

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHPB 2011/0137

BETWEEN:

MAUD GARDINER

Claimant

AND

ARLENE GOMEZ

Defendant

Appearances:

Ms. Sherrie-Ann Bradshaw for the Claimant
Mr. Cosbert Cumberbatch for the Defendant

2017: June 6th;
June 15th

ORAL JUDGMENT

[1] **WILKINSON J.:** This matter came on for trial on 6th June 2017. The Court having heard the evidence of Ms. Gardiner and read the witness statement of her sole witness, former counsel, Ms. Monique Francis-Gordon whose evidence pertained to actions post the death of Ms. Irma Genevieve Gardiner aka “Dollie” (hereinafter “the Deceased”), and being cognisant of the

limitations of the Civil Procedure Rules 2000 (“CPR”) rule 29.9 for amplification of a witness statement brought the trial to a halt and indicated to Counsel that the Court was of the view that Ms. Gardiner had not made out a case of undue influence and drew attention to some of the matters that caused the Court to reach its conclusion. The Court stated that it would render its oral decision shortly. The Court does so now.

[2] On 22nd March 2011, Ms. Gardiner filed her claim against Ms. Gomez. Therein Ms. Gardiner alleged that Ms. Gomez exercised undue influence over her sister, Ms. Irma Genevieve Gardiner aka “Dolly” (hereinafter “the Deceased”) and as such became the substantial beneficiary under the last will of the Deceased made at 21st March 2006.

[3] The particulars of undue influence pleaded at paragraph 3 of the statement of claim were:

- I. “Ms. Gomez is an attorney-at-law who befriended the Deceased, an elderly spinster who had no issue but was very close to her surviving siblings.
- II. Ms. Gomez prepared in her own handwriting the alleged will of the Deceased and is the most substantial beneficiary taking thereunder, which act in itself must excite the suspicion of the Court and places the burden upon Ms. Gomez to establish that the alleged will does express the true intentions of the Deceased.
- III. Ms. Gomez prepared in her own hand the true last will of the Deceased and was on the attesting witnesses thereto as per the handwriting analysis report annexed hereto and marked MG3.
- IV. Ms. Gomez shortly after the Deceased’s death took instructions from Ms. Gardiner who is also of advanced years and who was very close to the Deceased and who would spend several weeks at a time staying with the Deceased whenever she visited Antigua.
- V. For more than a year, Ms. Gomez never moved to complete the application for grant of letters of administration in the estate of the Deceased, contrary to her instructions from Ms. Gardiner.
- VI. Ms. Gomez never advised Ms. Gardiner during the period of her instructions to apply for letters of administration of the Deceased’s estate, that the Deceased had in fact died testate, she Ms. Gomez having prepared in her own handwriting the true last will of the Deceased dated 21st April 1986, and having been an attesting witness thereto.

- VII. Ms. Gomez never advised Ms. Gardiner that the proper application to make was for a grant of probate and in the circumstances where the 1986 will could not be found, an application for the re-creation of the same from the solicitor's notes of Ms. Gomez and from her memory as to the content of the said will.
- VIII. In or about the month of March 2011, Ms. Gardiner while on one of her increasingly rare visits to Antigua due to failing health, while cleaning out her sister's, the Deceased's home, discovered the true last will of the Deceased dated 21st April 1986 and immediately contacted Ms. Gomez who then asked the date of that will and proceeded to tell the Ms. Gardiner that only a few days before she, Ms. Gomez had discovered the alleged will of the Deceased which was dated later in time than that the true last will which Ms. Gardiner had found amongst her sister's possessions.
- IX. Ms. Gomez though knowing that Ms. Gardiner was on island at the time of discovery of the alleged will, never made any attempt to contact Ms. Gardiner until Ms. Gardiner advised her of her discovery of the true last will of the Deceased.
- X. Ms. Gomez initially refused to show the alleged will to Ms. Gardiner and would only state that neither Ms. Gardiner nor her surviving ailing brother took a share of the Deceased's estate under the alleged will and she specifically refused to advise Ms. Gardiner who the substantial beneficiaries under the alleged will were.
- XI. That it was only after the receipt of Ms. Gardiner's new solicitor's letter dated 21st March 2011, a true copy of which is annexed and marked MG4 terminating Ms. Gomez instructions to act for Ms. Gardiner did Ms. Gomez turn over a copy of the alleged will of the Deceased to Ms. Gardiner's attorney in a meeting of 4th April 2011.
- XII. That in spite of agreeing to do so, Ms. Gomez never produced the attesting witnesses nor their contact details. Neither did she turn over any documentation in connection with her instructions to prepare letters of administration for the Deceased's estate on the instructions of Ms. Gardiner. A series of correspondence detailing this is annexed hereto and collectively marked MG5.
- XIII. That clandestinely, Ms. Gomez ensuring that Ms. Gardiner was out of the jurisdiction, caused to be published in an obscure publication, with limited circulation, on or about 14th September 2011, a notice of her intention to apply for probate in the estate of the Deceased."

“The relief sought:

- i. That the Court shall pronounce against the validity of the alleged will dated 21st March 2006.
- ii. That the Court shall pronounce in solemn form from the true last will of the Deceased dated 21st April 1986.
- iii. That the Court shall appoint Ms. Gardiner the executrix thereof, the named executrix the sister of the Deceased and Ms. Gardiner, Sylvia White having since died.”

“Or in the alternative:

- i. A declaration that the gifts and residue under the alleged will to Ms. Gomez shall fail.
- ii. That the Court shall remove Ms. Gomez as executrix of the alleged will dated 21st March 2006, and that Ms. Gardiner be appointed in substitution of Ms. Gomez as Executrix of the estate of the Deceased.
- iii. That the Court shall then allow a grant of letters of administration with will annexed to Ms. Gardiner
- iv. Various costs were also claimed.”

Issue

- [4] The sole issue for the Court is whether Ms. Gomez can be said to have by her actions exercised undue influence on the Deceased with the result of her being the primary beneficiary in the 2006 will.

The evidence

- [5] Ms. Gardiner filed a witness summary on 4th February 2016, which she adopted at the trial as her evidence. Between the evidence in the witness summary and that given under cross examination there are a number of uncontested facts.
- [6] There was no death certificate disclosed for the Deceased but according to Ms. Gardiner the Deceased was 31 years of age when Ms. Gardiner migrated to the United States of America in 1957, and so having died in 2009 she would have been approximately 82 years of age.
- [7] Ms. Gardiner has identified the 2 wills. The first executed will she describes as the second executed will, she describes as “the True Last Will” and “the Alleged Will”. For simplicity, the Court refers to ‘the True Last Will’ as the 1986 will and “the Alleged Will” as the 2006 will.
- [8] It was not contested that in found the 1986 will in a cupboard of the home of the Deceased in early 2010, although her evidence subsequently varied and put that date at 2011, when she had a conversation with Ms. Gomez. It is not contested that Ms. Gomez apparently found the 2006 will in a china cabinet which belonged to the Deceased and was given to her by Ms. Gardiner. Both Parties knew at the time of handover that there were locked and unopened drawers at the time the china cabinet was delivered to Ms. Gomez.
- [9] It was not contested that Ms. Gardiner and the Deceased were half-sisters, they having the same father but not the same mother, and that the Deceased and Ms. Sylvia White had the same mother and father.
- [10] It was not contested that Ms. Gomez prepared both wills in her handwriting.
- [11] The 1986 will was witnessed by Ms. Gomez and another person. The 2006 will was witnessed by Ms. Heather Naton who was described as a manager, and Ms. Althea George an accountant. Both of these witnesses were persons known to Ms. Gardiner and according to Ms. Gardiner, they were also known to the Deceased.
- [12] It was not contested that at the beginning of the year 2006, that 3 of the 4 proposed gifts of the Deceased in the 1986 had lapsed by the effluxion of time. Firstly, the Deceased proposed to gift to her siblings Ms. Sylvia White and Ms. Gardiner a parcel of land at Marble Hill, Saint John that she owned, she sold this land in her lifetime. While not remembering exactly when the Deceased told her of the sale, Ms. Gardiner said that the Deceased told her of the sale approximately 1 year after

the sale had occurred that she had sold the land. She said that at the time the Deceased had said to her that she should have added her name to the deed because she had given her some of the money to purchase the land. Secondly, the Deceased proposed to gift her home at Gambles, Saint John's where she resided and the residue of her estate to Ms. Sylvia White. According to Ms. Gardiner, their sister, Ms. White passed away in the United States of American in 1987. This left only the proposed gift of \$500.00 to Ms. Mildred Aska. Ms. Aska was a person know to Ms. Gardiner.

[13] It was not contested by Ms. Gardiner, that in regard to gifts in the 2006 will that (a) Ms. Mildred Aska was now gifted \$5000.00, a gift 10 times larger than the 1986 proposed gift, (b) that she also knew 7 of 9 beneficiaries including Ms. Aska who received cash gifts. Aside from Ms. Aska, persons known to Ms. Gardiner were Mr. Jamal Devon Watt, Chatrisse Watt, Jasmine Lake, Ms. Eleanor C. Davis and Ms. Eleanor Genevieve Davis. All relatives. There was stated after each beneficiary's name their respective address, all were residing overseas; Ms. Gardiner admitted that such information as the names and addresses could only have been received for inclusion in the 2006 will from the Deceased and they were apparently relatives as she identified their connection to the Deceased.

[14] In regard to Ms. Gardiner's pleading in her statement of claim at paragraph 3 that Ms. Gomez was "an attorney-at-law who befriended the Deceased an elderly spinster who had no issue" and in her witness summary at paragraph 4 that Ms. Gomez was "a family friend", the facts as it turns out, under cross-examination were very different. Ms. Gardiner immigrated to the United States of American in 1957, she did not know Ms. Gomez to be a 'family friend" and under cross-examination retracted that description. Ms. Gardiner knew that her sister Ms. Sylvia White and Ms. Gomez were the first to be friends and were so from since the 1970s when they met thru work. Ms. Sylvia White lived in the same house with the Deceased and it was thru Ms. Sylvia White that Ms. Gomez and the Deceased came to be friends when she would visit the home of Ms. Sylvia White. Ms. Sylvia White immigrated to the United States of America in 1982 and resided there until she died in 1997. Ms. Gardiner also knew Ms. Gomez to continue to be friends with the Deceased after Ms. White immigrated and thus Ms. Gardiner knew the friendship between the 2 to be of long standing.

- [15] Ms. Gardiner in her statement of claim stated that Ms. Gomez refused to produce for her the witnesses to the 2006 will. This would be Ms. Heather Nanton and Ms. Althea George. This assertion of failure is most curious because under cross examination Ms. Gardiner was adamant that it was not Ms. Gomez who assisted the Deceased but rather it was Ms. Nanton who had been requested to look after the Deceased by Ms. Sylvia White and she knew the person who looked after the Deceased to be Ms. Heather Nanton. In fact she stated "She (the Deceased) was taking care of herself with the supervision of Heather (Nanton)". And she had admitted earlier to knowing the second witness Ms. Althea George to be a friend of the Deceased. The witnesses to the 2006 will were clearly not strangers to Ms. Gardiner.
- [16] Much was made of Ms. Gomez's actions after the death of the Deceased between 2009 and 2011, when both the 1986 and 2006 wills were said to be found. The Court addresses this later.
- [17] Much was also made by Ms. Gardiner about not being told by Ms Gomez that she had prepared the 2006 will and found the will until she revealed that she had found the 1986 will. The addresses this later.

The Law

- [18] It appears to the Court that it would not have been unusual for Ms. Gomez to prepare a will for the Deceased as she in fact did so, the 1986 will and which will Ms. Gardiner holds is the only valid will. The sole challenge therefore to the 2006 will is that Ms. Gomez as the person who prepared the 2006, was the primary beneficiary. In **Williams' Law relation to Wills**¹states:

"Will prepared by a beneficiary. It is not the law that in no circumstances can a solicitor or other person who had 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 it. **Baron PARKE** expressed the rule as follows in **Barry v. Butlin**:

'... if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to

¹ Vol. 1 6th ed. London Butterworth. 1987 p. 40.

be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does not express the true will of the Deceased.’

The degree of suspicion will vary with the circumstances of the case, and the burden of dispelling that suspicion may be slight or so grave that it can hardly be removed.”

- [19] Ms. Gardiner grounds her case on the principle of undue influence. In **Halsbury’s Laws of England**² it is stated:

“911. What constitutes undue influence. A will or part of a will may be set aside as having been obtained under undue influence. If the execution of the will is not in dispute the party alleging undue influence has the right to begin, and must discharge the burden of proof by clear evidence that the influence was in fact exercised. To constitute undue influence there must be coercion: pressure whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is species of restraint under which no valid will can be made.

A person may exercise an unbounded influence over another, which may be a very bad influence, without its being undue influence in the legal sense of the word. Undue influence may be found against a person who died before the execution of the will, on the ground that the testatrix was under the person’s complete control until his death, and thereby rendered incapable of making a fresh will free from such undue influence.”

- [20] In **Wingrove v. Wingrove**³ Sir J. Hannen P said:

“it is only when the will of the person who becomes a testator is coerced into doing that which he does not desire to do, that it is undue influence.”

- [21] **Williams’ Law relation to Wills**⁴ states:

“Undue influence and fraud. Fraud and undue influence are really questions of knowledge and approval rather than of testamentary capacity since what has first to be

² 4th Edition

³ (1885) 11PD 81

⁴ Vol. 1 6th ed. London Butterworth. 1987 p. 45.

proved is not the lack of capacity of the testator, but the acts of the others whereby the testator has been induced to make dispositions which he did not really intent to make.

Although undue influence is not impossible in the case of a testator of sound health and understanding, it is far more common in the case of a testator of weak or impaired mental capacity or in failing health. A gift obtained by undue influence or fraud is liable to be set aside upon proof of the undue influence or fraud. Undue influence means coercion to make a will in particular terms. The principle has thus been stated by Sir J P WILDE in Hall v. Hall⁵:

'Persuasion is not unlawful, but pressure of whatever character if so exerted as to overpower the volition without convincing the judgment of the testator, will constitute undue influence, though no force is either used or threatened.'

The proof of motive and opportunity for the exercise of such influence is required but the existence of such couples with the fact that the person who had such motive and opportunity has benefited by the will to the exclusion of others is not sufficient proof of undue influence. There must be positive proof of coercion overpowering the volition of the testator. The mere proof of the relation of parent and child, confessor and penitent, guardian and ward, or tutor and pupil does not raise a presumption of undue influence sufficient to vitiate a will and although coupled with, for example, the execution of the will in secrecy, such relationship will help the inference, yet there is never in the case of a will a presumption of undue influence. There is no presumption of undue influence, a case of undue influence must give the particulars of the acts alleged in exercise of it with necessary dates but not the means of the persons present. Evidence of a statement of the party exerting the undue influence though not made in the presence of the testator is admissible. The plea of undue influence ought never to be put forward unless the person who pleads it has reasonable grounds to support it."

Findings and analysis

⁵ LR 1 P&D 481 at 482.

- [22] The authorities are clear that it is not an absolute that a person in Ms. Gomez position could not be a beneficiary of the 2006 will. The Court bears in mind the caution stated and which is that the Court ought to be vigilant in examining the evidence. This fact is part of what the Court looks at in the round. It is not sufficient for the Court to declare the 2006 will or the specific gift to Ms. Gomez void.
- [23] Moving to Ms. Gardiner's burden her having grounded her case in the cause of undue influence. The authorities cited by the Court are clear in their description of Ms. Gardiner's burden. The Court has set out the particulars in her statement of claim. She clearly failed to plead actions that described how Ms. Gomez was exercising undue influence on the Deceased and so could lead her to making the challenged gift. There were no such pleadings.
- [24] Moving to the evidence received by the Court, on examination of the evidence, the Court is called upon to find positive proof i.e. actions of Ms. Gomez which could be described as overpowering the will of the Deceased and so lead her to make a gift or even the entire 2006 will and which will she did not really intend to make. There was no such evidence before the Court.
- [25] Otherwise than touching on the relationship as described above, the evidence of Ms. Gardiner was bare and lacking in any particulars and descriptions of any actions carried out by Ms. Gomez which could be attributed to her seeking to influence the Deceased to make the 2006 will. Not a single iota of evidence of Ms. Gomez exercising undue influence. This observation is significant as Ms. Gardiner said under cross-examination that although she left Antigua in 1957 at age 23 years, she visited Antigua sometimes once or twice per year from 1971 until 1984 and further that she spoke with the Deceased every week and that there was nothing that happening in Antigua that she did not know. She also said that she visited Antigua up to 3 months before the Deceased died in 2009.
- [26] Referring to the evidence about Ms. Gomez actions after the death of the Deceased whether officially retained or not and namely her failure to reveal that she had prepared the 2006 will and not moving to apply for letters of administration in the first instance during the period when there was no will discovered and after both wills were discovered, it is not the principle of law that the Court can find undue influence by examinations of such evidence. The actions the Court must examine are those leading up to the making of the 2006 will.

[27] On examination of the facts and the law, the Court has no choice but to strike out the claim of Ms. Gardiner.

[28] Court's order:

- i. The claim is struck out.
- ii. Prescribed costs are awarded to Ms. Gomez and they are payable within 60 days.

Rosalyn E. Wilkinson
High Court Judge

By the Court

Registrar