

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

MONTSERRAT

MNIHCVAP2018/0004

BETWEEN:

**[1] JOSEPH FENTON
[2] RICHARD FENTON
[3] MARY RYAN**

Appellants

and

**WILLIAM KEITH THOMAS
(Executor of the Estate of Peter William Molyneaux, deceased)**

Respondent

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Margaret Price-Findlay	Justice of Appeal [Ag.]

Appearances:

Mr. Ralph A. Francis for the Appellants
Mr. Khari Markham for the Respondent

2020: June 25.

Civil Appeal – Validity of Will – Undue Influence – Actual undue influence – Presumed undue influence - Whether beneficiary under Will and executor by their behaviour coerced testator to make Will in beneficiary's favour

REASONS FOR DECISION

[1] **PRICE-FINDLAY JA [AG.]:** On the 25th day of June 2020, we heard this appeal brought by the appellants, who were the defendants in the court below. We dismissed the appeal and we further promised to provide written reasons at a

later date. We do so now.

- [2] The late Peter William Molyneaux (“the testator”) made a Will dated 5th May, 2010. He died on the 28th March, 2013. By this Will, the testator left his entire estate to Donarene Lewis (“Donarene”), his carer and her daughter Shaneil Jones.
- [3] The appellants are relatives of the testator who received nothing under his Will. In that Will, the testator named the respondent as executor.
- [4] The appellants having received nothing under the Will, became suspicious that the Will was not made voluntarily, but that undue influence was exerted on the testator.
- [5] The appellants thereafter filed caveats on two (2) separate occasions, giving notice of their intention to oppose a grant of probate to the respondent. In response, the respondent by way of fixed date claim form filed on 24th July 2013, applied to the High Court for the caveats to be removed and for him to be granted probate and to execute the terms of the Will.
- [6] The appellants in their defence, contended that the testator suffered from schizophrenia and other mental health problems, and that he had become increasingly emotionally unstable and irrational. He was withdrawn and reclusive. They questioned the testator’s mental capacity to make a Will.
- [7] With respect to his mental capacity, the learned trial judge stated at paragraph 7 of the Judgment¹:

“Over many years, Peter had a history of mental health issues which, though explored by the defendants, it was accepted did not mean he had lacked testamentary capacity. He had no children he knew, though thought he might have a son in the UK he had never met. He was one

¹ William Keith Thomas (Executor of the Estate of Peter William Molyneaux, deceased) v Joseph Fenton et al MNIHCV2013/0017 (delivered 5th March 2018, unreported).

of five siblings all now dead, leading to his being uncle to eighteen (18) siblings.”

[8] And again at paragraph 19:

“Peter’s medical notes (being 155 pages) were disclosed by Dr Krishnamurthy Gopal and filed on 15th October, 2013 and 15th November, 2013. On analysis, they disclose a diagnosis of schizophrenia in 1988 and 1997, with mention of his believing ‘people were shooting at him’ in 2008. He suffered a stroke in October 2011 and January 2013, and when admitted to hospital on 20th March, 2013, he profoundly lacked lucidity, suffering dementia and dehydration, and had significant foul-smelling bedsores which ultimately led to sepsis and contributed to his death, inter alia from further stroke, on 28th March, 2013. Joseph in evidence recalled how Peter was interested in voodoo, and was suspicious of a person touching him, suggesting some mental illness. However, there has been no argument advanced by counsel at trial that his earlier diagnosis of mental illness plays any role in these proceedings, or that at the time he made his Will he was suffering mental illness, and importantly it has not been relied on, as said above, to suggest lack of testamentary capacity”.

[9] On 5th March 2018, clearly having examined all of the circumstances, the learned trial judge delivered his Judgment finding that the testator had the required capacity to make a Will, that the Will was valid and that it should be admitted to probate and that the caveats be quashed.

Grounds of Appeal

[10] The appellants being dissatisfied with the rulings of the learned trial judge appealed to this Court by way of notice of appeal filed on 13th April 2018. Three grounds of appeal were filed on behalf of the appellants, namely:-

(a) The learned trial judge failed to properly examine circumstances suggestive of undue influence e.g. His Lordship’s conclusion at paragraph 56 of the Judgment fails to take into consideration the inconsistency of His Lordship’s finding as opposed to that suggested by evidence led.

(b) His Lordship found that “having made his Will, and having begun to weaken, Donna and Keith began to change toward Peter, as can be

human nature, so that it appears Donna began to do less for him, awaiting his passing, and Keith began to treat the account as his own, while perhaps believing his actions in Peter's ultimate interests in developing the land".

- (c) This finding together with evidence of the manner in which monies were withdrawn from the deceased account; The way in which the deceased was isolated from others; The way in which he was cared for all suggests that the deceased was lulled into a false sense of gratitude.

- [11] In the Court's opinion, all the grounds can be taken together, in other words that the main beneficiary and the executor by their behaviour coerced the testator to make the Will in the main beneficiary's favour.

Undue Influence

- [12] The appellants claimed that the Will was made in suspicious circumstances and further they questioned why the testator named the respondent as executor when he had not known him, but for a short period of time. They claim that the testator was unduly influenced by both Donarene and the respondent.

- [13] And what is undue influence? Sir James Hannen in **Wingrove v Wingrove and Others**² described undue influence as follows:-

"...[T]here is no subject upon which there is a greater misapprehension...We are all familiar with the use of the word "influence"; we say that one person has an unbounded influence over another, and we speak of evil influences and good influences, but it is not because one person has unbounded influence over another that therefore when exercised, even though it may be very bad indeed, it is undue influence in the legal sense of the word. To give you some illustrations of what I mean, a young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make a will in her favour, to the exclusion of his relatives. It is unfortunately quite natural that a man so entangled should yield to that influence and confer large bounties on the person with whom he has been brought into such relation; yet the law does not attempt to guard against those

² (1885) 11 P.D. 81 at pp. 82 and 83.

contingencies. A man may be the companion of another, and may encourage him in evil courses, and so obtain what is called an undue influence over him, and the consequence may be a will made in his favour. But that again, shocking as it is, perhaps even worse than the other, will not amount to undue influence.

To be undue influence in the eyes of the law there must be – to sum it up in word – coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or she make a will in a particular person's favour, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence.

The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything. This would equally be coercion, though not actual violence.

These illustrations will sufficiently bring home to your minds that even very immoral considerations either on the part of the testator, or of someone else offering them, do not amount to undue influence unless the testator is in such a condition, that if he could speak his wishes to the last, he would say 'this is not my wish, but I must do it'."

[14] It is a question of fact whether a particular transaction was brought about by undue influence and the persons claiming are required to present evidence as to the nature of the alleged undue influence, the relationship between the parties and the extent to which the transaction complained of cannot be readily explained by the ordinary motives of persons involved in that relationship, and the totality of the circumstances of the case.

[15] In **Murray v Deubery and Another**,³ the Court examined the doctrine of undue influence. In **Murray**, Sir Vincent Floissac stated:-

³ (1996) 52 WIR 147 at p. 151.

“The doctrine of undue influence comes into play whenever a party (the dominant party) to a transaction actually exerted or is legally presumed to have exerted influence over another party (the complainant) to enter into the transaction. According to the doctrine, if the transaction is the product of undue influence and was not the voluntary and spontaneous act of the complainant exercising his own independent will and judgment with full appreciation of the nature and effect of the transaction, the transaction is avoidable at the option of the complainant. This means that the complainant may elect to have the transaction rescinded if he has not in the meantime lost his right of rescission.

The modern tendency is to classify undue influence under two heads, namely class 1 (actual undue influence) and class 2 (presumed undue influence). Class 2 is further classified under two sub-heads. The first sub-head is class 2(A) which is descriptive of the legal presumption which arises from legally accredited relationships such as those existing between solicitor and client, medical adviser and patient, parent and child, and clergyman (or religious adviser) and parishioner (or disciple). The second sub-head is class 2(B) which is descriptive of the legal presumption which arises from a relationship whereunder the complainant generally reposed trust and confidence in the dominant party”.

- [16] The court below examined both principles of actual undue influence as well as presumed undue influence.
- [17] The learned trial judge stated at paragraph 45 of the Judgment, “...that for actual undue influence, in category one (1) the defendants must show it arose. For presumed undue influence the Defendant’s must show a category two (2) relationship existed which gives rise to the presumption, which must then be rebutted by the claimant”.
- [18] The learned trial judge further stated “concerning category two (2) the question arises what was the nature of the relationship between Khari and Peter, namely, whether as solicitor and client in category 2A, and what was the nature of the relationship between Keith and Peter, namely whether as surveyor and client in category 2A or 2B”. The Court in **Hilda Elisabeth Stoutt et al v Firstbank of**

Puerto Rico,⁴ and **Clement Lawrence and Cleopatra Ballantyne v First St. Vincent Bank Limited**⁵ elucidated on such relationships which a presumption of undue influence would arise.

[19] In **Hilda Elisabeth Stoutt** at paragraph 35 , Mitchell JA [Ag.] (as he then was) stated:

“The mere fact that a transaction is improvident or manifestly disadvantageous to one party is not sufficient by itself to give rise to a presumption that it has been obtained by the exercise of undue influence. But, where it is obtained by a party between whom and the complainant there is a relationship like that of mother and son which is easily capable of developing into a relationship of trust and confidence, the nature of the transaction may be sufficient to justify the inference that such a development has taken place. It becomes unavoidable when the mother in question is proven to be elderly and suffering from a psychotic condition that leaves her mentally incompetent. Where the transaction is so extravagantly improvident that it is virtually inexplicable on any other basis, the inference will be readily drawn”.

[20] In **Clement Lawrence and Cleopatra Ballantyne v First St. Vincent Bank Limited** at paragraph 37, Webster JA [Ag.] stated:

“Essentially, the law is that in a case of class 2B presumed undue influence the complainant will succeed in setting aside the impugned transaction by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the transaction impugned. The authorities suggest that the presumption of undue influence may be rebutted by proving that the complainant had the benefit of independent legal advice before the transaction. In **Hilda Stoutt**, Mitchell JA [Ag.] stated at paragraph 36 that:

‘As between the wrongdoer and the complainant, the existence of independent legal advice may go some way to rebut the presumption of undue influence. The presumption is not rebutted by showing that the complainant understood what (he or) she was doing and intended to do it. The wrongdoer can rebut the presumption only by showing that the complainant was either free from any undue influence on his part or had been place(d), by receipt of independent (legal) advice, in an

⁴ BVIHCVAP2010/0016 (delivered 13th February 2012, unreported).

⁵ SVGHCVAP2014/0016 (delivered 24th February 2020, unreported).

equivalent position. This involves showing that (he or) she was advised as to the propriety of the transaction by an adviser fully informed of all the material facts. As regards the bank which has been put on enquiry of the possible existence of some impropriety by the circumstances described above and known to the bank, and (of) which (the) bank wishes to avoid being fixed with constructive notice, one means of doing so is to ensure that the complainant obtains competent and independent legal advice before entering into the transaction.”

[21] In the instant case, the learned trial judge found at paragraph 49 of the Judgment:-

“I further find as a fact that concerning the making of the Will on 03.05.10, then later signed on 05.05.10, that there was no actual undue influence at that time, and that any presumed undue influence has been rebutted by the Claimant case through hearing testimony. Specifically:

- (a) I am persuaded that Peter was not coerced, and genuinely, of free and clear mind, wanted to leave land and his personal property to Donna and Shaneil. This is because Khari gave evidence Peter was particularly fond of the little girl, which I accept and is an understandable sentiment in a man facing his end, looking to a child as the future which will follow him, noting her helplessness, and wanting to protect and provide for her, and her mother as her primary carer.
- (b) Donna came into Peter’s life in 2006, so that by 2010 there was enough time to have passed for Peter to have developed an affection and strong connection to her and her daughter.
- (c) The one description, prior to the Will being signed, of Donna exercising influence over Peter was when Monica Williams saw him ushered away in around 2007, which is not enough information to show that Donna controlled Peter’s pre-Will mind.
- (d) There is scant evidence Peter’s siblings took any fulsome care of him pre-Will, or even after, so that it is understandable to the Court how Donna evolved into his carer who in May 2010 he wished to benefit in his Will, which even Joseph agreed understanding in evidence on 6th December, 2017. I will deal later with Peter’s unhappy state of health post-Will between mid-2010 and his death in 2013.
- (f) The clear-minded intention of Peter to benefit Donna and Shaneil is particularly clear from his taking them into Thatch Valley with Keith on 8th May, 2010, within three (3) days of

signing the Will, to my mind reinforcing it, as can be seen in the photographs in KT3 (being exhibit filed on 29th October, 2013) which have all the hallmarks of a family outing.

- (g) Concerning Keith, as a surveyor he was not in category 2A, consistent with the dictum of Thom J in *Cresse v Joslyn* (supra), where at paragraph nine (9) she specifically said a surveyor-client relationship does not fall within it, supported by the Judgment of Floissac CJ in the *Murray v Dewberry and Matthew* (supra), who Thom J quoted at paragraph eight (8) as saying that the 'relationship between surveyors and their clients... is not a legally credited Class 2A relationship'.
- (h) Concerning whether Keith was in category 2B, I find he was, in that it is clear Peter placed trust and confidence in him, advising Peter as to how best to develop the land, and in due course from 2011 being given power of attorney over his affairs. The presumption of undue influence arises, but was rebutted on Keith giving evidence on 4th December, 2017. This is because I am satisfied as follows:
 - i. At the time of the Will being made, Keith only knew Peter six months, from November 2009 to May 2010, which was not enough time for Peter's mind to become enthralled and captured by Keith;
 - ii. It was clearly Peter's idea to develop the land, he had previously said he would to others, and the evidence shows that he approached Keith, not vice versa, having first instructed a surveyor named Burke, so that I find pre-Will it was Peter influencing Keith as to what he wanted done, and not Keith telling Peter;
 - iii. I accept on the evidence that Keith did not know Peter would make him his executor and it came as a surprise to him to learn it on 5th May, 2010, so that I find he was not angling or manipulating for it; and
 - iv. I was impressed with Keith and his steady manner, so I can well see why Peter freely chose him as executor; so that
 - v. At the time the Will was made, I am satisfied that Keith has shown he was not exercising undue influence over Peter.
- (i) Concerning Kharl, he was in a category 2A relationship with

Peter, as the solicitor writing up the Will, meaning there was a solicitor-client relationship. The presumption of undue influence arises, but has been rebutted on Kharl giving evidence on 4th December, 2017. This is because I am satisfied as follows:

- a. Kharl kept proper notes of the meeting on 3rd May, 2010, showing an appropriate professionalism, in combination with the Will signed on 5th May, 2010 being in proper form, reinforcing that professionalism; and
- b. While it can be criticised that Kharl might be thought to have a conflict of interest, as Keith is his friend, and did not tell Peter of this close connection, (being musicians together in the 1990s, and of Kharl being a non-executive director of Axuum and possibly K-Tech), nevertheless I am satisfied that there has been, is, and will be, no direct or indirect financial benefit to Kharl, that the directorship is a formality, his being chosen as he is a lawyer, my having heard him swear to this, and for me to find otherwise would be to consider Kharl an outright liar, which I am on his evidence and oath sure he is not; so that
- c. At the time the Will was made I am satisfied Kharl was not exercising undue influence over Peter.”

[22] Here the learned trial judge, having examined the nature of the relationships in this matter and having considered the relevant legal principles was satisfied that neither Kharl nor Keith exercised undue influence over the testator in the making of the Will. We can therefore find no fault with his reasoning.

[23] We are satisfied that the learned trial judge took into account all the evidence before him including the behaviour of the respondent and main beneficiary, as well as the conduct of the Attorney, who took the instructions for the Will from the testator.

[24] The learned trial judge carried out a comprehensive analysis of the principles of undue influence and concluded that none of the criteria was satisfied.

[25] The appeal is therefore dismissed. The decision of the learned trial judge is affirmed.

[26] With respect to the counter appeal, the details of which are as follows:-

(1) Details of the Order appealed

Paragraph 56: "What appears to have happened in this case is that Peter had a dream of developing his considerable land holdings, which as he aged he thought he should set in motion, finally spurred on by his affection for Shaneil and her mother who were looking after him. He found Keith and was taken by his manner and abilities. He settled his Will in favour of Shaneil and Donna, specifically ignoring his siblings, possibly because he felt they had little interest in him. Anxious to see the land project succeed, he tried to settle its term as instructions to Keith in his Will under paragraphs 5 and 6. To keep the project going, as he weakened he gave power of attorney to Keith. But having made his Will, and having begun to weaken, Donna and Keith began to change toward Peter, as can be human nature, so that it appears Donna began to do less for him, awaiting his passing, and Keith began to treat the account as his own, while perhaps believing his actions in Peter's ultimate interests in developing the land. It may be the flaw in Peter's dream was not the Will but the power of attorney, as it made him redundant while living, and so he found himself neglected, financially and as to his health".

(2) Details of any finding of fact:

His Lordship at paragraph 56 of his judgment found that "...But having made his Will, and having begun to weaken, Donna and Keith began to change toward Peter, as can be human nature, so that it appears Donna began to do less for him, awaiting his passing, and Keith began to treat the account as his own, while perhaps believing his actions in Peter's ultimate interests in developing the land. It may be the flaw in

Peter's dream was not the Will but the power of attorney, as it made him redundant while living, and so he found himself neglected, financially and as to his health".

(3) Grounds of appeal

Ground 1

The learned trial judge erred in law when he found that "But having made his Will, and having begun to weaken, Donna and Keith began to change toward Peter, as can be human nature, so that it appears Donna began to do less for him, awaiting his passing, and Keith began to treat the account as his own, while perhaps believing his actions in Peter's ultimate interests in developing the land. It may be the flaw in Peter's dream was not the Will but the power of attorney, as it made him redundant while living, and so he found himself neglected, financially and as to his health". Because there was no evidence before him upon which he could have come to such a conclusion.

[27] We are of the view that these statements were mere expressions of the learned trial judge's opinion of the evidence which was led and form no part of the order of the court and ought to be disregarded.

[28] The counter appeal is also hereby dismissed.

[29] We make no order as to costs.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar