[2019] JMSC Civ 23

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HCV 04116

IN THE ESTATE OF ALTAMONT DeLISSER BLOOMFIELD otherwise called ALTAMONT BLOOMFIELD and ALTIMONT DeLISSER BLOOMFIELD, late of 10 Mewton Close, Spanish Town in the parish of St. Catherine, Retired Businessman, deceased, Testate.

BETWEEN	**WINSTON BLOOMFIELD**	**CLAIMANT**
AND	**MARKIS SANDRA WEST** (Executrix of the Estate of Altamont DeLisser Bloomfield)	**1ST DEFENDANT**
AND	**THELMA AGATHA WILSON** (Executrix of the Estate of Altamont DeLisser Bloomfield)	**2ND DEFENDANT**

IN OPEN COURT

Mr. Lawrence L. Hayes for the Claimant

Ms. Stacey P. Knight and Miss Nieoker Junor instructed by Knight Junor & Samuels for the 1st and 2nd Defendants

Heard: 29th, 30th, 31st, October and 1st, and 6th November 2018

Judgement delivered: 25th February 2019

Probate - Will - Validity - Forgery- Undue influence - Whether Testator possessed testamentary capacity at the time of execution of Will - Whether signature on Will was that of the testator - Expert Evidence

BERTRAM LINTON, J

BACKGROUND AND INTRODUCTION

[1] Altamont DeLisser Bloomfield (herein after referred to as "the deceased") was a pastor and a retired business man who fell ill sometime in 2005 and later passed away on the 20th of April 2009 at his home in 10 Mewton Close, Spanish Town in the parish of St. Catherine. He was the father of the Claimant and the 1st and 2nd Defendants.

[2] He died leaving two Wills; one dated the 7th of September 2006 and the other dated the 9th of April 2009. The Defendants are the named executrixes of his estate under the Will dated the 9th of April 2009 and, in this capacity, made an application for a Grant of Probate to the Land Administration and Management Programme (LAMP) in or about 2010.

[3] The Claimant challenged this application on the basis of its validity and raises allegations of deception and fraud against the Defendants. He avers that the Will was not duly executed as the testator lacked the testamentary capacity and did not approve of its contents. He maintains that the Will of 2009 is fraudulent.

[4] By way of Claim Form dated the 16th of July, 2013, the Claimant sought the following orders:

1. An order that this Honourable Court pronounce against the force and validity of paper writing alleged to be the Last Will and Testament of Altamont DeLisser Bloomfield dated the 9th day of April, 2009 and declare the said Will null and void for the following reasons: -

    a) the Last Will and Testament was not duly executed.

    b) that at the time of the execution of the Will the testator: -

1. did not know or approve of its contents;

2. was not of sound mind, memory and understanding to execute a Will.

c) the execution of the Will was obtained by undue fraud and or influence and is a forgery.

He requests that the Court grants:

2. An order that the Executrixes in the aforesaid estate produce for inspection by the Claimant all testamentary documents in relation to the aforesaid estate that they have in their possession.

3. An order that the Executrixes of the aforesaid namely MARKIS SANDRA WEST and THELMA AGATHA WILSON be removed forthwith as executrixes of the aforesaid state.

4. An order that the Claimant be entitled to make an application for Grant of Probate of the Will photocopy attached marked A annexed hereto dated the 7th day of September 2006 as a true copy of the last Will and Testament of Altamont DeLisser Bloomfield in which the Claimant is a named beneficiary.

5. That there be liberty to apply.

6. That costs of this action be borne by the Defendants or in the alternative, there be provisions for the costs of this action out of the estate of the said deceased.

7. Such further and other relief as this Honourable Court deems just.

CLAIMANT'S CASE

[5] The Claimant's position is that the deceased, made a Will on the 7th day of September 2006 whereby he was a named beneficiary and an executor along with one Mr. John Skyers. This Will he purports, devised all of the deceased estate to his wife and children.

[6] The Claimant relied on evidence from three (3) witnesses. These were Errol Bloomfield, Hector Cummings and the Claimant himself. He also relied on the expert report of Sergeant George Dixon.

[7] The Claimant states that he inhabited the home of the deceased since 2002 and was in control of the deceased's business affairs and catered to the needs of both the deceased and his wife who was also in poor health.

[8] Subsequent to the deceased becoming gravely ill, he had to be discharged from the hospital as his physical condition became unfavourable and they were unable to operate on him. The Claimant asserts that on removal from the hospital, the deceased was unable to walk, could hardly talk and when he spoke, it was incoherent and severely emaciated.

[9] He alleges that at the time of death, the condition of the deceased did not improve and he could not help himself and he had to be clothed and fed by the Claimant himself, his brother or their helper. He argued that the deceased was so sick he was unable to identify the Claimant, the helper, or any other person with any level of clarity and consistency.

[10] Hector Cummings (the neighbour of the deceased since 1976) substantiated this point when he avowed to visiting the deceased in the hospital and noticing that he was unaware of what was happening, could hardly recognize him and could hardly speak. He states that the deceased was skeletal in appearance due to all the weight he lost. He was now unable to move unaided, his hands shook violently, and he could not hold anything.

[11] The Claimant says that it was not until the death of the deceased that he was made aware of a second Will. He became suspicious of this Will when he noticed it had excluded benefit to the wife of the deceased with whom he had lived for more than 50 years. Under cross-examination, the Claimant said he noticed that the signature of the deceased was different for the reason that the deceased would not normally write out his middle name but just his middle initial.

[12] The Claimant's position is that the deceased did not leave the house in March to April 2009 nor was he visited by anyone in relation to the purported Will. He states also that he was under the impression that the deceased was not in a position to instruct anyone on any legal matters, as his condition was constant. In addition, he was unable to climb the stairs to access the law firm of his Attorney-at-Law, Mrs Lilieth Lambie-Thomas. The Claimant stated also that he had difficulty locating the alleged witnesses to the purported Last Will and Testament of the deceased.

1ST AND 2ND DEFENDANTS CASE

[13] The 1st and 2nd Defendants states that the Will dated the 7th of September 2006 was not the Last Will and Testament of the deceased but that the deceased died leaving his Will dated the 9th of April 2009 in which the Defendants are named executrixes and trustees.

[14] There were five (5) major witness statements provided in support of the Defendants case.

[15] The 2nd Defendant asserts that the Claimant did not move into 10 Mewton Close in 2002 as he alleged but sometimes in 2006. The Defendants deny that the Claimant had responsibility for the care of the deceased and his wife and admits that he had little to no dealings with them as he was very disrespectful and treated them with scant regard. The Defendants allege that the Claimant was abusive to the deceased and other members of the family. Albeit the Claimant lived in the same premises, he was not an active participant in their lives and had stopped talking to the deceased a year prior to his death.

[16] The Defendants' position is that although the deceased was ailing, he was in full control of his faculties and fully capable of handling his affairs. The argument is that the Claimant spent the majority of his time outside the household and is unable to speak to the daily activities of the deceased inclusive of whether he made a Will prior to that of the 7th of September 2006.

[17] They relied on the report of Dr Clyde Sirju who stated that the speech of the deceased was fluent and he spoke with appropriateness and rationality. Dr Sirju submitted that there was no evidence to suggest the intellect of the deceased was insufficient for judgement and decision making. Dr Clyde Sirju stated that the nature of the illness was cardio and no complaints were made by the deceased relating to his central nervous system. He never complained of confusion, disorientation or memory loss and the physical examinations did not support such a claim.

[18] The Will they posit, was executed in accordance with the relevant provisions of the Wills Act in March 2009 by his attorney at the time Mrs Lilieth Lambie-Thomas. It was taken to LAMP for a Grant of Probate with the full corporation of all the beneficiaries including the Claimant who signed off to the contents of the relevant documents inclusive of a transfer from the executrixes (Markis West and Thelma Wilson) to the beneficiaries (Markis West, Thelma Wilson, Errol Bloomfield and Winston Bloomfield). Under cross-examination, the Claimant admitted to this but contends he only signed the document to avoid a squabble.

[19] The 2nd Defendant states that she sent money to take care of her parents and her sister (the 1st Defendant). Nigel (their other brother) also contributed but he stopped in 2002. The deceased would often complain to the 2nd Defendant that the Claimant would treat him badly. He showed no love or respect and would not talk to him and did not help around the house. The 2nd Defendant states that even through the days when the deceased was confined to bed he was still able to do things by himself and run errands. He was not forgetful and was able to handle his affairs.

CLAIMANT'S SUBMISSIONS

[20] The crux of the Claimant's submission is that the Will presented to the Supreme Court is a forgery. To this end, they sought to outline the evidence of the expert witness Detective Sergeant George Dixon.

[21] Learned Counsel submitted that the expert had an opportunity to examine the original Will and concluded that that the known signatures and handwriting on the Last Will and Testament provided are not genuine and that it is a forged Will. He outlined that:

4. The purported Will bears two (2) signatures and based on the fact that it purports to have been signed on the same day, reflects several inconsistencies to each other.

5. Having placed the document under what he described as a VSC 40 the ink illumination reflects that the author who purportedly signed the document was not the author of the document dated 9th April, 2009.

6. The author of the date uses the same ink as witnesses of the Will.

7. The purported author of the signature and the authors as witnesses handwriting disappear separately under ink testing, which can be that the witness and the author were not in the same place or they signed on different occasions."

[22] It is counsel's position that the conclusion of the expert highlighted doubts in the testimony of the sole witness called by the Defence to establish due attestation. Reference was made to the requirement of section 6 of the Wills Act and the fact that the Will "shall be signed at the foot or end thereof by the Testator and such signature shall be made or acknowledged by the Testator in the presence of two (2) or more witnesses PRESENT AT THE SAME TIME; and such witnesses shall attest and subscribe the Will IN THE PRESENCE OF THE TESTATOR……"

[23] Counsel for the Claimant advanced that the witnesses could not have signed the Will at the same time as the testator so the witness Lavern Sinclair must be lying and if the Court so finds then due attestation has not been established. Counsel also stated that another fatal finding is that the two (2) signatures on the Will purporting to be that of the Testator reflects differences to each other. This they say have been left unanswered by the Defence.

[24] The submission is that the evidence led by Claimant came from the two persons who took the deceased to the hospital. Their evidence was that he was not in the state of health to leave to Mrs. Lambie-Thomas' office nor to climb the stairs on his own and to sign his name on the Will of the 9th of April 2009. The argument is that none of the witnesses for the Defence could speak to the actual execution of the Will save and except Lavern Sinclair.

[25] Referencing the case of **Re B (A Minor Split Hearings: Jurisdiction) [2000] 1 WLR 790** the point made was that the general rule is that a judge should refuse to accept the lay evidence in preference to the uncontradicted evidence of an expert. Counsel however pointed to the fact that the Judge is not obliged to accept expert evidence if there are sufficient grounds for rejecting it such as where it does not speak to a relevant issue (**R v Lanfear [1968] 2 Q B 77**) or where the Judge does not believe the expert or is otherwise unconvinced by the expert's witness. (**DOVER DISTRICT COUNCIL v SHERRED (1997) THE TIMES, in February 1997**). The submission as a result is that the expert is very convincing and no rebuttal has been forthcoming to Sergeant Dixion's opinion.

[26] It was submitted that suspicious circumstances arise in relation to the execution of the Will from the very document itself and the fact that the Testator signed in two places; on the first page at the bottom and on the second page at the bottom. He does not sign at the place provided in the Will for him to sign; the witnesses signed at the place provided for the witnesses to sign but the Testator did not. No explanation was advanced for this and technically neither of the two signatures of the Testator was "witnessed".

[27] Reliance was placed on **Pre Tretram and Coote's Probate Practise (29th Edition) Paragraph 3.151- (Citing as authority Sarat Kumari Bebi v Sakhi Chand (1928) LR 56 Ind. App 62 PC) and Re Hines Goods [1893] P 282** where it was stated that "where a Will is propounded which raises the suspicion of the court that it does not express the mind of the Testator, the onus is on those who propound it to remove the suspicion."

[28] On this point counsel sought to outline the inconsistencies in the statement of Miss Sinclair when she first stated that the Testator signed at a place on the Will indicated for him to sign and that was not so. She changed this argument and conceded that he did not in fact sign at the places indicated and she said that she said nothing to him about that.

[29] A further observation was made in relation to her description of her occupation as a hairdresser on the Will and in Court she gave evidence to being a delivery agent or dispatcher for over a year from 2008-2009. This they submit is a case where she is always on the street and was visiting the Testator by chance on the 9th of April 2009.

[30] In conclusion, the Claimant's counsel submitted that the Will has been proven to be a forgery through the expert evidence which was not rebutted. They submitted that the evidence of Ms Sinclair does not suffice for a rebuttal. Her evidence it that the Will itself raises suspicion and is uncorroborated despite the fact that she claims that another witness (Janet) was present. The closing argument for the Claimant is that the Will should be declared a forgery and the probate obtained therein should be set aside as it was wrongly obtained.

DEFENDANTS SUBMISSION

[31] Counsel for the Defendants on the other hand prefaced her submissions by stating that the law is settled that a testator can only have one Will where the latter will revoke the earlier given it was made in accordance with the requirements of a valid Will.

[32] Reliance was placed on the case of **Banks v Goodfellow (1870) LR 5 QB** where it is argued that the testator must have “sound mind, memory and understanding”. The burden of proof they averred is on the person who contests the Will to prove the lack of capacity as according to **Dew v Clark 162 E.R. 410**. In **Parker v Felgate (1883) 8 PD 171** it was stated that even where the testator lacks the capacity at the time of execution, the Will is still valid if he has the capacity at the time he gave the instructions for the preparation of the Will. This being on the premise that (1) the Will was prepared in

accordance with the testator's instructions and (2) at execution, the testator understood that he was executing his Will for which he had given instructions.

[33] Counsel tackled the issues raised by the testator's signature by referencing Section 6 of the Wills Act which posits that the position of the signature does not invalidate the Will save and except in certain circumstances.

[34] On the topic of Undue Influence, the counsel for the Defendants submitted that there has to be some form of coercion and states that it must not be a case in which a person had been induced by someone to conclude that he or she will make a Will in a particular person's favour. If the testator has been persuaded by considerations which one person may disapprove of, yet it is strictly legitimate in a legal sense. The case of **Wingrove v Wingrove (1885),11 P.D. 81** was used to authenticate this point. Counsel went on to state further that there could be no presumption of undue influence, as it has to be actual. The burden of proving the same rests on the shoulders of the Claimant.

[35] Suspicious circumstances do not impose a higher standard of proof on the propounder of the Will than the civil standard of proof on a balance of probabilities. The propounder of the Will as a result only needs to prove knowledge and approval of testamentary capacity to the usual standard. The burden they submit with respect to fraud and undue influence remains with those attacking the Will.

[36] Where fraud is concerned, the definition offered is that the fraud involves misleading the testator. The requirement is that the person who claims fraud should give the particulars. The argument is that even though there may be (i) suspicious circumstances; (ii) a suspicion of dishonesty; and (iii)a person benefitting under a Will who was instructed in its preparation, to pursue a claim for fraud, there is a higher degree of proof required than usual in civil cases.

[37] The submission is that through the evidence of Lavern Sinclair the testator had asked her to witness his Will. Counsel argued that he was being his usual self and these visits were routine.

[38] For the issue of forgery, counsel for the Defendants argued that forgery was a technique of fraud and involves the act of making a false document knowing to be false. She asserts that the Claimant at no point indicated who is guilty of the forgery at no point in his witness statement or testimonies.

ISSUES

[39] The issues for consideration are:

a) Whether the deceased possessed the testamentary capacity at the time the Will dated April 9, 2009 was being made.

b) Whether the deceased signed the Will dated April 9, 2009.

   i. If yes was the deceased compelled into signing the Will?

   ii. If no, was the signature of the deceased forged?

c) Whether the Will dated, April 9, 2009 as a result can be considered to be duly executed.

d) Whether the Will dated September 7, 2006 is now revoked by the Will dated April 9, 2009?

LAW AND ANALYSIS

[40] I had an opportunity to not only listen to the witnesses and their accounts but to observe their demeanour.

Whether the deceased possessed the testamentary capacity at the time the Will dated April 9, 2009 was being made.

[41] In order for a Will to be valid, the testator has to have the '*animus testandi'* or the testamentary capacity. The test of testamentary capacity was laid down by Cockburn C.J. in **Banks v Goodfellow (**supra) where he asserted that:

> *"It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing ; shall be able to comprehend and appreciate the claim to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties- that no insane delusions shall influence his will in disposing of his property and bring about a disposal of which, if the mind had been sound, would not have been made."*

[42] According to Parry and Kerridge in the **Law of Succession**, 12th Edition at page 65, the test requires that the testator is to understand three matters:

a) the effects of his wishes being carried out at his death, although he need not understand their precise legal effects;

b) the extent of the property of which he is disposing, although he is not required to carry in his mind a detailed inventory of it; and

c) the nature of claims on him.

[43] Concerning time, it is the established law that the testator must, at the time of the execution of the Will have the testamentary capacity. As stated in **Parker v Felgate** (supra) the principle is that the Will is still valid if the testator had the testamentary capacity when he gave instructions for the preparation of the Will provided that it was prepared according to his instructions and at the time of execution he understood that he was executing a Will for which he gave instructions.

[44] In **Parker v Felgate** the testatrix was seriously ill, but had the capacity when instructing her solicitor to prepare a Will in which she disposed of most of her estate to a children's hospital, as opposed to her relatives. The Will was prepared in keeping with these instructions, but the testatrix fell into a partial coma from which she was periodically roused. On one such occasion, the doctor produced the Will, saying: "This is your Will". The Will was then signed on her behalf with her consent.

[45] The court found that the testatrix neither recalled the specific instructions she had given the solicitor nor would have been able to understand the different clauses of the Will. Despite this, the Will was upheld on the basis that at the time of execution, she was

capable of understanding, and did understand that she was executing a Will, which she had instructed to be prepared.

[46] The burden of proving that the testator had the requisite testamentary capacity according to **Barry v Butlin (1838) 2 Moo PCC 480** rests on the propounder of the Will who 'must satisfy the conscience of the court that the instrument so propounded is the last Will of a free and capable testator.'

[47] On the evidence before the Court, I find that the propounders of the Will are in fact the 1st and 2nd Defendants.

[48] The evidence from the Claimant through his brother Errol Bloomfield is that the deceased was gravely ill to the point where he could not walk, he could hardly talk and when he spoke it was incoherent and he was severely emaciated. When asked under cross-examination however what the words 'incoherent' and 'emaciated' meant he reacted by stating that he did not know the meaning and had never heard these words before. Contradictory to his witness statement, he indicated that he would visit the deceased at his home every day or every other day and would sit and talk with him for two to three hours during the same period.

[49] Hector Cummings proclaimed that upon visiting the deceased in the hospital, he noticed that he was unaware of what was happening, could hardly speak and had trouble recognising anyone. It must be borne in mind however that the responses given by Mr Cummings were in a state of disorder and he gave explanations rather than direct answers to the questions being asked. He explicitly stated also that he was never a friend of the deceased but a friend of the Claimant. He had only visited the deceased at his home once when he made the statement that he was unable to recognize him. His visit to the hospital was also not a scheduled visit but a mere glimpse at the deceased as he went there to visit someone else and saw the Claimant who told him his father was ill.

[50] Under cross-examination, the Claimant in combating the witness statement of the 2nd Defendant stated that the condition of the deceased deteriorated rapidly as he eventually became senile. The Claimant stated that Dr Sirju did not 'literally' tell him that

the deceased had mental problems but he was able to say he did based on being around the deceased every day.

[51] The evidence from the Defendants however, through the medical report of Dr Clyde Sirju was that he examined the deceased from July 2006 to March 2009, the last visit being on the 5th of March 2009 a month before the contested Will was executed. He reveals that in 2009, he diagnosed and treated the deceased for Cervical Spondylosis and averred that the deceased gave no complaints related to the central nervous system at any of his visits. He spoke to the fact that there were no historical complaints of confusion, disorientation or memory loss and the physical examination of the deceased did not support such. He divulges that the deceased was fluent in his speech, he answered questions rationally and appropriately and his conversations were reasoned and pertinent to the subject at hand. There was no formal mental status examination done, as there was no indication for such based on his presenting complaints. He asserted that there was no evidence overtly to suggest that his intellect was insufficient for judgement or decision-making.

[52] The deceased's attorney of long standing, Mrs Lilieth Lambie-Thomas also gave evidence that at the time the deceased approached her in April, he appeared to have known and approved the contents of the Will. She gave evidence that he gave clear instructions for the preparation of his Will and was able to identify his properties by address and description and could also state the full names of all the beneficiaries. Under cross-examination she maintained that he was healthy and strong and in his right mind.

[53] The testimony of Gloria Golding, who was the helper at the time, is that the deceased would still do his farming in the yard and went out on the road to Spanish Town every other Monday to do business. She stated that for all the time she knew the deceased, he was in his right mind and the last two days before he died, he went to Spanish Town to conduct business. She communicated also that he was active all the time and had sensible conversations all along until he died.

[54] Lavern Sinclair, the attesting witness to the contested Will stated that the deceased appeared to be in his right mind at the time he asked her to sign the Will. She stated that when she visited the deceased at his home he was in total control of his mind and understood fully what he was doing as they would engage in conversations about life and about his sickness.

[55] Of the two accounts, I find the evidence of the Defendants and their witnesses to be more compelling and credible. The evidence from the Defendants was invariable for the most part. In contrast, the Claimant had relied on two major witnesses to prove its case one of whom regurgitated the Claimant's witness statement filed on the 16th of October 2015. The evidence of Errol Bloomfield bears a grave similarity to that of his brother Winston Bloomfield. I am well aware that this goes to the consistency in the statements but it raises questions as to whether the witness is stating his accounts of the facts or that of the Claimant. Given also that Errol Bloomfield under cross-examination said he sat and talked to his father regularly after admitting to never hearing and not knowing the meaning of the words 'incoherent' and 'emaciated', it is reasonable to deduce that the mental state of the deceased is exaggerated and he was basing his evidence off that of his brother, the Claimant.

[56] The evidence from Hector Cummings is also not very reliable as he led evidence to the effect that he was never around the deceased for an extended period to provide an assessment of his mental state.

[57] It is uncontested that the deceased was ailing shortly before his death. The evidence however points to the fact that the deceased had the mental and legal capacity at the time he gave his instructions to make the Will. I am convinced from the evidence that the deceased was aware of the consequence of his conduct, as he possessed a sound mind and memory. From the evidence of Mrs Thomas, the deceased was able to describe his properties by address and description and could also state the full names of all the beneficiaries (a clear indication that he would have furthermore satisfied the test as laid down in **Parker v Felgates**).

[58] I find also the medical evidence to be very valuable and a clear indication that the deceased may not be in as bad a shape as described by the Claimant and his witnesses. The Claimant's evidence is unsatisfactory as it failed to raise suspicions that the deceased was mentally incompetent to execute the Will.

[59] I am persuaded as a result, that the Defendants have effectively discharged their burden and conclude on this issue that the deceased in deed possessed the testamentary capacity at the time he made the Will dated April 9, 2009.

Whether the deceased signed the Will dated April 9, 2009.

[60] Section 6 of the Wills Act states in part that:

> "*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 by 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, but no form of attestation shall be necessary."*

[61] The argument posited by the Claimant is that the deceased did not sign the Will. He contends that the signature is inconsistent with that of the deceased and was not attached to the alleged Will by the deceased or by his directions and is a forgery. In his evidence, he stated that he became suspicious of the Will as the deceased would not normally write out his middle name but just his middle initial whenever he signed.

[62] The Claimant also averred that the deceased was so frail that his body shook violently and he was unable to hold anything in his hands. He was unable to assist himself and required special attention. The Claimant stated that he was responsible for the maintenance and care of the deceased and his wife who was also ill. Under cross-examination, he however avowed to having helpers right around the clock who cared for his father's needs. He asserted also that he had never seen the deceased leave the house nor was he visited by anyone in relation to the purported Will. Contradictorily, he admitted that he worked between the hours of 8:00AM to 5:00PM and was not able to speak to

who came to the house. He admitted also to the deceased being visited by church people in 2009 who would visit and pray for him.

[63] The Claimant relied on the expertise of George Dixon who affirmed via report dated September 10, 2018, that the Will dated April 9, 2009 did not appear to be signed by the deceased. He compared the signature of the deceased to that of the signature on his driver's licence and his four mortgages. He stated conclusively that the signature on the Will dated September 7, 2006 was that of the deceased. He averred that the Will in question reflected tremor and appears to be slowly executed and reflects tracing.

[64] The evidence arising from cross-examination however was that he did not have the original Will in his possession when he made these observations. His stories as to where the original Will was located were disjointed. He stated on the stand at first that he was told that the Will was at LAMP to be probated then later that the Will was with the Defendants.

[65] The Defendants on the other hand through the evidence of Ms Lavern Sinclair stated that the deceased had asked her to witness the Will. Her evidence is that she witnessed the deceased executing the said Will on the 9th of April 2009 by signing his name at the foot of the Will intending it to be his final signature. She gave evidence that she had known the deceased for over 10 years through his son and had visited the deceased at his home when he asked her to sign as a witness. She attested that the Will was signed in his own handwriting and thereafter signed by herself and Yvonne Ranger. When asked why the deceased did not sign on the line provided, she asserted that she had noticed the error but did not bring it to his attention.

[66] Yvonne Ranger substantiated this position by stating that the deceased had signed his name at the foot of the Will in her presence and that of Lavern Sinclair. She maintains that she was at the home of the deceased when she was asked by him to witness the Will. She asserts also that she too signed the Will as his witness in his presence and the presence of Lavern Sinclair.

[67] I find that even though the Claimant claims to have known the deceased to write out his first name, middle initial and last name when he signed he had not led evidence to show the Court how often he had seen the signature of the deceased or even if he had observed the deceased while he signed a document.

[68] Albeit that I am guided by the findings of Sergeant Dixon, I am not obliged to accept his findings and conclusion. In the case of **Clarke v Beckford et al JM 1993 CA 33**, it was posited that the report of the expert may be rejected with good reason.

> *"The peril facing expert evidence is that, like any other evidence tendered, it may for good reason, be rejected. The trial [sic] judge had the benefit of listening to and observing this witness testify as he compared the disputed signature with the accredited signatures of the testatrix. Further, he had the benefit of addresses from counsel for both parties who examined his evidence in great detail and then he demonstrated in his judgment his assessment of the evidence before concluding that he preferred the real evidence to the comparison evidence."*

[69] I have thoroughly compared the signatures on both Wills and would like to note that they appear to be very similar to me even though there are differences visible to the untrained eye. There are a few changes in the formation of some of the letters which I believe factors such as the age and illness of the deceased would account for. I am inclined to disagree with the evidence of the expert and determine that the deceased did in fact sign the Will. The evidence of the expert is that he had copied the documents and returned them. I am not aware that an exhaustive examination can be made from a photocopied document. The expert stated under cross-examination that he was unaware of the fact that a person's handwriting changed during their lifetime. When asked if he was aware that an elderly persons handwriting deteriorates he states that it varies but does not change. His evidence is that he was unaware of the age and the particulars of the deceased. It is noted that your handwriting is a physical illustration of your personality and the first would have looked healthy but as the physical condition of the deceased deteriorated I believe so too would his hand writing. The signatures were made years apart. In 2006, the testator would have had a steadier hand compared to 2009 closer to his death.

[70] On this issue I find therefore that the deceased did in fact sign the Will.

[71] It is paramount that a testator exercises some level of independence when he makes a Will. The key factor in proving a case of undue influence is that pressure is exerted on the testator to such a degree that he is not acting as a free agent. As observed by **Sir J.P. Wild** in **Hall v Hall (1868) LR 1 P & D 481:**

> *"… pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made …".*

[72] Having analyzed the evidence and noticed the demeanour of Mrs Thomas (the attorney of the deceased), I find that there was no pressure exerted on the testator which would warrant the Will being invalidated. From the evidence, there was no use of force that could be said to have overpowered the mind of the deceased. I am of the opinion therefore that the deceased disposed of his property independently. I find no undue influence.

[73] In **Allen v M'Pherson 9 ER 727,** the testator was aged and frail when he gave substantial gifts to the appellant in his Will. He then executed a codicil consisting of a considerably smaller gift to the appellant. There was evidence that the difference in benefit was due to false representation to the testator of the appellant's character. It was held to be a clear case of fraud.

[74] I find no fraud by the Defendants on the facts of this case.

Whether the Will dated, April 9, 2009 as a result can be considered to be duly executed.

[75] For a Will to be considered valid it must satisfy the provisions of Section 6 of the Wills Act which posits that:

> *"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 by 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, but no form of attestation shall be necessary .Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within this Act, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent, on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will, and no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will; or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature; or by the circumstance that the signature shall be placed among the words of the testimonium clause, or of the clause of attestation, or shall follow, or be after, or under the clause of attestation, either with or without a blank space intervening, or shall follow, or be after or under or beside the names, or one of the names, of the subscribing witnesses; or by the circumstance that the signature shall be on a side, or page, or other portion of the paper or papers containing the will .whereupon no clause or paragraph, or disposing part of the will shall be written above the signature; or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under this Act shall be operative to give effect to any disposition or direction which is underneath, or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made."

[76] The quintessence of Section 6 is that the Will is not valid unless it is writing, it is signed at the foot or end by the testator or by someone in the presence of the testator and by his direction and such signature to be made or acknowledged in the presence of two or more witnesses present at the same time and such witnesses shall attest and subscribe the Will in the presence of the testator.

[77] When the requirements of section 6 are measured against the Will in question, it appears from the discussions above that the deceased had executed what is accepted by the Courts as a valid Will.

Whether the Will dated September 7, 2006 is now revoked by the Will dated April 9, 2009.

[78] In the Privy Council case of **Douglas- Menzie v Umphelby [1908] A.C. 224,233** the position is that there can only be one Will.

> *"It is the aggregate or the net results that constitute his will, or, in other words, the expression of the testamentary wishes. The law, on a man's death, find out what are the instruments which express his last will. If some extant writing be revoked, or is inconsistent with a later testamentary writing, it is discarded. But all that survive this scrutiny from part of the ultimate will or effective expression of his wishes about his estate. In this sense it is inaccurate to speak of a man leaving two wills; he does leave, and can leave, but one will."*

[79] I note however that this case spoke to the disposition of the testator's estate in two separate locations and the Privy Council accordingly construed it as one Will which is the net result of every valid expression of the testator's intentions during his lifetime.

[80] Notwithstanding the noticeable differences in the circumstances under which the decision in **Umphelby** was arrived at and the circumstances in the current case, the Wills Act at section 15 explicitly states that a Will may be revoked by another duly executed Will or codicil in writing:

> *15. No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.*

[81] The onus probandi (onus of proof) lies on the person who alleges revocation. I am of the opinion that through the witness statement of Mrs. Lelith Lambie-Thomas the Defendants have discharged this onus by proving that a second Will of April 9, 2009 was in fact the Last Will and Testament of the deceased. The rule of implied revocation usually applies when there is no revocation clause in the second Will and in the case of **Birks v Birks (1865) 164 ER 1423**, the general rule is that the later Will revokes the former Will to the extent of the inconsistencies.

[82] The evidence of Attorney-at-Law, Mrs. Lelith Lambie-Thomas, was that in 2006 the deceased instructed her in preparation of a Will which he signed in her office. Later in March of the year 2009, the deceased attended her office again by himself requesting that his Will be changed. She prepared the draft Will in accordance with the instruction of

the deceased who was unable to return to her office to sign the same but he sent someone to collect it. The Will was executed by the deceased and the original was delivered to her office for safe keeping. Mrs Thomas attested to the fact that the deceased knew and approved the contents of the Will on his own freewill without fraud or undue influence.

[83] Based on the foregoing, I reject the evidence of the Claimant and his witnesses that the Will is a forgery and find that the Will dated April 9, 2009 was duly executed.

[84] It is therefore ordered that:

1. That the Last Will and Testament of the deceased, ALTAMONT DeLISSER BLOOMFIELD otherwise called ALTAMONT BLOOMFIELD and ALTIMONT DeLISSER BLOOMFIELD, dated the 9th of April 2009 is hereby declared a valid Will which was signed by the deceased and is not a forgery.

2. That the deceased ALTAMONT DeLISSER BLOOMFIELD otherwise called ALTAMONT BLOOMFIELD and ALTIMONT DeLISSER BLOOMFIELD, died testate and his estate is to be distributed in accordance with his Will dated April 9, 2009.

3. Cost to the Defendants to be agreed if not taxed.