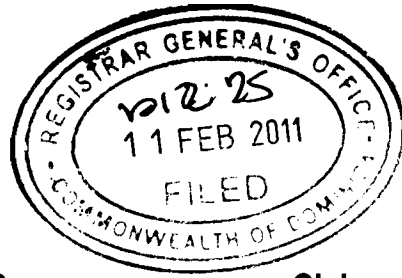


COMMONWEALTH OF DOMINICA

DOMHCV2008/0308



BETWEEN:

WEBSTER SHILLINGFORD

Claimants

WALTER WILLIAMS

and

NORMA DALRYMPLE

Defendants

RUTH AMES

BRENDA BANNIS

CHRISTINA SALAUN

WILMA CASTOR

WILLIAM THOMAS

Before: The Hon. Justice Brian Cottle

Appearances:

Mr. Alick Lawrence for Claimant and ancillary Defendants

Mrs. Dawn Yearwood-Stewart for Defendant / ancillary Claimants

[2010: December 6th, 7th]

[2011: February 11th]

JUDGMENT

- [1] **COTTLE J:** William Thomas, late of Marigot in the Commonwealth of Dominica, died on the 2nd of August 2007. The claimants are the named executors of his will. They seek to have the court pronounce for the will and a

later codicil to that will in solemn form. The defendants are children of William and Agatha Thomas. Agatha predeceased the testator in 1975 and he later re-married Theresa Thomas the Ancillary defendant. That union lasted some 25 years and produced 2 children

- [2] The defendants contest part of the Will and codicil of William Thomas and seek to have the rest of the Will admitted to probate. They say those bequests should be struck down for two reasons. Firstly, the bequests are bad for want of knowledge and approval by the testator, and secondly the gifts were made because of undue influence by the ancillary defendant over the testator.

The contested gifts

- [3] Under the Will of 29th July 1989 at clause 4 the testator devised as follows:

“To my wife Theresa Thomas I give and bequeath all the remaining property at Weirs, Marigot Commonwealth of Dominica including all the remaining portion of land (excluding that bequeathed to the children of my first wife) and all buildings and structures situated there.”

- [4] Under the codicil to that Will, clause 1 reads:

“To the children of my first wife Agatha Thomas now deceased I give and bequeath (a) the dwelling house at Weirs Marigot and the lot on which it is situated bounded as follows. On the South-West by the drive way in front of the house and extending in a straight line to the boundaries with Adeline Hamlet and Mary Henderson (b) the building and lot as Sams Gutter situated between Newman Nelson and Imbert Alexander.

- [5] The defendants thus challenge the gifts to the ancillary defendant. Both counsel provided the court with very helpful written closing arguments and authorities in support. I find it convenient to dispose of one issue at the outset. In her submissions, counsel for the defendants argues forcefully that the claimants have failed to adduce any evidence of the witnesses who attested to the Will. This, she says, is fatal.

- [6] In order for the claimants to prove the Will in solemn form, they must show due attestation. To do so they must lead evidence from the attesting witnesses. Having failed so to do the court should pronounce against the Will and declare that William Thomas died intestate. Counsel cited the case of Bowman v Hodgson 36 L.J.P 124 as authority for the proposition that at least one attesting witness must be called to prove a Will in solemn form.
- [7] It is undoubtedly the case that it remains for the claimant propounding a will to show that it has been duly executed and generally the court will require an explanation, at least, for the absence of the attesting witnesses to the will. However, in the instant case there are other factors to be considered as well. The defendants in their pleadings, do not aver any want of due execution. On the contrary, they seek to have the court pronounce in favour of the will once the contested bequests are struck down.
Under the CPR 2000 part 68.8 (3)

“Any party who pleads that at the time when a will, the subject of the proceedings, was alleged to have been executed the testator did not know and approve of its contents, must specify the nature of the case on which he or she intends to rely, and no allegations in support of that plea which would be relevant in support of any of the following other pleas, that is to say that-

(a) at the time of the execution of the will the testator was not of sound mind, memory and understanding;

(b) the execution of the will was obtained by undue influence or fraud;
or

(c) the will was not duly executed;

may be made by the party unless that other plea is also set out in his or her statement of case.

- [8] The defendants are debarred from alleging any want of due execution as they did not plead any such lack. Additionally, the court heard the evidence of the Solicitor who drew up the will and who witnessed its due execution. Her evidence in this regard was accepted unchallenged by the defendants. Applying the maxim “omnia praesumuntur rite esse acta” I conclude that this will, duly signed and bearing on the face of its proper attestation clause, has been duly executed. There remain two questions left for the court to answer. These are whether the testator knew of and approved of the challenged bequests and whether there was undue influence by the ancillary defendant.

Want of knowledge and approval

- [9] It is essential to the validity of the will that the testator should have known of and approved its contents. The burden of establishing this rests on the claimants. The way in which that burden is to be discharged is set out by Mendonca J.A in the Trinidad case of Visham Lalla v Suruy John Lalla Civil appeal 102 of 2003 delivered on 21st December 2004. At paragraph 55 the learned Justice of Appeal stated

“The burden of proof of knowledge and approval in this case was discharged by the positive evidence that that Testatrix read and approved the will referred to above. But it is not necessary that there be such evidence, since the burden may be discharged prima facie by the presumption which arises by proof of the capacity of the Testatrix and due execution of a will regular on the face of it. From these knowledge and approval of the will are presumed (see in the Estate of Musgrave, Davis v Mayhew [1927] p. 264 and Lucky v Tewari (1965) 8 W.I.R.363). The Judge concluded that the Respondent in this case could rely on the presumption to establish the knowledge and approval of the Testatrix.”

In the present case, I turn to examine the evidence.

- [10] The claimants assert the validity of the will. The will was prepared by Mrs. J. Prevost attorney at law. It and the codicil appear to be regular in form and appear to have been properly executed. Ms Prevost testified as a witness for the claimant. Her evidence was not challenged. She says that Mr. William Thomas came to her chambers with his wife, the ancillary defendant. She says that she asked the ancillary defendant to wait in the waiting area and took the instructions of the testator in her private office.
- [11] Ms. Prevost produced her manuscript notes from which she produced the will. She also exhibited the handwritten draft will from which the final document was typed. Also exhibited is a hand written will dated 29th July 1989. all parties agree that the will is in the handwriting of the testator. The typed will is consistent with the handwritten one. I find that the will drawn by Ms. Prevost accurately reflects the desires of the testator. It cannot be seriously argued that the testator did not know or approve of the contents of a will he wrote himself. As far as the codicil goes, again Ms. Prevost testifies that she

prepared it on the instructions of the testator and that it accurately reflects his wishes. She was not cross examined by the defendants or their counsel.

- [12] On the other hand, none of the defendants advance any evidential basis for the assertion that the testator did not know of and approve of the contents of the will and codicil. I have no difficulty in holding that this ground of challenge to the validity of the will and codicil has failed.

Undue Influence

- [13] All of the defendants say that the ancillary defendant was able to overbear the mind of the testator. As it is the defendant who allege undue influence, the burden rest on them to demonstrate this on a balance of probability.

The evidence

- [14] The claimant called 6 witnesses. Theresa Thomas denied exercising undue influence over her husband the testator. In her witness statement she characterized the testator as a man would not be made to do anything against his will. Once he made up his mind he would not yield to pressure to change it. She denied preventing the defendants from having free access to the testator.
- [15] Webster Shillingford, one of the named executors, is a retired civil servant. He retired after having attained the rank of Assistant Secretary, one of the most senior positions in the Civil Service of the Government of Dominica. He says he was asked by the testator to be executor some time in the 1980's. He agreed. The testator was his cousin. He thought Mr. Thomas was a pleasant, intelligent, business minded, strict and decisive person. He was not one to be "pushed around."
- [16] Solomon Alexander has been living in Marigot since 1979. He worked with the testator in different capacities. He considered the testator was not the type of person that someone could get to do what he did not want to do. Webster Shillingford is also a retired civil servant. He is now a farmer. He is a childhood friend of the testator and he is the other named executor of the will. He too thought the testator was a man who could not be made to do what he did not wish to do.
- [17] Mrs. Prevost the solicitor who prepared the will and codicil, she testifies that she spoke to the testator privately to assure herself that he was in "in a proper

state of mind, fully appreciated what he was doing, and was doing so of his own free will." This testimony of Mrs. Prevost was not challenged by the defendants.

- [18] Dr. Robert Nasiro is a former Chief Medical Officer of Dominica. The testator was a patient of Dr. Nasiro from 1984 until his death. Dr. Nasiro would see him regularly both professionally and socially over the intervening years. Dr. Nasiro thought that at the time of the will and codicil, Mr. Thomas was able to make sound decisions and exercise good judgment. He could, if he wished, resist any verbal or mental pressure to which he might have been subjected.
- [19] The defendants paint another picture. To them, the ancillary defendant was a woman of loose morals. She was an unmarried mother of 7 (two of whom has died). She was wholly unsuitable as a wife for their father. Apart from her unsuitability they view her as a "gold digger", they say she abused the minor children of Mr. Thomas by his first wife and forced them to flee their home. She was a bully and was able to exercise total control over the testator. Whenever he was in her presence he was unable to act or speak as he wished.
- [20] Norma Dalrymple is the oldest child of the testator by his first wife. In her witness statement she does not challenge the bequest in the will. She says the codicil was "clearly influence (sic)" by the ancillary defendant, because it did not accord with the handwritten will of 29th July 1989 or the instructions to Mrs. Prevost. She also advances that the testator had expressed to others, including the defendants that the property at Weirs would be left to the defendants and the codicil does not indicate that the testator possessed testamentary capacity when it was executed.
- [21] As evidence of the influence of the ancillary defendant over the testator Norma Dalrymple told the court that during her visit to her father the ancillary defendant did not leave them alone and her father "appeared tense" when Theresa was around. All of the other witnesses for the defense stated that they thought Theresa was unsuitable as a wife for the testator and that they were surprised at the bequest to her.
- [22] The defendants points to an undated letter of the testator to his children by his first wife. They say this letter was written while he was in Germany and away from the influence of Theresa. It thus represents his true intentions. Theresa and her children were to get lands at Thibaud. The implication is that

the Marigot property would be for the defendants. The letter is ambiguous at best. The sentence the defendants rely on reads "Theresa and her children helped quite a lot. I am giving them Thibaud and I want full control of the business." Later in the letter he says "In spite of it all, I married Theresa. She has helped a lot though not very clever."

- [23] When the evidence is all considered I cannot say that I am convinced that it shows any undue influence over the testator by the ancillary defendant. On the contrary even the words of the testator in his letter reflect his opinion of his second wife. He thought that she had been very helpful to him but he did not consider her very clever.
- [24] There is nothing in the evidence of the defendants that goes to show influence by Theresa over the testator. What emerged was a picture of the defendants who never bothered to conceal their contempt for the ancillary defendant. Despite the fact that she had been married to their father for over 25 years they persisted as referring to her as the "maid".
- [25] I find that the will and the codicil to it were properly executed by the testator and accurately reflect his true desires as to the disposition of his property. Judgment is thus entered for the claimant. The ancillary claim is dismissed. Probate of the will and codicil is hereby granted. In the circumstances of this case I make no order as to costs.

