

ROYAL COURT
(Probate Division)

10th September, 1997

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Before: F.C. Hamon, Esq., Deputy Bailiff, and
Jurats Le Ruez and Le Brocq.

In the matter of the estate of
Nellie Edna (otherwise Joan) Wainwright
(née Watson) deceased.

Mrs. S. Sharpe, Crown Advocate, *Amicus Curiae*.

JUDGMENT

THE DEPUTY BAILIFF: Mrs. Nellie Wainwright, née Watson, died on 8th February, 1997, domiciled in Jersey. On 28th October, 1995, she made a will entirely in her own handwriting. It would have been a perfectly unexceptional document had it not been witnessed by two witnesses, one of whom was also a beneficiary.

An application was made by the named executors for a personal Grant of Probate. The Probate Registrar referred the matter (after some complex negotiations had taken place) to this Court for an adjudication. Crown Advocate Sharpe appeared as *amicus curiae*. The Court is greatly indebted to her for the careful research that she has carried out.

Were it not for the attestation clause it is clear that the will would be a valid holograph will. In Falle -v- Falle (1951) 1 PD 56, the Court held: "*That the said document is not a valid will inasmuch as it was not dated by the hand of the de cujus, the law and custom of Jersey with regard to holograph wills of personal property requiring that a holograph will shall be entirely dated and signed by the hand of the testator*" (and see In Re Futter (27th January, 1994) Jersey Unreported).

The purpose of the strict rules regarding the formalities of wills is to prevent fraud and/or duress. A valid holograph will requires no witnesses because if it is entirely in the hand of the testator and signed "*sous seing privé*" there can be no fraud.

What we have here is a holograph will, dated 28th October, 1995, at its head by the testator, entirely written by the testator and then signed by her.

At pp.389-90 of the *Oeuvres de Pothier* (Nouvelle Edition) *Coûtures d'Orléans*: Tome II (Paris, 1821), we read:

"*La forme de l'olographe consiste en ce qu'il doit être écrit en entier et signé de la main du testateur ... La signature doit être à la fin de l'acte dont elle est le complément:*

*c'est pourquoi un postscriptum après la signature est nul,
s'il n'est aussi signé."*

5 We must remind ourselves that in Falle -v- Godfray (1889) 8 OC 24
the Privy Council said obiter of its judgment:

10 *"Their Lordships consider it a sound rule that when effect
can be given to the intention of a testator it should be
given; and ... they would rather adopt a rule of law which
gives effect to the intention of the testator than one which
defeats it."*

15 We have no doubt that the deceased intended to make a valid will
and we are prepared to regard the addition of the witnesses as otiose.

We have carefully considered all the helpful authorities given to
us by Crown Advocate Sharpe and examined the possible alternatives.

20 We therefore order that the holograph will be admitted to probate,
that the Greffier draw a line through the otiose attestation clause that
appears after the signature of the deceased and that two affidavits as
to handwriting be provided in the usual way.

The costs of these proceedings shall be met by public funds.

Authorities

Probate (Jersey) Law, 1949: Article 7.

Falle -v- Falle (1951) 1 PD 56.

Re the Will of Futter, deceased (27th January, 1994) Jersey Unreported.

Re the Will of Russell (1963) JJ 259.

Re Cowap, ex parte Cowap, née Evans (1975) 2 PD 24, 26, 40.

Oeuvres Complètes de Pothier (Nouvelle Edition): Coutumes d'Orléans:
Tome II, Au Titre XVI Article Premier (Paris, 1821): pp.389-90.

Aubin et aus. -v- Godfray et aus. (1887) 212 Ex 102.

Godfray et aus. -v- Aubin et aus. (1887) 10 CR 356.

Falle -v- Godfray (1888) 14 AC 70.

Falle -v- Godfray (1889) 8 OC 247.

Beaugié -v- Beaugié & Ors. (1970) JJ 1579.

Williams on Wills (5th Ed'n): pp. 140-142.