[2017] JMSC Civ.44

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013HCV05463

In the Estate of HENRY ALPHANSO DAVIS deceased late of 5 Lansdale Avenue, Kingston 10 in the parish of Saint Andrew, Businessman, testate.

BETWEEN	**ERROL ANTHONY DAVIS**	**1ST CLAIMANT**
	EDWARD EVERTON DAVIS	**2ND CLAIMANT**
	DONNA MARIE DAVIS-HICKEY	**3RD CLAIMANT**
	DWIGHT ST. AUBYN DAVIS	**4TH CLAIMANT**
AND	**NAOMI EVADNEY BARRETT-DAVIS**	**DEFENDANT**

Probate – Will – Validity – Whether testator possessed testamentary capacity at the time of execution of will – Whether signature on will was that of the testator – Whether testator was acting under duress when he executed last will and testament – Whether grant of probate to be revoked.

Mrs. Joan Thomas instructed by E.D. Davis and Associates for the Claimants

Mr. Aon Stewart instructed by Knight, Junor and Samuels for the Defendant.

IN OPEN COURT

HEARD: 30th & 31st January, 15th &16th February and 24th March, 2017

COR: V. HARRIS, J

Introduction and Background

[1] The claimants Mr. Errol Anthony Davis, Mr. Edward Everton Davis, Mrs. Donna Marie Davis-Hickey and Mr. Dwight St. Aubyn Davis are the children of Mr. Henry Alphanso Davis who died testate on December 26, 2008 (the deceased). The defendant Mrs. Naomi Evadney Barrett-Davis is his widow. They were married on July 14, 2008, a little over five months before he died. However, they had shared an intimate relationship for some eighteen (18) years before his death and had lived together since 1994.

[2] The parties will be referred to as the claimants (collectively) and defendant. This is merely for ease of reference and not a sign of disrespect for not referring to them by their respective names. Where it is necessary to identify the claimants and defendant by name, this will be done.

[3] This claim commenced originally with the four (4) named claimants as parties. However, on the first day of trial, the Court was told that Mr. Edward Everton Davis, the 2nd claimant, would not be available to attend and give evidence. In light of the reason that was given for his absence, the Court granted an application by the claimants' attorneys-at-law to have him removed as a party to the claim so that the trial of the matter could proceed.

[4] During the trial it was discovered that probate in the estate of the deceased had been granted to the defendant on March 13, 2015. As a consequence, I permitted the claimants to amend their claim to ask for an order revoking that grant of probate. The other orders that were being sought by the claimants remained. No objection was taken and the trial continued.

[5] The deceased prior to his death made a will dated July 09, 2006 (the first will) in which he made certain provisions for the claimants, defendant and other persons. This will was drafted by Mr. Ernest Davis, attorney-at- law. It was, of course, invalidated by the deceased's subsequent marriage to the defendant.

[6] Another will dated September 16, 2008 was made by the deceased (the disputed will). It was drawn up by another attorney-at-law Ms Audrey Allen, who gave evidence on the defendant's behalf. In this will, the deceased devised most of his estate to the defendant. No provisions were made for his children.

[7] The claimants have challenged the validity of the disputed will because:

a) The deceased had been diagnosed with a brain tumour in 2008 and suffered at least two (2) strokes which made him unable to use his right hand. Therefore, he would have been unable to sign the disputed will and the signature that appeared on that document differed considerably from his other signatures and was not his;

b) The brain tumour and strokes affected him mentally and left him unable to speak coherently or to communicate effectively. As a result, the deceased would not have had the testamentary capacity to give instructions for and execute the disputed will; and

c) Due to his deteriorating health, he would have been vulnerable to influence and coercion and had in fact been coerced by the defendant to execute the disputed will which gave her most of his assets.

[8] The defendant, on the other hand, while agreeing that the deceased could not use his right hand at the time he signed the disputed will, contended that signed it using his left hand. She also asserted that he was of sound mind, memory and understanding when he executed it and had done so of his own free will**.**

The Evidence of the Claimants

[9] Mr. Ernest Davis gave evidence on the claimants' behalf. He was the testator's attorney-at-law and had known him for some fifteen (15) years prior to his death. He also knew the claimants and defendant.

[10] Mr. Davis testified that the defendant visited his office once to enquire about changing the first will and he informed her that the deceased would need to attend his office in person to do so.

[11] Mr. Davis told the Court that the defendant also took the deceased to his office in his pyjamas directly from the hospital. Mr. Davis however, could not say specifically when this happened. However, as the evidence unfolded that incident seemed to have occurred on the same day that he (Mr. Ernest Davis) drafted a Power of Attorney for the deceased. The evidence revealed that this was sometime in May 2008.

[12] The deceased requested to speak with him in private, Mr. Davis stated. During that conversation he (the deceased) told him that he did not wish to change the first will but that the defendant was putting him under pressure to do so and to give her all of his assets. The deceased, Mr. Davis said, instructed him to keep it.

[13] Mr. Davis said that he was surprised to learn, when he attempted to probate the first will, that another one had in fact been executed in 2008 and there was an application made to the Supreme Court to have it probated.

[14] The claimants all gave evidence of the excellent relationship they shared with their father. Mrs. Davis-Hickey, the 3rd claimant, said that she came to Jamaica in May 2008 when she learnt that her father was ill and took him to the United States of America for medical treatment. (She agreed she was notified of his illness by the defendant).

[15] Her evidence was that her father was very ill and weak. After having a stroke he could not use his right hand at all and could barely do anything with his left hand. He required assistance to be fed as he could not hold a cup in his left hand. She also said that the illness affected him mentally as well. She maintained that the signature on the disputed will was not her father's and that in any event he lacked the mental capacity to make it. Mrs. Davis-Hickey also testified that when her father became ill he could not speak. He just mumbled words.

[16] She also asserted that her father had complained to her that he was being pressured by the defendant to change his will and that he had become fearful of her. She had communicated this complaint to Mr. Ernest Davis via email

[17] Mr. Errol Davis, the 1st claimant, also testified that he had a good relationship with his father. He stated that he was very familiar with his father's signature and that the signature that appeared in the disputed will, did not belong to him. He also told the Court that his father had told him that he was being pressured by the defendant to change his will and that he was afraid of her. He was unable to say when this conversation took place. He too said that his father could not speak that well when he became ill.

[18] The 4th claimant, Mr. Dwight Davis, gave evidence that he visited with his father regularly and would spend at least fourteen (14) hours per day with him. He insisted that his father could not hold a pen in his left hand as his motor skills were severely compromised as a result of his illness. He said that his father was unable to speak when he became ill.

[19] He also testified that he visited the offices of Mr, Ernest Davis on the day that his father had the private conversation with him. (This seemed to have been in May 2008). He also gave evidence that his father had spoken to him about being pressured by the defendant to change his will and that he was afraid of her.

The Defendant's Evidence

[20] Mrs. Barrett-Davis denied that she had ever visited Mr. Ernest Davis' office to make enquiries about changing the first will. She also denied that it was at her bidding that the deceased was taken directly to Mr. Ernest Davis' office from the hospital in his pyjamas. This she said was his wish because he wanted to execute a Power of Attorney in her favour so that she could manage his affairs while he was ill. (A Power of Attorney was given to the defendant from the deceased. It was drafted by Mr. Ernest Davis).

[21] She said that during this visit to Mr. Davis' office, he and the deceased did not engage in a private conversation. She stated that the deceased remained in the vehicle they had travelled in and Mr. Davis came to that vehicle to speak with the deceased, whom she said was arguing with him. At one point during this argument she stepped outside the vehicle and was not listening to the discussion/argument that they were having.

[22] The defendant said that while she was aware of the first will the deceased had not discussed its contents with her.

[23] The defendant indicated that unlike the claimants, she shared a close and loving relation with the deceased. They supported each other emotionally and spiritually. She took care of him when he became ill and ensured that he received all the medical attention and care that he needed.

[24] According to the defendant, he was of sound mind, memory and understanding when he executed the disputed will and he did so of his own volition. She was supported on this point by Mr. Ian Uter, one of the attesting witnesses to the disputed will, as well as, Ms Allen who drafted it. The defendant articulated that the deceased used his non-dominant (left) hand to sign the will and this accounted for the difference in the appearance of his signature.

[25] Both Mr. Uter and Ms Allen said that while the deceased was feeble due to his illness, he was able to speak coherently, albeit slowly. He was also of sound mind, memory and understanding when he executed the disputed will. Mr. Uter also indicated that he signed the will in his presence and that of the other attesting witness, Mr. Mills.

The Evidence of the Expert

[26] Dr. Sheray Ward-Chin was appointed an expert in this case. Her evidence was that the deceased was admitted to the University Hospital of the West Indies (UHWI) on November 28, 2008 (approximately two months after the execution of the disputed will). He was discharged on December 12, 2008.

[27] He was diagnosed with glioblastoma multiforme (a type of brain tumour/cancer), pneumonia, urinary tract infection and diabetes mellitus. She said that when she saw him she would not agree that that there was no indication of any illness which affected his central nervous system. She said that he was then incoherent, that is, incapable of having a logical and comprehensible thought process.

[28] Dr. Ward-Chin said that the brain tumour diagnosis was made before November 2008 but could not say when this was. She also admitted that while a brain tumour may well affect the mental capacity of an individual, this was dependent on the stage the cancer had reached. However, she was unable to say the stage the brain cancer that afflicted the deceased had reached.

Issues

[29] The following are the issues that are to be resolved by the Court:

i) Did the deceased possess the requisite testamentary capacity at the time he executed the disputed will?

ii) Did the deceased sign the disputed will?

iii) Was the deceased coerced to sign the disputed will?

Submissions on behalf of the Claimants

[30] Learned counsel, Mrs. Joan Thomas submitted that the defendant bore the burden of proof to establish that the deceased had the requisite testamentary capacity when he executed the disputed will. She relied on **Moonon v Moonan** 1963 7 WIR 420 and **Alethea McCollin v Peter Lynch** a decision of the High Court of Justice of Trinidad and Tobago delivered on February 17, 2011.

[31] She stated that it must be established by the defendant that the deceased possessed the necessary mental competence at the time of the execution of the disputed will. The leading case of **Banks v Goodfellow** (1870) LR5 QB 549 was cited as the authority for this principle.

[32] She advanced that since the deceased was diagnosed with having a brain tumour, strokes, as well as, other debilitating illnesses and he was described as being weak and feeble by the defendant's own witnesses, she (the defendant) was put to a higher level of proof to show that the deceased possessed the required testamentary capacity at the time he executed the will in dispute. Those illnesses, especially the brain tumour, could cause cognitive impairment, memory loss and personality changes. She directed the Court's attention to the evidence of Dr. Ward-Chin.

[33] Additionally Mrs. Thomas asserted that, "a stricter proof of knowledge and approval is necessary where there was some weakness in the testator which, though not amounting to incapacity, renders him liable to be made the instrument of those around him, or when the will is at variance with the known affection of the testator or was prepared on verbal instructions only or is at variance with previous declarations." (per Wooding CJ in **Moonan** (supra)).

[34] Mrs. Thomas submitted that a number of factors in the evidence should alert the Court that the deceased lacked testamentary capacity. These were:

i. The deceased made no provision for his children and employees in the disputed will, although he shared a good relationship with them and had previously provided for them in the first will;

ii. Mr. Ernest Davis had been the deceased's attorney-at-law for many years and had appeared for him in a number of matters. Even in May 2008 he had drafted a Power of Attorney on his instructions. Yet in September 2008 a different attorney-at-law drafted the will in dispute;

iii. The evidence of Mr. Uter and Ms Allen was unsatisfactory as to the testamentary capacity of the deceased. They both said that they had previously met with him on one or two occasions and would not be in a position to give evidence of his true mental capacity.

[35] She further submitted that the party asserting undue influence had to prove it, (in this case, the claimants) and must go beyond the bare assertion of persuasion and prove coercion. She cited the authority of **Wharton v Bancroft et al** [2011] EWHC 3250 (Ch) as supportive of this position.

[36] Mrs. Thomas went on to say that in **Wharton** it was also held that in many cases the fact of undue influence could not be proved by direct evidence but had to be inferred from proven facts.

[37] She pointed to a number of authorities that could provide assistance to the Court on this issue, such as **Cowderoy v Cranfield** [2011] EWHC 1616; **Wingrove v Wingrove** (1885) P & D 81 and **Parfitt v Lawless** (1872) LR 2 P & D 462.

[38] Mrs. Thomas urged the Court to accept the evidence given by Mr. Ernest Davis that he had a private conversation with the deceased who told him that he did not wish to change his first will; he was being pressured by the defendant to do so and had become fearful of her. Mr. Davis also testified that the defendant had come to his office on one occasion to enquire about the steps required to change the first will. This evidence, if accepted, she said would tend to show that the

defendant was coercing the deceased to change that will before they were married.

[39] The sudden marriage of the deceased to the defendant should also cause the suspicion of the Court to become arose as to whether he was being coerced by the defendant at the time that the disputed will was executed, Mrs. Thomas further posited. She said that although the testator and the defendant had shared a relationship for eighteen (18) years, he had not married her until July 14, 2008 a mere two months before the will in dispute was executed.

[40] Mrs. Thomas further asserted that it could be inferred from both the evidence of the defendant's witnesses concerning the deceased feebleness and the unchallenged evidence of the serious nature of his illness that he was coerced by the defendant to make the disputed will.

[41] Finally, she urged that given the evidence that the deceased had lost the use of his dominant hand and could barely do anything at all with his left hand, the Court was to reject the evidence of the defendant and her witnesses that he had in fact signed the disputed will.

Submissions on behalf of the Defendant

[42] Learned counsel for the defendant, Mr. Aon Stewart submitted that the starting point in this matter was sections 2, 6, 12 and 15 of the Wills Act (the Act). He further submitted that the claimants have not taken any issue with the formalities of the Act not being complied with. A testator was allowed to make a mark as his signature, as he did in this case. Therefore, where on the face of the will it appeared to be duly executed the presumption was in favour of due execution. Mr. Stewart cited **Re White** 1948 1 DLR 572 and **Barry v Butlin** (1938) 2 Moo P.C. 480 in support of his submissions.

[43] He directed the Court to the authority of **Gill v Woodall and others** [2010] EWCA Civ 1430 as providing guidance when considering the validity or invalidity of a testamentary document.

[44] Mr. Stewart agreed with the claimants' submission that the propounder of a challenged will bore the burden of proving that the testator had the testamentary capacity to make the will and did so of his own free will. He also relied on the cases of **Banks v Goodfellow** (supra), **Worth v Clasohm** 1952 86 DLR 439 and **Battan Singh v Amirchand** [1948] AC 161.

[45] The evidence as it concerned the mental capacity of a testator at the time he executed a will may come from an expert, as well as, persons who are not experts Mr. Stewart advanced. He relied on the cases of **Zorbas v Sidiropoulous (No 2)** [2009] NSWCA 197 and **Simon v Byfords & Others** [2014] EWCA Civ 280

[46] Mr. Stewart posited that the party who challenged a will on the grounds of fraud or undue influence must prove the allegations and there was no onus on the propounder to disprove them. The cases of **Craig v Lamoureaux** [1920] AC 349 and **Boyse v Rossborough** (1857) 6 HLC 2 were relied on.

[47] Mr. Stewart, on the other hand, put forward that the claimants' evidence was incredulous, tenuous and unreliable as it concerned the deceased's mental state at the time the disputed will was executed. The evidence, he stated, had failed to establish that the testator lacked the required testamentary capacity.

[48] Mr. Stewart posited that the claimants' evidence had failed to reach the requisite threshold so as to raise some suspicion in the mind of the Court that the deceased was suffering from any medical condition that would deprive him of the mental capacity he needed to duly execute the disputed will.

[49] The evidence from Mr. Uter, one of the attesting witnesses to the will in dispute, contradicted the assertions of the claimants on this matter, Mr. Stewart

advanced. Mr. Uter's evidence was that the deceased signed the disputed will, understood what he was signing and fully appreciated the dispositions that he had made in the document.

[50] Mr. Stewart then pointed the Court to certain aspects of the claimants' evidence which supported his submission that their evidence was unreliable and ought to be rejected. The evidence of the 4th claimant, Mr. Dwight Davis, was that he was conducting business on behalf of his father prior to and during September 2008. He indicated that he was able to communicate with and take instructions from his father during this period. He also updated him on what he was doing. The question posed by Mr. Stewart regarding this aspect of the evidence was this: If the testator was incoherent, unable to speak and his mental state so severely impacted, as alleged, how then was the 4th claimant able to do communicate with him?

[51] Mr. Stewart submitted that the 1st claimant Mr. Errol Davis also told the Court in cross-examination that in and around September 2008 he called and spoke with the deceased several times. However, when pressed as to the nature of those conversations, the 1st claimant was unable to recall. It was further submitted by Mr. Stewart that if this evidence was accepted, it would tend to show that the deceased was not incoherent and his mental state was not affected by his illness.

[52] The evidence of Dr. Ward-Chin, Mr. Stewart said did not assist the claimants on this point because while she testified that a brain tumour could affect a person's mental capacity depending on its stage, she was unable to say at what stage the tumour had progressed to. She was also unable to say whether or not he was mentally incapacitated when he executed the disputed will.

[53] The upshot of Mr. Stewart's submission was that the claimants had failed to produce any cogent evidence from which the Court could find or infer that the deceased lacked testamentary capacity at the time of the execution of the

disputed will. The testimony of the 1st and 4th claimants, he put forward, showed just the contrary and supported that of the defendant and her witnesses on this issue.

[54] Mr. Stewart submitted that the deceased signed the disputed will of his own free will and was not coerced to do so by the defendant. The claimants, he said, have failed to provide any evidence which would tend to show otherwise.

[55] The evidence of the 1st, 3rd and 4th claimants on this issue, Mr. Stewart asserted, was also to be rejected. The 1st claimant, Mr. Errol Davis, could not recall when he was told by the deceased that he was being pressured by the defendant and was fearful of her. When pressed in cross-examination about a number of matters in his witness statement he could not recall important details.

[56] The 4th claimant was shown to be untruthful on this aspect of the evidence, Mr. Stewart submitted. The deceased, Mr. Stewart said, could not have told Mr. Dwight Davis that he was being pressured to change his will and that he was in fear of the defendant, as he averred in paragraph 5 of his witness statement dated August 05, 2013.

[57] This was because in cross-examination the 4th claimant indicated that his father could not have said this to him because he could not talk at that time. He was adamant and maintained during cross-examination that his father was unable to speak and so he could not have said those things to him.

[58] The 3rd claimant's evidence was equally to be rejected on this point, Mr. Stewart submitted. When she gave evidence, Mrs. Davis-Hickey told the Court that she had received complaints from the deceased that he was being pressured by the defendant to change his will and he had become fearful of her. She indicated that she had sent her concerns about this to Mr. Ernest Davis in an email. However, Mr. Stewart pointed out that nothing about this email was mentioned in her witness statement and it was not produced at trial.

[59] Mr. Stewart has asked the Court to reject the evidence of Mr. Ernest Davis that he was told by the deceased, on an occasion, the date of which he was unable to recall, that he was being pressured by the defendant to change his will and how he had become afraid of her. He said nothing of the sort happened. Mr. Stewart indicated that it was curious that the deceased had instructed Mr. Davis to keep and probate the first will, but he made no notes of that meeting or the instructions he was given.

[60] The evidence of Mr. Uter and Ms Allen, on the other hand, was supportive of and consistent with the position that at the time he signed the disputed will, the deceased did so of his own free will and without any coercion from the defendant, Mr. Stewart articulated.

[61] Finally, it was submitted by Mr. Stewart, that the deceased had in fact signed the disputed will and any differences in his signature on that document with his previous signatures had to do with the fact that he used his left or non-dominant hand to sign the document because he was unable to use his right hand to do so.

Issue one – Did the deceased possess the required testamentary capacity?

The Law

[62] I wish to state at the outset that I have considered all the authorities cited by both attorneys in this matter. The fact that I do not refer to or discuss a case that has been relied on does not mean that it was not considered. I wish to thank them both for their industry and assistance in this matter.

[63] The starting point in this case must be, in my view, the statutory provisions of the Act). Section 6 of the Act sets out the formalities that must be satisfied for a will to be duly executed. These include that it must be in writing, signed at the foot by the testator in the presence of two or more witnesses present at the same time who shall “attest and subscribe” the will in the presence of the testator.

[64] No issue has been taken that the disputed will does not conform with the requirements of the Act.

[65] The test tor testamentary capacity is found in the case of **Banks v Goodfellow** (supra) where it was stated by Cockburn CJ that:

> ***"...as to the testator's capacity he must in the language of the law have a sound and disposing mind and memory."***

[66] In **Moonan** (supra) less than 24 hours after the testator had undergone surgery, he executed a will disposing of all his real and personal estate to his nephew and brothers. He left nothing for his wife and child (who was a minor at the time). The testator's nephew and one of his brothers had been alone with him after the surgery and his brother returned with a solicitor who took the testator's instructions and prepared the will which was duly executed. The solicitor knew nothing of the testator's wife and child.

[67] The evidence of one of the doctors was that on the day following the operation (the day of the making of the will) the testator was dangerously ill and would have been so for some days after. The doctor testified that he would have been in a toxic condition and felt that he would not have been competent to make a will. Additionally, the doctor's evidence, which was accepted by the learned trial judge was that he had spoken with the testator on several occasions after the surgery, and he (the testator) had told him that for a few days after the operation he remembered nothing.

[68] It was held that firstly that the onus of proving testamentary capacity was on the propounders of the will; and secondly that the preparation and execution of the testator's will were attended by circumstances of suspicion which its propounders had failed to remove and the judge was right to refuse the probate of the will.

[69] Wooding CJ in **Moonan** referred to 39 Halsbury Laws (3rd Edition) at page 858 - 859 paragraph 1301 where it was stated:

> ***"...stricter proof of knowledge and approval is necessary where there was some weakness in the testator which, though not amounting to incapacity, renders him liable to be made the instrument of those around him, or when the will is at variance with known affection of the testator or was prepared on verbal instructions only or is at variance with previous declarations."***

Analysis and disposal

[70] The claimants contend that the circumstances under which the will was prepared and executed ought to excite the Court's suspicion and that the defendant has not dispel those suspicions.

[71] They have made this assertion because of a number of factors such as:

i. the deceased health profile at the time of the execution of the will;

ii. he was unable to speak and so he could not give instructions for the preparation of the disputed will;

iii. the will was not prepared by his attorney of long standing Mr. Ernest Davis;

iv. the disputed will made no provisions for his children in comparison to the first will which did;

v. the disputed will was prepared two months after the defendant and deceased were married; and

vi. neither Ms Allen nor Mr. Uter was in a position to attest to the mental capacity of the deceased since they had met with him only once or twice.

[72] The defendant on the other hand has advanced that the claimants have failed to raise the Court's suspicion and in any event, those suspicions would have been dispelled by the evidence given by the defendant and her witnesses. The Court's attention was directed to the "serious inconsistencies" which arose on the claimants' evidence and has been urged to reject their evidence as untruthful and unreliable.

[73] Having considered the authorities cited above I adopt the approach adumbrated by Wooding CJ in **Moonan** that once the issue of testamentary capacity is raised on the pleadings, the onus of proving that the deceased had the necessary capacity rests on the defendant. The Court is required to deal with this issue in one of three ways:

> ***"...either that the court is affirmatively satisfied that (the testator) was sound in mind, memory and understanding, or that the court is satisfied that he was not sound in any of these respects, or that the court is left in doubt, with the result that the issue has to be resolved against (the person seeking to propound the will)."***

[74] In the instant case, there is no medical evidence (unlike in **Moonan**) which tend to show that at the time the disputed will was prepared and executed the deceased did not have required testamentary capacity.

[75] The evidence of Dr. Ward-Chin was not helpful in this regard because she spoke to the period November 28 to December 12, 2008 (over two months after the disputed will was executed). She indicated that having a brain tumour may affect a person's mental capacity, however this was dependent on its stage. Dr. Ward-

Chin was not in a position to say exactly when the deceased was diagnosed with the brain tumour and at what stage the cancer had reached when he was hospitalized in late November 2008. Clearly, therefore, she was unable to speak to the deceased's mental capacity around the time or at the time of the making of the will (unlike the doctors who testified in **Moonan**).

[76] It is undisputed that the claimants did not know of the marriage of their father to the defendant. This marriage would have invalidated the first will. They also testified that they were not present when the will was being executed and so could not give say that the deceased did not sign it. What they are maintaining is that their father, because of his illness was not possessed of the mental capacity required in law to execute the disputed will and additionally, he was coerced by the defendant to do so.

[77] Mrs. Davis-Hickey's evidence was that the deceased could only mumble words when he returned to Jamaica in July 2008. Yet in another breath she told the Court how when she called him, he complained to her that he did not have any diapers, had not eaten, he was scared, wanted to die and expressed to her that everybody was against him and wanted to take everything from him.

[78] Mr. Errol Davis said that he called and spoke with his father during his illness but was unable to recall if they had any conversations during this period. His evidence was not that his father couldn't talk at all (like the 4th claimant said) but rather that he didn't speak well (I interpret this to mean he didn't speak as he did before he became ill).

[79] Mr. Dwight Davis said on one hand that the deceased could not talk when he became ill (presumably in May or July 2008). He testified in cross examination that his father could not have told him that the defendant was pressuring him to change his will and he was afraid of her because he could not speak. (This was what was stated in his witness statement dated August 05, 2013). However, he later said that his father had in fact told him those things. Then when pressed as

to which was true, that is, whether his father told him so or was it that his father was unable to speak, he said that what was true was that his father could not speak.

[80] Yet he also testified that he was conducting business on his father's behalf in September 2008 and they would communicate. He stated that his father, in September 2008, understood what he (Mr. Dwight Davis) was telling him and he appreciated what he was doing on his behalf.

[81] This evidence, no doubt, was put forward to show that the deceased was incapable of speaking and therefore could not have instructed Ms Allen to prepare the disputed evidence.

[82] However, the inconsistencies that I have noted, have caused me to question the claimants' veracity on this issue. In fact Mr. Dwight Davis' evidence tend to show, that the deceased was in his right mind in September 2008 and was able to communicate with other persons and was in a position to appreciate what was happening.

[83] The defendant stated that the reason Ms Allen was contacted to draft the disputed will was because Mr. Ernest Davis had been called several times by the deceased but he did not turn up. This is the explanation she gave which I have accepted, in light of the argument that took place between them in May 2008, which I also accept as being true.

[84] The defendant testified that she asked the deceased why he was not making any provisions for his children in the disputed will and he told her that he had provided for them during his lifetime. (This was stated in the disputed will).

[85] What struck me as curious, as well, was that the defendant and the deceased were married on July 14, 2008. No challenge has been mounted to this marriage. Wouldn't the deceased be required to be of sound mind and understanding when he got married? And wouldn't he need to speak to recite his vows? I find it

difficult to believe therefore, that from as far back as May 2008 he could not speak and his mental state was impaired.

[86] Ms Allen's evidence was that the deceased came to her office and gave her verbal instructions to draw up the disputed will. She said that he was slow in speech at the time. He was alone with her in her office at the time. The defendant was in the waiting area.

[87] Ms Allen stated that the deceased was able to give her the names of the persons he wanted to be included in his will and this was indicative to her that he was of sound memory. He gave her instructions about his children and she included this in the will (unlike in **Moonan** where the solicitor was not aware that the testator had a wife and child). That clause in the disputed will explained why his children would not benefit under the disputed will.

[88] Mr. Uter testified that he went to the house of the deceased. The other attesting witness Mr. Mills was also there. He (Mr. Uter) spoke with the deceased, who was slow of speech. Based on the conversation they had, he concluded that he was of sound mind and memory. He said he also read over the will to him before they signed it and the deceased nodded and indicated that he understood and agreed with what was being read to him.

[89] Having considered the demeanour of the witnesses as they gave evidence and having carefully considered what they said, I am prepared to accept the evidence of the defendant and her witnesses on this issue. They appeared to me to be much more forthcoming than the claimants were. I therefore find that at the time that the disputed will was executed by the deceased on September 16, 2008 he was of sound mind, memory and understanding.

Issue two – Did the deceased sign the disputed will?

The Law

[90] Section 6 of the Act states in part:

> ***No will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or some other person, in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and subscribe the will in presence of the testator,...”***

Analysis and disposal

[91] The claimants have alleged that the deceased did not sign the disputed will. They have all given evidence of their familiarity with the deceased’s signature (which the Court does not doubt) and articulated that the signature on the disputed will is different from his signature in other documents.

[92] The defendant’s evidence was that the deceased being unable to use his right hand (and all the parties are agreed that the right side of the deceased’s body was affected by his illness) he used his left hand to write his signature.

[93] The deceased, the claimants said, was so weakened by his illness that he could not hold a pen in his left hand and therefore could not have signed the disputed will. However, they also testified that they were not present at the time when it was signed and so were not able to say with any degree of certainty that he was not the person who signed it.

[94] Mr. Uter's evidence was that the deceased signed the disputed will at his home in his presence and that of the other attesting witness. He said that at the time this happened the defendant was not present. He said that the deceased signed the will very slowly and that it took him some time to do so.

[95] The law is quite clear. For a will to be valid, it must either be signed by the testator himself or someone else at his direction in his presence. I wish to say I have looked at the signature that appeared on the first will and compared it with the signature on the disputed will and it does not take an expert to see that the two signatures are quite different in appearance. Of course, the first will would have been signed by the testator when he was physically hale and hearty. In September 2008 his physical condition was not the same.

[96] The resolution of this issue will turn on the view I take of the defendant and her witnesses. The undisputed evidence, which I have accepted, is that the deceased was unable to use his dominant hand (his right hand) because his illness had affected the right side of his body.

[97] In the end, I have accepted Mr. Uter on this issue. Although he was not able to recall at the time he gave evidence, which hand was used by the deceased to sign the disputed will, I believe him when he said that he (the deceased) signed the will in his presence. I draw the reasonable inference that he must have used his left hand to do so. This would account for the dissimilarity of his signatures.

Issue three – Was the deceased coerced to sign the disputed will?

The Law

[98] It has long been settled that those who allege that a will was created under duress or undue influence must prove it. To succeed, the party making the allegation must show that the testator was not merely persuaded. It must be established that the testator was coerced. Where a will was created under undue influence it will be declared invalid. (See **Wingrove** (supra))

[99] In **Wharton** (supra) Norris J puts it this way:

> ***"...where the line between persuasion and coercion is to be drawn will in each case depend in part upon the physical and mental strength of the testator at the time when the instructions for the will are given. Was the testator then free to express his own wishes? Or was the testator in such a condition that he felt compelled to express the wishes of another?"***

[100] It was also decided in **Wharton** that in many cases the fact of undue influence cannot be proved by the direct evidence of witnesses but is an inference to be drawn from proven facts.

[101] In the case of **Cowderoy** (supra) it was stated by Morgan J that:

> ***"... the allegation of undue influence is a serious one, the evidence required must be sufficiently cogent to persuade the court that the explanation for what has occurred is that the testator's will has been overborne by coercion rather than there being some other explanation... The fact of undue influence is in truth a complex of facts involving the establishment (by proof or inference) of the opportunity to exercise influence, the actual exercise of influence in relation to the will, the demonstration that the influence was "undue" and that the will before the Court was brought about by these means."***

[102] In short, it must be shown (whether by direct or indirect evidence) that the testator was coerced into doing what he or she did not want to do. This can range from "confinement to violence, or a person in the last days or hours of life may 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 actually violent." (per Sir James Hannen in **Wingrove** (supra)).

Analysis and disposal

[103] The claimants have asserted that the deceased was coerced by the defendant to make the disputed will. They have put forward the following evidence as the reason for this contention:

i. the deceased was ill and weak at the time of the execution of the will and given his physical and mental condition was susceptible to being coerced by the defendant with whom he was living and dependent on for his care;

ii. the defendant had the opportunity to coerce him given the time that they spent together;

iii. the defendant had visited Mr. Ernest Davis' office (when this happened, he was not able to say) and had asked him about changing the first will;

iv. the deceased, prior to his death, had told Mr. Ernest Davis that he did not want to change his will and that he was being pressured by the defendant to do so. He (the deceased) also said that he had become fearful of the defendant:

v. the sudden marriage of the deceased and the defendant; and

vi. the material differences in both wills. In the first will the deceased had made provisions for the defendant, his children and employees.

However, in the disputed will, the defendant is the not only the executor but also the main beneficiary.

[104] In the first will the deceased had appointed his sister and another person as his executors and trustees. In the disputed will the defendant and Mr. Mills (who also is an attesting witness) are the executors.

[105] In the first will the deceased bequeathed sixty per cent (60%) of the shares in his company to the defendant, twenty-five per cent (25%) to his employees (who had ten (10) or more years of service) and fifteen per cent (15%) to his son Mr. Dwight Davis. He also gave sixty per cent (60%) of his interest in a property to the defendant, with twenty-five per cent (25%) of that property going to his employees (who had ten (10) or more years of service) and fifteen per cent (15%) to his son Mr. Dwight Davis.

[106] He left fifty per cent (50%) of his personal funds to the defendant while the remaining fifty per cent (50%) was to be shared equally between his four children. The residue of his estate fell to his four children in equal shares.

[107] Save and except for provisions being made for Ms Eileen Cynthia Davis who was to receive $741,000.00 and forty per cent (40%) share in his company (in order to satisfy a judgment debt) all of the deceased's real and personal properties were devised to the defendant in the disputed will.

[108] I wish to make a few observations. In the disputed will, the deceased's executors and trustees were directed to sell the stock-in-trade of his company so that Ms Davis could be paid $714,000.00 in order to satisfy a judgment debt that was owed by the deceased to her. This was the same company that was divided between the defendant, the employees (who had over 10 years service) and the 4th claimant in the first will.

[109] The defendant was directed in the disputed will to pay Ms Davis forty per cent (40%) share in a property that he had bequeathed to her in its entirety in the first will.

[110] What seems clear to me is that the testator intended to satisfy the judgment that had been entered against him. Therefore, at the time of the execution of the disputed will his ability to dispose of his estate freely as he once could had changed since he was, at that time, fettered by an order of the Court.

[111] I say all of this to make the point that although there are significant differences between the first and disputed will, this does not necessarily mean that the deceased was under duress from the defendant when he executed it.

[112] When I examined the evidence of the claimants there were some features that I found telling. Firstly, Mrs. Davis-Hickey did not visit Jamaica regularly. On one of her visits she saw her father at his workplace (she met the defendant there). She never attended his funeral. Mr Errol Davis' evidence from my standpoint tend to show that he did not see his father regularly or spend a lot of time with him. He came across as being very absorbed in his business. The evidence given by Mr. Dwight Davis that he spent fourteen hours every day with his father six to seven days per week seemed contrived.

[113] I formed the view that the relationship they shared with their father was not as close as they would have the Court believe especially closer to the end of his life. This was stated by the defendant and I am inclined to believe her. I got the distinct impression that they were not happy about the relationship the deceased shared with the defendant. They certainly did not approve of his marriage to her. These are some of the factors that may well have influenced the deceased to dispose of his estate in the manner that he did in the disputed will.

[114] I am of the view that the evidence that has been presented by the claimants on this issue has fallen woefully short of the standard required by law. I am unable to say that the deceased was in such a condition that he felt "compelled to

express the wishes" of the defendant in the disputed will and that his will was overcome as a result of her coercion.

[115] Mr. Ernest Davis could not recall the approximate date (month and year would have sufficed) when it was that the defendant purportedly came to his office to enquire about the changing of the first will. If this in fact occurred, and I am not saying that it did, it would have been useful to know when. I was not particularly impressed with his evidence on this point. There were times when his inability to recall came across as evasiveness.

[116] Mr. Errol Davis and Mrs. Davis-Hickey were also not able to say when it was that their father had spoken to them about being afraid and pressured by the defendant to change his will. Mr. Dwight Davis eventually testified that his father could not have said those things to him because he could not talk. Quite frankly, I felt that this aspect of the evidence was fabricated.

[117] In any event, any doubts or suspicions that I had about the testamentary capacity of the deceased and whether he was being unduly influenced by the defendant at the time that he executed the disputed will, those were swept away by the provisions that were made by him to satisfy the judgment debt to Ms Davis and the inadequacy of the evidence presented by the claimants on this issue.

[118] I am convinced on a balance of the probabilities that at the time of the creation and execution of the disputed will, the deceased was not unduly influenced by the defendant.

[119] I wish to indicate that there are two matters that have not gone unnoticed. Firstly, that the deceased had devised a significant portion of his estate to the defendant in the first will; even though at that time they were not married; and secondly in May 2008 the Power of Attorney she got from him effectively gave her control over all of his business affairs and finances. He had the perfect opportunity to give this authority to any one of his children but he chose not to do so.

[120] It is obvious to me that it was the deceased's intention that the defendant be adequately provided for after his death and it would appear that he reposed a significant amount of trust and confidence in her. The Court will honour his intention.

[121] In closing, I adopt the words of Lord Neuberger MR in the case of **Gill v Woodall and others** [2010] EWCA Civ 1430 which was relied on by the defendant. At paragraph 16 of that judgment the learned judge remarked:

> ***"...Wills frequently give rise to feelings of disappointment or worse on the part of relatives and other would-be beneficiaries. Human nature being what it is, such people will often be able to find evidence, or persuade themselves that evidence exists, which shows that the will did not, could not, or was unlikely to, represent the intention of the testatrix, or that the testatrix was in some way mentally affected so as to cast doubt on the will. If judges were too ready to accept such contentions, it would risk undermining what may be regarded as a fundamental principle of English law, namely that people should in general be free to leave their property as they choose, and it would run the danger of encouraging people to contest wills, which could result in many estates being diminished by substantial legal costs."***

Orders

1. Judgment is given for the Defendant.

2. It is hereby declared that the last will and testament of Henry Alphanso Davis, deceased, dated the 16th day of September, 2008 is valid.

3. The grant of probate made on the 13th day of March 2015 in the estate of Henry Alphanso Davis to the Defendant is allowed and stands.

4. Costs to the Defendant to be agreed or taxed.