

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV2018/0017

BETWEEN:

JANICE GILBERT

Claimant

and

[1] **DEBORAH ST. BERNARD**

[2] **LARRIA ALEXANDER**

Defendants

Before:

The Hon. Mde. Justice Agnes Actie

High Court Judge

Appearances:

Mr. Ruggles Ferguson with Miss Danyish Harford for the Claimant

Mr. Michael Lindo for the Defendants

2022: October 18th: December 7th

2023: May 26th

JUDGMENT

[1] **ACTIE, J.:** This action concerns the validity of a Will of Doris Catherine Alexander (hereinafter referred to as “the deceased”) dated 20th January 2004 and a later Will dated 12th July 2008. The main difference in the two Wills is that under the 2004 Will, the deceased left her dwelling home to the second defendant who is her adopted daughter while in the second Will the said dwelling home was left to the claimant who is the second cousin and purported caregiver of the deceased.

[2] The claimant contends that the 2008 Will is the last will of the deceased whereas the defendants seek to pronounce for the validity of the 2004 Will.

Claimant's case

- [3] The claimant, Janice Gilbert, is the executrix of the purported 2008 Will (hereafter referred to as "the 2008 Will"). The deceased died on 10th April 2009 and the claimant obtained a Grant of Probate of the 2008 Will on 14th October 2009. Probate of the deceased's previous Will dated 20th January 2004 (hereafter "the 2004 Will"), was obtained by the first defendant on 26th August 2009.
- [4] In claim form filed on 16th January 2018, the claimant claims:
- (1) A declaration that the will of Doris Alexander, deceased, made on 12th July 2008 is the Last Will and Testament of Doris Alexander;
 - (2) A declaration that the second defendant's act of taking possession of the property situated at Williamson Road in the parish of St. George measuring 1,850.30 Sq. Ft., together with the building thereon (hereafter "the property") which formed part of the deceased's estate amounted to trespass to the property;
 - (3) An order setting aside the grant of probate to the first defendant, dated 26th August 2009 pursuant to a Will of Doris Alexander dated 20th January 2004;
 - (4) An order granting the claimant possession of the said property together with a permanent injunction restraining the defendants, their servants and/or agents howsoever named from entering onto the property or interfering with the quiet enjoyment of the property by the claimant her heirs and successors;
 - (5) Damages for trespass to property against the second defendant; Interest; Such further or other relief; and Costs.
- [5] By a "Notice to Quit" made 16th January 2017, the claimant gave notice to the second defendant to deliver up possession of the property on 28th February 2017. The second defendant refused to accede, representing to the claimant that the property was left to her by the 2004 Will.

- [6] The claimant avers that the 2008 Will is valid and that it revokes all former wills, including the 2004 Will. The claimant contends therefore that the Grant of Probate to the first defendant is void.

Defendants' case

- [7] The defendants in their defence and counterclaim deny that the claimant was the second cousin and caregiver of the deceased. They state that the claimant was a distant cousin.
- [8] The defendants contend that the 2008 Will and the Grant of Probate thereof is a false and invalid document. The defendants contend that the 2008 Will was not duly executed in accordance with the provisions of the Wills Act Cap 340 of the 1990 Revision of the Laws of Grenada. The defendants state that the deceased did not sign nor voluntarily or effectively place her mark on the 2008 Will. The defendants contend that the deceased was elderly, infirm and suffering from severe arthritis in her hands.
- [9] The defendants further contend that the 2008 Will violated the Golden Rule by the lack of witnessing and approving of the endorsement of the Will by a medical practitioner satisfying themselves as to the capacity and understanding of the deceased and recording their examination and findings. The defendants further state that at the time of the 2008 Will, the deceased was not of sound mind, memory and understanding.
- [10] The defendants also argue that the 2008 Will was procured by the undue influence of the claimant over the deceased.
- [11] The defendants aver that the property was the only or most valuable asset that the deceased owned, and that the effect of the 2008 Will is that the deceased revoked the 2004 Will which devised the property to her only child, the second defendant, and devised the property to a distant cousin.

[12] The defendants counterclaim:

- (1) That the court pronounce against the 2008 Will;
- (2) That the court pronounce for the force and validity of the 2004 Will;
- (3) A declaration that the Grant of Probate to the first defendant is valid and in effect;
- (4) An order that the Grant of Probate to the claimant be cancelled and set aside;
- (5) An order that the purported Deed of Assent and Conveyance dated 20th January 2010 and recorded in the Deeds and Land Registry between the claimant as executrix and the claimant as devisee be cancelled and set aside;
- (6) A declaration that the second defendant is the sole person entitled to the property under the 2004 Will;
- (7) An injunction restraining the claimant from entering, leasing, selling, mortgaging, encumbering, injuring or in any way dealing with the property;
- (8) Any other relief the court deems just, and Costs.

Legal Analysis

[13] The claimant asserts that the 2008 Will is the last will and testimony of the deceased. The defendants on the other hand assert that the 2008 Will is invalid.

[14] The defendants challenge the Will on several grounds namely: (i) it was not duly executed; (ii) it was contrary to the Wills Act; (iii) it was contrary to the Golden Rule; (iv) it was made without the deceased receiving independent legal advice; and (v) it was procured through the undue influence of the claimant.

[15] It has been established that in all cases, the party propounding the Will is bound to prove that the Will in question does contain the last will and testament of the deceased. The onus of proving that the Will propounded was executed as required by law is on the claimant or party propounding it¹. As a corollary, it is for the claimant

¹ Tristram and Coote's 31st Edn.

to prove that the 2008 Will was properly executed and is the last testamentary disposition of the deceased.

- [16] It has been further been established that a court ought not to pronounce in favour of a Will that is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testatrix. The court should be satisfied on the totality of the evidence that at the material time of making a Will, the testatrix was able to comprehend of her own volition the nature of her act and its effects of the dispositions in her will.

Whether the 2008 Will is valid

- [17] **Section 15 of the Wills Act CAP 340** states that a Will can be revoked by another Will or codicil:

“No will or codicil or any part thereof shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same and executed in the same manner in which a will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his or her presence and by his or her direction, with the intention of revoking it”

- [18] The 2008 Will includes a revocation clause revoking all former wills or testamentary dispositions made by the testator. It is pertinent to discuss whether the 2008 is valid and so effectively revokes the 2004 Will on the grounds alleged by the defendants.

Want of due Execution - The Golden Rule

- [19] The deceased was removed from her home and taken by the claimant to the Hilarion Home for the aged. It is the evidence of both parties that the deceased's hands were affected by severe arthritis. King's Counsel, Mr. Ruggles Ferguson argues that the deceased, although brought to the home, would not be considered old. It is the evidence, and the court accepts, that the deceased was feeble and unable to

sufficiently care for herself because of her arthritic hands and had to be assisted by her neighbours and her best friend, Marita Bailey.

- [20] The defendants contend that the legal practitioners who prepared the Will failed to comply with the Golden Rule. The Golden Rule as defined in **Tristram and Coote's**² reads:

“When a testator is elderly and infirm, his will should be witnessed and approved by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and who records his examinations and findings.”

- [21] Our Court of Appeal in **Anne-Marie Mac Leish v Vison Albert “Bert” Marryshow**³ stated:

“The application of the Golden Rule assists in the avoidance of subsequent disputes as to capacity. However, where the Golden Rule was not followed, and the court has to resolve a dispute as to capacity, non-compliance with the Golden Rule does not demonstrate a lack of capacity. The issue must be decided by the court by applying the correct legal principles to the court's findings of fact.”

- [22] Briggs J in **Richard Key and another v Jane Frances Key and another**⁴ stated that:

“Compliance with the Golden Rule does not, of course, operate as a touchstone of the validity of a will, nor does non-compliance demonstrate its invalidity. Its purpose, as has repeatedly been emphasized, is to assist in the avoidance of disputes, or at least in the minimization of their scope.”

- [23] There are no medical reports proffered by the claimant and the defendants with regard to the capacity of the testatrix. It is also the evidence of Mrs. Lilian Forde, one of the attorneys who drafted the 2008 Will, that she did not engage the services of a medical doctor to determine the competency of the testatrix as she was of the view that the deceased was of sound and disposing memory.

² Page 838 Paragraph 34.40

³ HCVAP 2010/012

⁴ [2010] EWHC 408 (Ch)

[24] In **Zorbas v Sidiropoulous (No 2)**⁵, a matter before the Court of Appeal of New South Wales cited in **Anne Marie Mac Leish & Anr v Avison Marryshow**⁶, it was observed that:

“Medical evidence as to the medical condition of a deceased may of course be highly relevant and may sometimes directly support or deny a capacity in the deceased to have understanding of the matters in the Banks v Goodfellow criteria. However, evidence of such understanding may come from non-expert witnesses.”

[25] The defendants argue that the 2008 Will ought to have observed the ‘Golden Rule’, which states that when a testator is elderly and infirm his Will should be witnessed and approved by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and who records his examination and findings⁷. However, this rule merely provides guidance, and is not a substitute for the established tests of capacity and knowledge of approval⁸. Thus, this is a matter for the court to apply common sense judicial judgment based on the whole of the evidence⁹ as to whether the testatrix had a sound and disposing mind, memory and understanding and acted as a free agent.

[26] In **Aubrey Edwards v Rolston Rawlins**¹⁰, Her Ladyship, Blenman J, as she then was, stated as follows:

“In order for a will to be valid, the Court should be satisfied that the testatrix understood three matters: the testatrix must understand the broad effect of her wishes being carried out; the extent of the property she is disposing and the claims to which she ought to give effect. The testatrix must have testamentary capacity at the time when she executes the will. See Banks v Goodfellow. This requires the Court to be satisfied that the testatrix had [sic] the following – (a) The nature of the act and its effects; (b) The extent of the property of which he is disposing; (c) The claims to which he ought to give effect.

⁵ [2009] NSWCA 197

⁶ HCVAP2010/0012

⁷ Re Simpson, Schaniel v Simpson (1977) 121 Sol Jo 224

⁸ Cattermole v Prisk [2006] 1 FLR 693

⁹ Simon v Byford [2014] EWCA Civ 280

¹⁰ ANUHCv2005/0513

The legal burden of proof always lies upon the person seeking to propound a will to prove that the testatrix had the testamentary capacity at the time. If that person fails to do so, the will would not be admitted to probate. The testatrix must have known and approved of the contents of the will. The will must be that of a free and capable testatrix exercising her genuine free choice and not a result of undue influence by another.”

[27] The writers of **Tristram and Coote's Probate Practice** state that:

“Unless suspicion attaches to the document, eg where it is signed by mark, or where the signature indicates extreme feebleness, the testator's execution is sufficient evidence of his knowledge and approval.”¹¹

[28] The burden of proof of the testator's knowledge and approval lies on the party setting up the Will¹². The burden is discharged prima facie by proof of capacity and due execution¹³.

[29] **Tristram and Coote's** state that:

“It is not the law that in no circumstances can a solicitor or other person who has prepared a Will for a testator take a benefit under it; but that fact creates a suspicion that must be removed by the person propounding the Will. In all cases the court must be vigilant and jealous¹⁴.”

[30] Where a Will is prepared in suspicious circumstances, the onus is cast upon the person propounding it to remove such suspicion, and to prove that the testator knew and approved of its contents¹⁵. A person who is instrumental in preparing a Will under which he is a beneficiary has to satisfy the court on a balance of probabilities that the testator knew and approved the contents¹⁶.

¹¹ *Guardhouse v Blackburn* (1866) LR 1 P&D 109

¹² *Barry v Butlin* (1838) 2 Moo PCC 480 at 482

¹³ *Barry v Butlin* (1838) 2 Moo PCC 480

¹⁴ *Wintle v Nye* [1959] 1 WLR

¹⁵ *Tyrrell v Painton* [1894] P 151 at 157

¹⁶ *Tristram and Coote's* 31st Edn.

[31] In as much as non-compliance with the Golden Rule would not vitiate the 2008 Will, the circumstances surrounding the testatrix's execution of the 2008 Will are that the Forde's did not know the testatrix. Consequently, they could not have made such an assessment with respect to the sound and disposing mind of the testatrix in the short space of time during which the instructions of the contents of the 2008 Will were discussed.

[32] In **Charles Harwood v Maria Baker**¹⁷ it was held that:

“In order to constitute a sound disposing mind, a Testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom by his will he is excluding from all participation in that property.’

[33] The Forde's were not acquainted with the deceased who was removed from the home for the aged and taken to the claimant's home for the instructions and preparation of the Will. The Forde's should have been prudent in first obtaining medical evidence to satisfy the Golden Rule. There was no notable urgency to rush in preparing the 2008 Will of the deceased. The Forde's were under a professional obligation having regard to all the circumstances to have obtained medical evidence to satisfy themselves of the mental competence of the testator not only for the instructions but also to ensure that the testator understood the nature and extent of the testamentary disposition.

Signature on the Will

[34] The defendants allege that the deceased did not voluntarily or effectively place her mark on the alleged 2008 Will. The defendants contend that the legal practitioners who prepared the Will failed to prove the due execution of the Will. The defendants allege that the Will marked with the “X” raises suspicions concerning the due

¹⁷ 1840) 13 ER 117

execution of the Will as the deceased was elderly, infirm and suffering from severe arthritis in her hands.

[35] Both the claimant and the defendants asserted that the deceased suffered from arthritis in her hands, which would justify the deceased's failure to properly sign her name in execution of the 2008 Will.

[36] The attestation clause of the 2008 Will does not include a statement that prior to the execution of the Will, it was read over to the deceased and that she appeared thoroughly to understand the same, though the attestation clause discloses that the deceased could not sign her name due to arthritis.

[37] The attestation clause of the will reads:

"Signed/executed by the said Doris Catherine Alexander as and for her last will and testament after reading same by making her mark, though literate unable to write by reason of swollen, rigid and apparently arthritic fingers in the presence of us both being present at the same time who at her request and in her presence have hereunto subscribed our names as witnesses".

[38] Mrs. Lilian Forde, one of the two attorneys who prepared the Will, in her witness statement states:

"Since the deceased was unable to sign, she made her mark in the presence of both of us and we thereafter signed our names as witnesses in the presence of Ms. Alexander".

[39] Mr. Michael Lindo, counsel for the defendants, at the trial and in cross-examination challenged Mrs. Forde by stating that the mark did not appear to be made by an arthritic and feeble hand. Mrs. Forde in response stated:

"Mr. Forde held Doris Alexander's hand and help her to put the 'X' mark."

- [40] Mr. Lindo contends that nowhere in the attestation clause is it stated that the deceased was assisted by counsel in drawing the mark.
- [41] Mr. Lindo noted that Mrs. Forde's original evidence was that it was Mr. Forde who read the Will over to the deceased prior to the execution. However, during cross examination, she affirmed the sequence of events in her witness statement where at paragraph 6 she stated: "Mr. Forde then read the Will to Ms. Alexander; he then asked if the Will complied with her instructions; she said yes. He then asked if she wanted to make any changes and if she wanted to add anything else; and she said no".
- [42] Clearly the evidence of Mrs. Forde in her witness statement is plainly contrary to her evidence at the trial in relation to the manner of the execution by placing the mark and the reading of the Will prior to being assisted in placing a mark.
- [43] However, the sequence of events, the manner of placing the mark or whether the Will was read to the testatrix or read by her is not so fundamental; what is to be determined is whether the deceased knew and appreciated the contents and effects of the Will.
- [44] Where a Will is signed by a cross or other mark only, or where for any other reason doubt arises as to whether the testator had knowledge of its contents, the court requires to be satisfied that the testator had knowledge of its contents at the time of execution¹⁸.
- [45] In the case of **Sherrington & Ors v Sherrington**¹⁹, it was held that:

"The court ought to have in all cases the strongest evidence before it believes that a will, with a perfect attestation clause, and signed by the testator, was not duly executed, otherwise the greatest uncertainty would prevail in the proving of wills. The presumption of law is largely in favour of the due execution of a

¹⁸ Tristram and Coote's 31st Edn.

¹⁹ [2005] EWCA Civ 326

will, and in that light a perfect attestation clause is a most important element of proof.”

- [46] In the case **In the Goods of Chalcraft**²⁰ where “E.Chal” was signed as opposed to the testatrix’s usual signature of “E.Chalcraft”, it was held that where the signature of the deceased is not completed, the court will not necessarily refuse to pronounce in favour of a testamentary document. Although there must either be the name or some mark which has been acknowledged by the testator, the particular circumstances should be considered in deciding the effectiveness of the signature; and it must be decided whether the inference can be drawn that what was written was intended by the deceased to be the best that could be done by way of writing his or her own name.
- [47] On the face of the documents, there is nothing to suggest that the deceased did not have the requisite mental capacity; the issue to be determined is whether she understood the nature and effect of the devise without further independent legal advice, the extent of the property of which she was disposing, and whether she acted as a free agent.
- [48] The burden of proof is on the person propounding a Will and is in general discharged by proof of capacity and the fact of execution²¹, together with proof of knowledge and approval if the prima facie case is met²².

Undue Influence

- [49] It is the defendants’ claim that the execution of the 2008 Will was secured by undue influence of the claimant. It was held by Lewison J in **Re Edwards (dec’d)**²³ that:

“...Undue influence means influence exercised by coercion, in the sense that the testator’s will must be overborne, or by fraud... coercion is pressure that overpowers the volition without convincing the testator’s judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future

²⁰ (1948) P 222

²¹ *Barry v Butlin* (1838) 2 Moo PCC 480

²² *Tristram and Cootes*, 31st edn.

²³ [2007] All ER (D) 46

destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment discretion or wishes, is enough to amount to coercion in this sense..."

[50] In the case of **Schomberg v Taylor**²⁴, it was found that a testatrix in a very fragile mental and physical state after the death of her husband was subjected to unwanted and persistent pressure and had been worn down to do what was suggested in order to have a quiet life.

[51] Further, the Privy Council in **Inche Noriah v Shaik Allie Bin Omar**²⁵ held that where the relations between a donor and donee raise a presumption that the donee had influence over the donor, the court will set aside the gift unless the donee establishes that it was the spontaneous act of the donor acting in circumstances which enabled him/her to exercise an independent will, and which justified the court in holding that it was the result of a free exercise of the donor's will.

[52] In **Boyse v Rossborough**²⁶ the Lord Chancellor stated:

"In order to come to the conclusion that a will has been obtained by coercion it is not necessary to establish that actual violence has been used or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency. A will thus made may possibly be described as obtained by coercion."

[53] Counsel for the defendants relies on authorities which pertain to inter vivos gifts and undue influence. However, the author of **Theobald On Wills**, cited in **Sin Young Chin & Anr v Catherine Kelly & Ors**²⁷ of the territory of Jamaica, stated that:

"The rules therefore applicable in the case of gifts inter vivos to persons standing in a fiduciary relation to the donor do not apply to wills. In the case of

²⁴ [2013] EWHC 466 (Ch)

²⁵ [1929] AC 127

²⁶ [1843-60] All ER 610

²⁷ (1968) 12 WIR 429

gifts inter vivos, such persons have to show not only that the donor intended to give, but that his intention was not influenced by the donee, a burden of proof which in most cases is impossible to discharge, at any rate so long as the fiduciary relation subsists. In the case of wills, when once it is proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence rests on the party who alleged this.”

[54] Whether undue influence has procured the execution of a Will is a question of fact to be decided on the totality of the evidence. It must be shown that there is influence exercised by coercion, in the sense that the testatrix’s will is overborne, or by fraud. Coercion is pressure that overpowers the volition without convincing the testator’s judgment²⁸. The burden of proving undue influence lies on the person who asserts it. The burden therefore lies on the defendants.

[55] It is the evidence that Shanica Gilbert, daughter of the claimant, contacted the Forde attorneys who prepared the 2008 Will. Shanica Gilbert in her witness statement and in cross examination stated that she visited Aunty Doris in 2007 at the Hilarion home, and every summer on holidays from study in England. She said she learnt from her mother that Aunt Doris was moved to the home because Larria was ill treating her, which she said was not surprising. She states in her witness statement that in one of her visits in 2008, while on vacation, the testatrix told her that she wanted to make a Will. She said that the testatrix asked her to get the Forde Lawyers to come to claimant’s home in Mt Craven and she made the arrangements.

[56] The court does not accept the evidence that the testatrix asked for the Forde’s to prepare the Will as it is the evidence that the date of the execution was the very first time that the deceased met with the Forde’s. Shanica Gilbert confirms in her evidence that she made the arrangements for the Forde’s to make the deceased’s Will. Throughout her cross-examination, Shanica Gilbert spoke of the adopted daughter ill-treatment of the deceased which the Court does not accept. The claimant made much of the daughter, who was a teenager at the time, leaving the deceased home and the

²⁸ Tristram and Coote’s page 840 para 34.37

fact that the deceased was found in an abandoned home. There is no evidence to corroborate what the Court perceives to be the claimant's self-serving evidence.

[57] It is the evidence confirmed by the all the parties of the love, care and affection that the deceased had for her adopted daughter, Larria Alexander. Shanica Gilbert in her own evidence spoke of the deceased's sadness whenever she (Shanica) visited the deceased at the home. In her witness statement Shanica Gilbert said " Throughout all my visits to Aunty Doris at the Hilarion Home she always asked for Larria. Indeed the very first question she would ask me if Larria had come. She was always sad when I told her that Larria had not come. She would openly weep on some occasions. I tried to comfort her by saying to her that it was out of her control and that she had done her best ".

[58] It is the evidence that the second defendant, Larria Alexander, was a teenager at the time when the deceased was forcibly removed from her home and could not be reasonably expected to make the long journey to the Hilarion Home, which from all evidence is a far distance away from the town of St. George. It is the evidence that Larria was taken to the claimant's home for a short period when the deceased was forcibly taken to the Home. However, Larria returned to St. George and continued her school and was cared for by her neighbours. It is also the evidence that the deceased's best friend, Marita Bailey, begged the claimant to allow her to take care of the deceased. The claimant refused, and instead took the deceased to the Hilarion Home and had total control over the deceased.

[59] Secondly, the claimant's residence was used for the taking of instructions and execution of the 2008 Will. The court accepts the uncontroverted evidence that the Forde's that prepared the contested Will are the claimant's lawyers and that the claimant is a tenant of the Forde lawyers.

[60] The court does not accept Shanica Gilbert's evidence that the deceased specifically asked for the Forde's to prepare the 2008 Will. The 2004 Will was made by the

deceased's own volition naming the first defendant, Deborah St Bernard, an Attorney-at-Law by profession and former neighbour as executrix of the said will.

- [61] It is Lilian Forde's evidence that it was the first time she was meeting Ms the deceased. She said she met the deceased at the claimant's home at about 11 am and the deceased gave clear instructions regarding her property at Williamson Road and her adopted daughter, Larria Alexander. Ms Forde said she and Mr Forde returned approximately after 3 hours and met Ms Alexander and the Mrs Gilbert (the claimant) sitting in the verandah.
- [62] The claimant was present in the same house when the instructions were given, and when the Forde's returned to execute the Will. It was their first time meeting the deceased.
- [63] The deceased, although old and in a home, was not given any further time to consider the terms of the Will or seek other independent legal advice. There is no direct evidence of any other meetings with the testator prior to the short hours when the Will was executed. Also, there was no specific revocation of the 2004 Will to indicate that the deceased was consciously revoking the same.
- [64] The competency of the testatrix's mind and understanding must be judged of by the nature of the act to be done, and from a consideration of all the circumstances of the case. Each case turns on its own facts. The court is of the view that the manner in which the 2008 Will was executed raises a suspicion which ought to be dispelled by the claimant who propounds the Will.
- [65] The 2004 Will shows the intention of the testatrix as to the disposition of her only and most valuable property to her adopted daughter when she was in good health and able to look after her own affairs. The evidence throughout is consistent that deceased loved and cared for her adopted daughter. Mrs. Forde in her own evidence states the deceased gave instructions regarding her adopted daughter which clearly shows the deceased desire to make provisions for her adopted daughter whom Shanica Gilbert

insisted was ill-treating the deceased. All the circumstances listed above have created suspicions that the 2008 Will was not properly executed.

[66] In **Murphy v Lamphier**²⁹, Sir John Nicholl said:

"To support a paper thus revoking and altering this will and substituting a disposition quite different from and the very opposite to it, would require the clearest and most indisputable evidence."

[67] The claimant does not provide the Court with evidence from other family members of the deceased to support the proposition made by her that she was as close to the deceased to justify the gifts to her in the 2008 Will. Reference is made of family members such as Allan Calliste, who, from the evidence, was pivotal in the movement of the deceased from her place of residence to a geriatric home. However, this individual has not been placed before the Court.

[68] The first defendant, Ms Deborah St. Bernard, states that she and her family moved to Williamson Road in 1968 and the deceased was one of their immediate neighbours. Ms St Bernard said that she never observed the claimant making regular visits to the deceased nor was she aware that the claimant was a virtual daughter of the deceased as alleged. Evidence from the claimant with respect to the relationship between the deceased and the claimant is given by the claimant herself and her daughter, which evidence can be deemed as self-serving.

[69] The court is of the view that in light of the totality of the evidence, the deceased was not given sufficient time to obtain independent legal advice to understand the nature and effect of the residuary clause. The 2008 Will was instructed on the morning, prepared and returned for signature within hours of the instructions without giving the testatrix an opportunity to consider the effect of the Will. This is especially so since it was the very first time that the Forde lawyers were meeting the testatrix. It is the

²⁹ (1914) 20 DLR 906,32 OLR 19

evidence that no inquiry was made of the terms of her previous Will. No specific mention of the previous Will was made in the revocation clause.

[70] The first defendant, an attorney-at-law, was a very close acquaintance and executrix of the 2004 Will of the deceased, yet the testatrix was not given any time to even attempt to make contact with her primary attorney. Also, the residuary clause is vague and is plainly contrary to Mrs. Forde's evidence with regards to the alleged instructions to make provisions for the adopted daughter.

[71] The fact that the dwelling house was the only valuable asset of the testatrix is of further concern. This, together with the vague residual clause all lend to the fact that the testatrix did not appreciate the effect of the terms of the Will with respect to her adopted daughter. The claimant had full control and domination over the testatrix. It is the evidence that the claimant was responsible for paying for the Hilarion home for the aged where the deceased was forcibly relocated and for all her other amenities.

[72] I accept counsel, Mr. Michael Lindo, contention in submissions that the 2008 Will is irrational as it purports to devise the deceased's most valuable asset and contents to the claimant. However, the Will failed to make firm arrangements for the adopted daughter. The residuary clause merely gives the claimant an option to provide for the adopted daughter, who from all accounts was the pride and joy of the deceased. The residuary clause is wholly ambiguous, and in light of the vagueness, creates some doubt as to whether the testatrix understood the effect of the Will in disposing her only asset to the claimant.

[73] There is no evidence that the Forde's inquired if the deceased had any other valuable property considering the representation allegedly made by the deceased to make sufficient provisions for Larria Alexander.

[74] In **Tyrrell v Painton and Another**³⁰, the defendant's son subsequently prepared another will in his handwriting by which the testatrix purportedly devised and bequeathed nearly the whole of her property to the defendant. The will was executed by the testatrix in the presence of the son of the defendant who, with his young friend, were the attesting witnesses. The Court found the circumstances under which the purported will was executed to be strange and suspicious, casting doubt whether the testatrix knew the effect of the document she was signing. The court held:

“The true rule is that whenever a will is prepared and executed under circumstances which raise the suspicion of the court, it ought not to be pronounced for unless the party propounding it adduces evidence which removes such suspicion and satisfies the court that the testator knew and approved the contents of the instrument”.

[75] The deceased would have been feeble and totally dependent on the claimant, having then recently been moved from her residence to the home. Due to this vulnerability of the deceased and the total domination by the claimant, the court is of the view that the claimant has failed remove the suspicion that the 2008 Will was not the free will of the testatrix. It seems unlikely that the testatrix would have intentionally revoked the previous 2004 Will leaving her only asset to the claimant without any proper provision for her adopted daughter, Larria Alexander.

[76] The court is of the view that the defendants have proved that the 2008 Will was executed under suspicious circumstances and under the undue influence of the claimant. The claimant on the other hand has not sufficiently dispelled the suspicious circumstances surrounding the execution of the 2008 Will.

[77] The court is of the view that the 2008 Will does not express the mind and intention of the deceased. It is a well-established rule that the Court ought not to pronounce in favour of a Will unless the suspicion is removed. The claimant has failed to prove that the 2008 Will was that of a "free and capable" person.

³⁰ [1894] P. 151 at page 157

Conclusion

[78] Given the above circumstances, the court finds in favour of the defendants and the claimant's claim stands dismissed.

- (1) The court pronounces against the 2008 Will.
- (2) The court pronounces the force and validity of the 2004 Will.
- (3) It is declared that the Grant of Probate to the first defendant is valid and in effect.
- (4) It is ordered that the Grant of Probate to the claimant be cancelled and set aside.
- (5) It is ordered that the purported Deed of Assent and Conveyance dated 20th January 2010 and recorded in the Deeds and Land Registry between the claimant as executrix and the claimant as devisee be cancelled and expunged from the records.
- (6) It is declared that the second defendant is the sole person entitled to the property under the 2004 Will.
- (7) The claimant is hereby restrained the claimant from entering, leasing, selling, mortgaging, encumbering, injuring or in any way dealing with the property.
- (8) Prescribed Costs to the defendants in the sum of \$7,500.00 pursuant to CPR 65.5 to be paid within sixty (60) days of today's date.

Agnes Actie
High Court Judge

By the Court

Registrar