their late mother's Estate.



THE HON. JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT