



[2022] JMSC Civ 145

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2015P00436**

<b>BETWEEN</b>	<b>LOUISE GRAHAM</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>ANGELLA GRAHAM</b>	<b>DEFENDANT</b>

**IN OPEN COURT**

**Validity of a Will – Whether the testator was unduly influenced to execute his final Will – Whether the testator requested the requisite testamentary capacity at time he prepared his Will**

**Tamara Francis Riley-Dunn and Karlene McFarlane Richards instructed by Nelson Brown Guy and Francis for the Claimant**

**Gail English instructed by Gilroy English & Co for the Defendant**

**Heard on May 30 and 31, 2022 and July 26, 2022**

**PALMER, J**

### **Background**

[1] The Claimant, Louise Graham (now Louise Proctor), is the daughter of the deceased, James Graham. The Defendant, Angella Graham, is his widow. Mr. Graham died testate on or about November 15, 2014, and prepared three Wills between December 2013 and March 2014. The first two Wills, in December 2013 and February 2014, were prepared by Karene Stanley-Jones, Attorney-at-Law, and are substantially the same in substance, save that in the February 2014 Will, Mrs. Graham was removed as one of the executors, and her daughter Diane

Forrester was removed as a beneficiary. The March 2014 Will is a significant departure from the prior two in that the entire estate is left to Mrs. Graham, save for a devise of One Million Dollars to Mrs. Proctor.

[2] The Claimant challenges the validity of the March 2014 Will primarily on the ground that she says it was obtained by undue influence on the part of Mrs. Graham over the will of Mr. Graham. In her Fixed Date Claim form she sought orders as follows:

- (i) *A decree pronouncing against the validity of the disputed Will of James Graham dated March 19, 2014, as the procurement of same was by undue influence;*
- (ii) *A decree pronouncing for the validity of the Will of James Graham dated February 19, 2014, as the sole and valid Last Will and Testament of the deceased.*

*Orders that:*

- (iii) *The Claimant is granted permission to apply for a Grant of Probate in the deceased's estate pursuant to the February 19, 2014 Will in her sole name.*
- (iv) *The Defendant is to account for sums from the deceased's estate that she has put to her own use including sums held in the [RBC Bank account].*
- (v) *The estate is to be refunded with the sums withdrawn from the testator's bank account by the Defendant in particular the [RBC Bank account].*
- (vi) *The Defendant releases documentation relating to the circumstances as to the death of the deceased.*

The Defendant rejects the allegation of exerting undue influence over her husband in the preparation of the March 2014 Will and counterclaims as follows:

- (i) *That the Court shall pronounce against the force and validity of the Will dated February 19, 2014 on the ground that it revoked all the contents of any prior Will.*
- (ii) *That the Court shall pronounce the Will dated March 19, 2014 to be the deceased's Last Will and Testament and the Defendant may proceed in her application to obtain a Grant of Probate thereof.*

### **Claimant's case**

[3] Louise Proctor's in her witness statement, the contents of which, save for redactions, stood as her evidence in chief, stated that her father was an engineer working in England up until his retirement at about sixty years old. She described him as financially stable but vulnerable to exploitation of his loving and kind nature;

she seems to imply that Mrs Graham is one such person. Mr. Graham met the future, Mrs. Graham, at his sister's home in Jamaica, where she worked as a helper, and with the significant age difference (Mr. Graham being sixty and his future wife being twenty-two with a young child), Mrs. Proctor's suspicion seems to have been even further fuelled. It did not help that the two were married in England six months after meeting.

- [4] Shortly after their nuptials, Mrs. Graham returned to Jamaica, and eventually, Mr. Graham sold his home in England and joined her. Mrs. Proctor said that her father fell ill in 2009 and had surgery to amputate one of his legs, below the knee. In 2013 she stated that her father informed her of Mrs. Graham's ill-treatment of him, including leaving their bedroom to another room and leaving him alone for days at a time. She claimed that her father wanted Mrs. Graham to leave his house and pay someone to be his caregiver but didn't as he would have to throw her out.
- [5] Mrs. Proctor claimed that her father told her he feared his wife, and after his admission to hospital on several occasions, had lost his will to live. She said he complained of loneliness in his marriage, and concluded that her father believed he was close to death when he prepared the December 2013 Will. When he prepared the February 2014 Will, like in the December Will Mr. Graham left his home to Mrs. Graham, his nephew Baldwin Jones, and also left Mrs. Proctor the proceeds of the RBC bank account, which she said was in line with his promise to leave money with her for his grandchildren.
- [6] Mrs. Proctor said that she visited her father in May 2014 when he asked her for a copy of his February 2014 Will and told her that Mrs. Graham had found out about it and became upset. Mr. Graham told her about the March 2014 Will, she alleged, and how Mrs. Graham had argued with him when he raised the issue of including Mrs. Proctor in his Will. According to what she alleged her father told her, this prompted the Attorney to place them in separate rooms. According to Mrs. Proctor, it was Mrs. Graham who gave the Attorney Mr. Graham's Will and threatened him to sign it. Mrs. Proctor alleged that her father assured her that he planned to 'use'

the February 2014 Will and not the March 2014 iteration; a suggestion she knew made no sense. However, not wanting to distress her father further, she did not press him on the issue but deduced that he did not understand the March Will was his final Will.

- [7] Mrs. Proctor claims that her father attempted to secure the funds in the RBC bank account for her, but Mrs. Graham resisted. Mrs. Graham promised to assist in having her name added to the bank account instead but never did so. Mrs. Proctor also alleged that her father informed her that he had hidden money inside the house for her to assuage her concerns about Mrs. Graham handling his bank book. According to the Claimant, the plan was for her aunt to hand her this hidden win fall upon her father's death, but the funds could not be located when he died. Mrs. Proctor is convinced that Mrs. Graham found the money and never handed it over to her, and claims Mrs. Graham admitted as much to her.
- [8] Mrs. Proctor claimed that her father was very depressed in the months before his death and told her that Mrs. Graham did not treat him well or show him much concern. Mrs. Proctor believed that Mrs. Graham knew that his condition was very serious, and neglected him to hasten his death. She found the circumstances of the preparation of the March 2014 Will to be "unusual and even suspicious" as its provisions did not reflect what her father told her was his intention for her and his grandchildren in regards to his estate. Also, in the February 2014 Will, Mrs. Proctor had been named an executrix, which was undone in the March 2014 Will, where Mrs. Graham and her daughter, Dionne Forrester, were so named. Mrs. Proctor asserted that with the years of mistreatment complained of by her father, she found this suspicious.
- [9] Mrs. Proctor stated that the argument in Counsel's chambers that her father told her of, should have alerted the Attorney- at- Law that her father was not in the right mental state to be adjusting his Will. The very presence of Mrs. Graham, in Mrs. Proctor's view, should have been viewed by Counsel preparing the March 2014 Will, as suspicious, and proved that Mrs. Graham was truly there to dictate the

terms of the Will. In her view, her father was coerced to change his Will and afterwards, maintained an erroneous view that his February 2014 Will was still effective.

- [10]** In cross-examination, Mrs. Proctor stated that she was eighteen or nineteen years of age when Mr. and Mrs. Graham were married and, after his move to Jamaica, kept in contact with her father by writing letters, making phone calls every weekend and visiting when she could. Her visits during the over twenty-six-year period amounted to three or four occasions but Mr. Graham also visited England during that time. It was not until about three years before he passed away, however, that she claims that she became his confidante.
- [11]** Mrs. Proctor did not know the surgeries that her father had done, when they had been done or their cost. Even in her witness statement, she refers to surgery to 'one of his legs', which suggest that she did not know which leg. She stated that she knew he had his bank account and took care of his medical costs from it. While she did not know the available sums in his bank account, she was confident that the sum would cover his surgical procedures, especially as he assured her as much in June 2014, and owed nothing. Mrs. Proctors stated that though she was aware that her father had had several surgeries, she did not visit him in the hospital as Mrs. Graham told her not to but that she would be contacted and informed when she should. She later admitted that she would not have been able to travel due to her finances and the cost of travelling with her children. Mrs. Proctor vehemently rejected the suggestion that she was not close to her father and addition to the regular calls and letters, assisted him with his mobility needs after his surgery. She knew he had diabetes and had the amputation, but blamed the fact that she could not speak to the number, particulars or cost of his surgeries on the fact that Mrs. Graham did not inform her.
- [12]** Baldwin Jones is the nephew of Mr. Graham and one of the beneficiaries under the February 2014 Will. He viewed Mr. Graham as a prosperous individual who had made his wealth working with metals and steel in England before he retired

and returned to Jamaica. Between 1992 and 2009, he would visit his uncle weekly and claimed to have been aware of the closeness with his daughter to whom Mr. Graham spoke regularly on the phone and stayed at his uncle's house when she visited. According to him, Mr. Graham confided in him about his concern that his wife and stepdaughter were using him.

**[13]** Mr Jones stated that Mr. Graham was quite ill and that his diabetes became so severe that in 2007 his leg was amputated. This made him more dependent on his wife, but her treatment of him worsened, with her moving to another side of the house. He said that Mr. Graham took the view that she had become scornful of him due to his physical disability. He had difficulty bathing himself and Mr. Jones said that when he visited he would assist him with cutting his toenails. Mr. Jones claimed that his uncle was fearful of his wife, who would ignore his medical and mobility needs and speak harshly to him at times. His uncle appeared depressed and told him that he wanted to die due to the poor treatment. Mr. Jones said that he planned to speak to Mrs. Graham about the treatment but that, as with Mrs. Proctor, says that he did not as his uncle feared the repercussions from his wife.

**[14]** Mr. Jones stated that Mr. Graham told him that he wished to see a lawyer about the writing of a Will and had an Attorney by the name of Mrs. Richards, but feared that if he went to that lawyer, his wife would find out. He suggested to his uncle that he use Mrs. Stanley-Jones, whom his uncle had used before. He took Mr. Graham to Mrs. Stanley-Jones' chambers in December 2013 and back again in February 2014. In March 2014, his uncle informed him that his wife had found out about the February 2014 Will and became upset. She threatened him with harm if he did not change it, Mr. Jones alleged. Mr. Jones said that he found the circumstances of the preparation of this second Will suspicious due in part to the advanced years of his uncle and his heavy reliance on his wife for everything. Mr. Jones indicated that he held the view that her threats influenced his uncle's decision to change his Will.

- [15] In amplification, Mr. Jones recanted his statement about Mr. Graham informing him of Mrs. Richards and stated instead that he was told that it was Auntie Mollie's lawyer by Ruthven Road that Mr. Graham had informed him of. Also, where in his witness statement he stated that his uncle went to Mrs. Stanley-Jones because she had been his brother's lawyer, Mr. Jones recanted and said that it was his uncle that asked to be taken to her, as she had done work for Uncle Boysie. Mr. Jones continued, that he did not know Mrs. Stanley-Jones 'like that', and rather than fearing his wife potentially discovering his visit to Mrs. Richards, the reason his uncle gave was that the 'lawyer at Ruthven' had failed to return a document to Mr. Graham, that was entrusted to her by Aunty Molly.
- [16] In cross-examination, Mr. Jones indicated that he could not recall when his uncle asked to be taken to Mrs. Stanley-Jones, but that when he asked to be taken there, it was he (Mr. Jones) who enquired of his uncle as to the family lawyer, a reference to Auntie Molly's lawyer; Mrs. Richards. He could also not recall when his uncle had his first surgery or how many surgeries he had because after 2009 he had moved to Portland.
- [17] Mr. Jones recounted that he took his uncle to see Mrs. Stanley-Jones in a taxi and that he had a need to use a crutch and orthopaedic shoes. On both occasions he took his uncle to Mrs. Stanley-Jones, Mr. Graham was alert and had his faculties about him, and he concluded that his uncle knew what he was doing and what he wanted. He stated that while he is named as a beneficiary in the February Will, that it was only upon Mr. Graham's insistence that he (Mr. Jones) agreed for this to be done that his uncle stated that he had 10% of his estate that he did not know what to do with.
- [18] In re-examination, he explained that it was only upon his uncle's insistence that he relented and agreed to be included in the Will, as he had told his uncle that he did not want anything. Also, he indicated that on the occasion when he went to Mrs. Stanley-Jones with his uncle, Mrs. Graham was not there as she worked on shifts at Nutrition Holdings. After he moved to Portland he would still come weekly to visit

his uncle and bring coconuts and other food. Where he had stated in his evidence that he moved to Portland in 2009 he stated that he had in fact moved there between 2005 and 2006.

**[19]** Mrs. Karene Stanley-Jones gave evidence that on December 13, 2013, Mr. Graham came to her office with Mr. Jones whom he identified as his nephew. The December 2013 Will was prepared with the following instructions she stated:

- (i) To appoint Angela Graham and Louise Graham as his executors;
- (ii) His personal estate he would give to his wife;
- (iii) His house he would give to his wife, daughter and nephew in shares of 50%, 40% and 10% respectively;
- (iv) The residue of his estate he would give to Mrs. Graham, Louise Graham and Diane Forrester (his step daughter) in equal shares.

**[20]** The Will was signed on December 19, 2013, and Mr. Graham returned on February 19, 2014, with instructions to draft a new Will. The instructions were as follows:

- (i) To appoint Louise Graham (Proctor) and his nephew Baldwin Jones as his executors;
- (ii) His personal estate he would give to his wife;
- (iii) The sums in the RBC Royal Bank Account to his daughter. He would remove his wife's name from the account and 'build it up' for Louise;
- (iv) His house to his wife, daughter and nephew in shares of 50%, 40% and 10% respectively;
- (v) And the residue of his estate he would give to his wife and daughter in equal shares.

**[21]** Counsel stated that in her interview with Mr. Graham prior to taking instructions, he advised that he had been mistreated by Mrs. Graham and his stepdaughter and that after his most recent hospitalisation, he desired death rather than to return to his wife. She also spoke with Mr. Jones who advised that Mr. Graham would call him to visit him to clean his feet as Mrs. Graham refused to take care of him which was essential to his care as a diabetic. Had she even not refused, Mr. Jones

informed that Mr. Graham did not trust his wife to care of his feet in any event as he feared that she would do damage.

[22] On January 16, 2015, after the death of Mr. Graham, Mrs. Stanley-Jones was contacted by Mrs. Proctor who informed her of the March 2014 Will, which Counsel found surprising because he had only in February 2014 prepared a Will and he did not return to her to prepare it. Mrs. Proctor told her what her father had told her about Mrs. Grahams reaction to finding out about the February 2014 Will, and that a new Will was subsequently prepared as a result. The differences between the March 2014 Will, and the February 2014 was posited as a cause for suspicion as Mr. Graham left the house to his wife and Mrs. Graham and both she and his step daughter were now named as executrices; excluding Mrs. Proctor as executrix. Mrs. Proctor expressed the view that her father was the victim of duress and undue influence by his wife, and thereby decided to challenge the validity of the said March 2014 Will.

[23] In cross-examination, Mrs. Stanley-Jones indicated that she had never worked for Mr. Graham prior to December 2013. Between the 1<sup>st</sup> and 2<sup>nd</sup> Wills, the changes were in her opinion significant and that Mr. Graham appeared to have been acting under his own Will and was capable of giving instructions She gave evidence that despite the fact that Mr. Jones repeatedly refused the 10% interest in the house, Mr. Graham insisted, until he finally relented. Counsel was asked whether, based on that exchange, she determined that Mr. Graham was strong-willed, to which she responded that he was clear what he knew, what he wanted and knew about the context in which he lived.

### **Defendant's case**

[24] Mrs. Angella Graham's evidence is that she got married to Mr. Graham on May 26, 1987. Mr. Graham was diabetic and had circulation problems with his left leg. This circulation issue eventually led to his leg being amputated in 2013, Mrs. Graham said. She had initially stated in her witness statement that the amputation was in

2012, but this was stated in amplification that it was in fact 2013 and that the reference to 2012 was a mistake. Initially, after the amputation he required the use of a walker but, as time progressed, was able to walk with aid of crutches. She said that he was quite independent and would move around the house on his own. He was able to pour coffee on his own, share food for himself and after she apportioned his pills for the week, he would also administer his medication on his own. Mr. Graham also took walks for sunlight and as his exercise and continued to do things on his own, with the aid of a crutch, right up to November 15, 2014, when he fell ill. Mr. Graham was thereafter admitted to the hospital and died later that day.

**[25]** Mrs. Graham refuted the Claimant's allegation that the reason for their visit to Mrs. Richards was because she found out about the February 2014 Will and became upset. Mrs. Graham said that it was Mr. Graham who expressed a desire to prepare a Will during breakfast, and requested that she contact Mrs. Shirley Richards, Attorney-at-Law, to make an appointment. Mrs. Graham stated that she had never heard of Mrs. Richards prior to her husband mentioning her name and it was Mr. Graham who provided Mrs. Richards' telephone number. She carried out the request of her husband, she said, and accompanied him to Mrs. Richards' office, where she was introduced to Mrs. Richards, apparently for the first time. She waited in the reception area while her husband went into Mrs. Richards' office, and said that she was called in and asked by Mrs. Richards about a bank account from which Mrs. Proctor was to receive One Million Dollars. She said that she informed Mrs. Richards that while Mr. Graham had this account, he did not have those funds, and after the discussion on the matter, returned to the reception area.

**[26]** Mrs. Graham maintained that she did not force her husband to prepare the March 2014 Will that made her the sole owner of the house, but that he acted free of any input or control, coercion, threat or fear of harm from her and independent of her views or concerns. Mrs. Graham stated that she did not know that her husband had prepared any Will prior to the March 2014 Will, and did not find out until she

received a letter from Mrs. Stanley-Jones and was shown the February 2014 Will by Mrs. Richards when she visited her office on the matter.

- [27] She gave evidence that she met Mr. Graham in 1985 when she worked at Mr. Graham's sister's house, when Mr. Graham was in the island on vacation. Mr. Graham's sister, Gertrude Clarke, was blind and Mrs. Graham says that she was there to assist in taking care of him and to do house work. Her daughter was by then born, but though the job was a live-in job, Mrs. Graham said that she did not have her daughter there with her. She stated that her daughter did not move in immediately with her after she married Mr. Graham, but did live with them since she was four years of age.
- [28] In cross-examination, Mrs. Graham gave evidence that the first amputation was in April 2013, where her husband's leg was removed below the knee. While she could not recall the month of his next surgery, she recalled that the surgery was to remove more of his leg above the knee. She explained that Mr. Graham's doctor had initially recommended an amputation above the knee due to her husband's circulatory issues but that Mr. Graham insisted the amputation should be below the knee.
- [29] After his surgery, his wounds were dressed by the doctor and thereafter a nurse came in every day for two weeks. Mrs. Graham said that she had to get up early to ensure that the bed and Mr. Graham were cleaned up before the nurse arrived. He also had to attend for follow-up visits every month, and she would take him to his appointments. Mrs. Graham rejected as untrue, the suggestion that Mr. Graham would fall on occasions and that she would either leave him there or left him unattended often. Mrs. Graham responded to state that Mr. Graham could take care of himself once she left his food prepared and organized his medication. She insisted that any absence from home was for work, as she worked on shifts.
- [30] She denied that Mr. Jones visited Mr. Graham frequently but when he did, he only came when he needed money. She denied that Mr. Graham had difficulty

travelling on the road. While it was true she said that there were times when Mr. Graham did not go to church, that was not because he was too ill but simply because he did not want to. Mrs. Graham gave evidence that though he had several ailments and had challenges with his eyes, he could read once he had his glasses. She denied that after the surgeries Mr. Graham became depressed.

- [31]** Mrs. Graham said that she would prepare his medication in pill boxes and took care of his meals and helped him to get light outside and offered him encouragement. Mrs. Graham agreed that at some point she stopped sleeping in the same room as her husband, but explained in re-examination there was a reason for this. According to her evidence, her husband had had a bypass procedure done in his groin and a splint put in his foot to help with blood circulation, which oozed and got sore. This forced Mr. Graham to lie in the middle of the double bed which left limited room to accommodate them both. Notwithstanding not being in the room, she would usually awaken very early in the morning to have him cleaned up before the arrival of the nurse at 6:30 or thereabout.
- [32]** Mrs. Graham said that she had to access Mr. Graham's RBC Bank account to pay for his medical treatment, but denied that she 'controlled' his bank book. The primary source of the funds in the bank account was Mr. Graham's pension but she would also put funds in the account from her 'partner draw', as the account was in fact a joint account. Mrs. Graham denied that her husband ever asked her to have Mrs. Proctor's name added to the RBC Bank account.
- [33]** Mrs. Graham gave evidence that on an occasion, Mrs. Proctor visited Jamaica and stayed with her and her husband at their home for about a week and could recall Mr. Graham going to England during their marriage. Mrs. Proctor brought items to help with Mr. Graham's mobility and his medical care on that third visit. Mr. Graham was happy to see Mrs. Proctor and his grandchildren.
- [34]** Mrs. Graham insisted that though she had made the appointment for her husband to visit Mrs. Richards, it was her husband that gave her the instructions and

telephone number to do so. She said that she accompanied him to the appointment and stayed in the reception area in the lobby while Mr. Graham was in Mrs. Richards's office for the entire visit. The only exception, she insisted, was when she was called in to Mrs. Richards' office once to enquire RBC account. After informing the account did not hold such sums, she returned to the reception area. Mrs. Graham stated that she understood that account to mean that in the event of his death, that she would have to find that money even if she was to borrow it, but that she had not yet paid any of that money to Mrs. Proctor.

**[35]** Mrs. Proctor did not travel for the funeral and Mrs. Graham denied that Mrs. Proctor informed her that she had no money to travel for the funeral or asked to purchase the ticket or lend her the amount for a ticket from the RBC Bank Account. She maintained that she did not see the March 2014 Will until Mrs. Richards showed it to her and maintained that she never discussed the contents with her husband. Mrs. Graham denied that when she learned of the contents of the February Will she became angry with her husband, but agreed that having seen the Will, she was not happy that Mr. Jones was included in the Will.

**[36]** Mrs. Shirley Richards, Attorney-at-Law, prepared Mr. Graham's March 2014 Will and had prepared another Will for Mr. Graham in 2003. Mrs. Richards in her witness statement indicated that she has been in practice since 1987 and is frequently called upon to assist with preparing Wills for clients. In addition to the work done for Mr. Graham in 2003, Mrs. Richards stated that from 2007 onwards, she assisted Mr. Graham in his capacity as local informal agent for his uncles Paul, Ernest and Glaister Graham who resided overseas and were obtaining a Grant of Probate for their mother. She also assisted from time to time with other legal work to be done for the Graham family and continued to do so up to 2017, after Mr. Graham's death. Mr. Graham even discussed legal issues relating to a motor vehicle accident in which he was involved with Mrs. Richards.

**[37]** Mrs. Richards stated that she found Mr. Graham to be of strong character, reliable and a no-nonsense person. When she saw him on March 19, 2014, she noticed

that his leg had been amputated and he was walking with a crutch. Mrs. Richards stated that it was on that occasion that she was introduced to Mrs. Graham. Mrs. Graham was asked to wait in the reception area while Mrs. Richards took Mr. Graham into her office to receive his instructions on the making of the Will. Mrs. Richards' evidence is that Mr. Graham indicated that he wanted to leave the house to his wife and One Million Dollars for his daughter. Counsel said that she advised him of the option of leaving the house to his wife for life, presumably to allow him room to dispose of the remainder as he pleased, but that Mr. Graham was adamant that the house should be left to his wife as an outright gift.

**[38]** With reference to the gift to his daughter, Mr. Graham stated that it should come from an account that his wife would know where it should come from. It was then that Mrs. Richards stated that Mrs. Graham was invited in to give information about the account, and informed Mrs. Richards that while the account existed, it was depleted as the funds had been used in his medical care. Mr. Graham was nonetheless adamant that the sum should be left for his daughter and Counsel stated that she complied with his wish, and drafted the Will in accordance with his instructions though that is not the way she would have drafted it.

**[39]** Mrs. Richards stated that, as with all persons for whom she would prepare Wills, she printed the Will in draft form and then reviewed it with Mr. Graham line by line. Once satisfied that he knew what he was doing, the Will was printed on special paper that is thicker than ordinary typing paper, and the Will was executed by Mr. Graham and witnessed by her and one Ms. Walcott, who was then working with Mrs. Richards. She gave the Will to Mr. Graham and he left her office.

**[40]** In cross-examination, Mrs. Richards indicated that while she could not recall the last date prior to March 2014 that she had seen Mr. Graham, she did work for his family and he was the local agent. She stated that she could not speak to his age but that, save for his amputation, he looked good. She was a bit surprised when she saw him on crutches in March of 2014, as the last she had seen him, he had both feet. Beyond him stating that he had been in hospital and had the amputation,

Mrs. Richards said that she did not question him about his medical state as she did not see someone who looked seriously ill. He appeared reasonably well to her, and if he had underlying illnesses, it was not evident to her.

[41] On the issue of the One Million Dollars to his daughter, Mrs. Richards stated that she only invited Mrs. Graham in because Mr. Graham stated that his wife would have the bank account information. Mrs. Richards did not find this unusual or surprising as many times it was the wife that knew of the financial affairs. Mrs. Graham said that the sums were not in the account and the Will reflects the precise instructions given by Mr. Graham. Mrs. Richards was strident that the first time that she had ever met Mrs. Graham in all the times she interacted with Mr. Graham, was on that day, and had never prior to that laid eyes on anyone identified as Mrs. Graham in relation to him.

[42] Mrs. Graham remained in the reception area of her office while she spoke to Mr. Graham, but was only called into the office for the purpose of the bank account information as she determined that the information was necessary. Mrs. Richards stated that Mr. Graham appeared annoyed at learning that there wasn't enough money in the account, such monies having been spent on his medical care. She rejected the suggestion that the couple had any conflict or argument regarding the money in the account but they did have a conversation about it at her office. Mrs. Richards insisted that Mrs. Graham did not insert herself into the preparation of the Will, and was made to sit outside except for when she was called in regarding the bank account information.

### **Claimant's Submissions**

[43] According to the submissions for the Claimant, the Will's validity is being challenged on the following three bases:

- (i) It varies significantly from all the other Wills prepared;
- (ii) It was the only Will prepared by legal counsel that wasn't of the deceased's choosing; and

(iii) The deceased being an 86-year-old diabetic amputee, who was highly dependent on the Defendant, was vulnerable to the Defendant's influence and coercion and was in fact coerced by the Defendant to execute the disputed Will, which gave her the lion's share of his assets.

[44] There was no issue raised at trial as to, save for the issue of undue influence, the March 2014 Will was valid under the Wills Act. It was submitted that the March 2014 Will was invalid as Mr. Graham lacked the mental capacity to prepare a Will at the time. Reliance was placed on the authority of **Banks v Goodfellow** [citation] (cited with approval by this Court in **Bloomfield v West & Wilson** [2019] JMSC Civ. 23) that outlined the criteria as follows:

*"It is essential ... that the testator shall understand the nature of the act and its effects, ... the extent of the property of which he is disposing ... 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 disposal of which, if the mind had been sound, would not have been made."*

Similar criteria are outlined in **Sharp v Adam** [2006] EWCA Civ 449, also cited for the Claimant.

[45] Where a Will was prepared under undue influence it will be declared invalid. The authority of **Davis v Barrett-Davis** [2017] JMSC Civ. 44, a decision of Harris J (as she then was), stated that in proving the allegation of undue influence, the Claimant Claim must not merely be alleged but must be proven. It is not sufficient to show simply that the testator was persuaded but that they were coerced. It was noted in **Davis** that the fact of undue influence cannot be proven by direct evidence in most cases but is left to be inferred from proven facts. This inference was described in **Scott v Cousins** (2001) 37 ETR (2d) 113 as evidence that creates a general miasma of suspicion that something unsavoury may have occurred. It was submitted that while a well-grounded suspicion of undue influence will not discharge the burden of proving undue influence on those challenging a Will, it will rebut the presumption that the testator knew and approved of the contents and had the testamentary capacity. This it was argued, then places on the party relying on the Will's validity, the burden of proving testamentary capacity.

- [46]** It was submitted from the authorities that there is a non-exhaustive list of circumstances in which the Court's suspicion may arise as to whether a testator at the time of the execution of a disputed Will, was coerced or unduly influenced. According to Counsel, they include an elderly testator; or one unwilling to provide the solicitor with full information relating to assets liabilities, medical history or family condition and circumstances. Where the testator suffers from ill health especially where the condition, disease or medication could affect the mental stability or general mental outlook of the testator, it should invoke the Court's suspicion. A disposition of the estate which seems unusual in the context of the circumstances as known to the testator or which drastically deviates from the terms of a former will should invoke the Court's suspicion. Also the circumstances of a beneficiary who has been particularly involved in assisting the testator in the preparation of the Will should meet the standard of suspicion that was referred to.
- [47]** It was submitted further that where the testator appears dependent upon another, for example allowing the other person to speak on behalf of the testator, this should invoke the Court's suspicion. Numerous wills prepared in a short period of time also place the testator in a position to be unduly influenced in the execution of a Will. The Court's suspicion should be invoked where the Will makes no gifts to those for whom such gifts would seem appropriate or are based on instructions provided by a questionable beneficiary or where the testator is suffering from depression or loneliness. It was submitted that a number of these factors existed on the facts of this case to excite the suspicion of the Court and rebut the presumption of knowledge and approval by the testator.
- [48]** Counsel submitted that the Court should find the following factors to be proven facts, supportive of a conclusion or suspicion of undue influence:
- (i)* Mr. Graham was an elderly testator;
  - (ii)* Suffered from significant ill-health that affected his physical outlook and mental fortitude as it left him depressed;

- (iii) Three Wills were prepared within a fairly short space of time – December 2013, February 2014 and March 2014.
- (iv) Significant changes in the provisions between the December 2013/ February 2014 Wills drafted by Mrs. Stanley-Jones and the March 2014 Will drafted by Mrs. Richards;
- (v) Despite the many complaints to his nephew, Mr. Jones, and his daughter, Mrs. Proctor, of mistreatment by his wife and step-daughter, he disposed of his entire estate to his wife; save for the One Million Dollar gift to his daughter.

**[49]** All this, it was submitted is in the context of the alleged ill-treatment, scorn and verbal abuse by his wife. Mr. Graham distrusted his wife and as such hid his Wills, money and other valuables from her. She added to his mistreatment and need for dependency on her by hiding his bank book and car keys, limiting his ability to move about as he pleased. On the strength of the circumstances as outlined by Counsel, the Court was invited to find that the Will is not valid due to the undue influence of the Defendant on her husband.

### **Defendant's submissions**

**[50]** Counsel for the Defendant submitted that firstly, the Claimant was in breach of Rule 68.60 (3) (b) (i) and (ii) of the Civil Procedure Rules which reads as follows:

*"Any Party who contends that –*

*(b) at the time of the execution of a will the testator –*

*(i) did not know and approve of its contents; or*

*(ii) was not of sound mind, memory and understanding*

*Must specify the nature of the case on which he or she contends to rely giving particulars of the facts and matters relied on.*

**[51]** It was submitted that the Claimant's pleadings did not contain any fact of a lack of testamentary capacity or a lack of knowledge and approval; particulars of these 'deficiencies' and who determined that Mr. Graham lacked testamentary capacity, knowledge and approval when he executed the Will. Had this been pleaded, it was argued, the Defendant would have been put in a position to have met that case,

rather than to have the Claimant hide behind the “smokescreen” of submissions made on her behalf, to seek to establish the Claim. It was submitted that the issue of a lack of testamentary capacity and knowledge and approval are nonissues in the instant case.

[52] Counsel cited the case of *Wingrove v Wingrove* [1885] 11 PD 81 for the standard of proof required for undue influence:

*“To establish undue influence sufficient to invalidate a Will, it must be shown that the will of the testator was coerced into doing that which he did not desire to do, and the mere fact that in making his Will, he was influenced by immoral considerations does not amount to such undue influence so long as the dispositions of the Will express the wishes of the testator.”*

[53] Relying on *Edwards v Edwards* [2007] EWHC 1119 (Ch) at par. 47 it was submitted that the Court should consider the following:

- (i) There is no presumption of undue influence in a case of testamentary disposition and whether it exists is a matter of fact to be proven by the one who asserts it;
- (ii) It is not enough for the facts to be consistent with a hypothesis of undue influence but the facts must be inconsistent with any other hypothesis in which case undue influence means such influence exercised by coercion that must have overborne the testator’s will or by fraud;
- (iii) In this context, coercion must be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate.
- (iv) Pressure that causes the testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator’s free judgment, discretion or wishes, is enough to amount to coercion in this sense.
- (v) The physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will. The will of a weak and ill person may be more easily overborne than that of one who is strong and healthy.
- (vi) Fraud; poisoning the mind of the testator against an otherwise natural beneficiary making false assertions that he knows to be false or does not care is true or false.

(vii) The question is not whether the Court considers that the testator's testamentary disposition is fair because, subject to statutory powers of intervention, a testator may dispose of his estate as he wishes. The question in the end is whether in making his dispositions the testator has acted as a free agent.

[54] Counsel submitted that the Claimant must prove that not only did the Defendant have the power to overbear the will of Mr. Graham but also that she did exercise that power. To prove this, there must be cogent evidence to satisfy the allegation for the Court to make a finding of undue influence. It was submitted on the authorities, that proof of undue influence must be an inference to be drawn from other proven facts that are inconsistent with any other hypothesis. The Claimant must prove on a balance of probabilities that the explanation for what has occurred is that the testator's will has been overborne by coercion rather than there being another explanation. (See **Coles v Reynolds & Anor** [2020] EWHC 2151 (Ch) that referred to the decision of Norris J in **Wharton v Bancroft & Ors** [2011] EWHC 3250 (Ch), **Schrader v Schrader** [2013] EWHC 466).

[55] Counsel commented on the assertion in the Claimant's case that the fact that Mr. Graham was elderly and sick was a factor to be considered in her favour. The undisputed evidence is that Mr. Graham was a man in his eighties, diabetic and who had had an amputation resulting from circulatory issues. According to the Claimant, he had been ailing in this way for at least five years by the time that the March 2014 Will was prepared. It was submitted that this fact of his illness was not a factor that adversely impacted Mr. Graham's testamentary capacity for either the December 2013 and February 2014 Wills but that a month later it was a contributing factor to invalidate the Will done in March 2014.

[56] It was submitted as untenable, the argument that his physical and mental health had degraded so much in a month as to make him weak, feeble, vulnerable and lacking in the capacity to exercise his own will, making it easy for Mrs. Graham to exercise her power over him. Counsel submitted that even frail and vulnerable individuals with various health problems can make valid Wills (See **Coles v Reynolds & Anor** [2020] EWHC 2151 (Ch), per Matthews J at paragraph).

Furthermore, Counsel submitted, there was no medical evidence that his medical condition had degraded since February 2014 or prior months and that he was in fact unable to make a valid Will.

- [57]** The burden of proving the existence of undue influence rests on the Claimant to prove on a balance of probabilities. It was submitted for the Defendant that the evidence of Mrs. Proctor was unreliable and self-serving. She admitted that in the twenty-six years that her father lived in Jamaica she had visited him only three to four times due to her responsibilities caring for her children, and called him about once every two weeks. She had no knowledge of the number of surgeries that her father had and did not seem to know that he had had more than one amputations of the same leg. It was evident that she had not been aware that her father had executed a Will in 2003 and done other business with Mrs. Richards and she was therefore no stranger to him. It was submitted that all the circumstances showed that the Claimant was not as aware of her father's affairs as she claimed and certainly could not speak to what happened in his home.
- [58]** By comparison, it was submitted, Mrs. Graham gave evidence that she did not know about the February 2014 Will and did not demand that Mr. Graham change it. She gave evidence that she only became aware of the February 2014 Will after the death of her husband. Counsel further recounted the evidence of Mrs. Graham that she would prepare his meals and organise his medication as she had to head out for work and ensured he got his exercise. Mrs. Graham admitted that she left the bedroom in which Mr. Graham slept because after his amputation the space became limited due to the need for the leg to drain properly. Mrs. Graham stated that her husband was capable of caring for himself and that it was untrue that she would see him fall and refuse to help him up.
- [59]** Counsel reminded the Court that it was the submission of the Claimants that her presence of Mrs. Graham at the office of Mrs. Richards was significant in influencing Mr. Graham. Mrs. Graham stated that she did not know Mrs. Richards prior to March 19, 2014. Her husband asked her to make the appointment and

gave her the contact number. She took her husband to Mrs. Richards' office and she gave evidence that she did not enter the room that they were in except for when she was summoned to the room to speak to the RBC bank account. After giving the information requested, Mrs. Graham left the room and Mr. Graham remained and completed his instructions with Mrs. Richards.

**[60]** This account, Counsel argued, was corroborated by Mrs. Richards who said that she had worked for Mr. Graham for years and found him to be a man of strong character and a no-nonsense person who got things done. Mrs. Richards had been surprised at the amputation as when last she had seen him he had had both feet but otherwise he appeared reasonably well to her. Mrs. Richards stated that it was the first that she was meeting Mrs. Graham and ensured that she (Mrs. Graham) was not present when Mr. Graham gave instructions to her in private. It was only in relation to the gift of One Million Dollars to Mrs. Proctor that Mrs. Graham was called as previously mentioned, for Counsel to enquire about the bank account. Mr. and Mrs. Graham had a discussion about the limited funds in the account but that it was not an argument, according to Mrs. Richards, who also advised Mr. Graham about the possibility of giving a life interest to his wife. Mrs. Richards said Mr. Graham was adamant that he wanted to make her an outright gift to his wife.

**[61]** On the evidence as a whole, it was submitted that the testator was clearly of the requisite physical and mental strength at the time of the giving of instructions for the Will to be made, did so freely and was able to express his own wish to produce the Will prepared by Mrs. Richards. Counsel submitted further that Mrs. Graham did not compel her husband to express any will except his own at any time. It was contended that with the due diligence and care of Mrs. Richards in taking instructions from Mr. Graham, that in regards to his devise of the property, he acted as a free agent, and was not acting under any undue pressure or coercion from his wife.

**[62]** In commenting on the evidence of Mrs. Stanley-Jones and Mr. Jones where Mr. Graham, despite Mr. Jones' vehement refusal of the 10% interest in the property,

insisted that this provision be included in the February 2014 Will. This, it was argued, was further evidence of the strong character and mental strength of Mr. Graham despite his age and infirmity. It was submitted that in view of the fact that he had drafted three different Wills in a four-month span, that would not have been unusual for Mr. Graham to decide to change his Will after the February 2014 Will was prepared. The fact of the change of the Will a month later does not mean, Counsel asserted, that he acted under duress from his wife when he executed the disputed Will.

**[63]** Counsel cited the decision of Harris, J (as she then was) in *Davis* for the proposition that even with medical evidence of serious medical ailments, the contention of undue influence may fail. The testator had been diagnosed with a brain tumour in 2008 and subsequently had two strokes. The testator married the Defendant earlier in 2008, prepared a Will in September 2008 and died in December 2008. The Claimants, the testator's adult children, alleged that the Will prepared in September 2008 was procured by undue influence on the part of the Defendant, and called medical evidence detailing the medical ailments of the testator. The Claimants argued that his medical condition had rendered him incapable of giving his Attorney instructions to prepare a Will. The Court accepted the evidence proffered for the Defendant, from the drafting Attorney and the attesting witness, that the deceased was well enough to execute a Will.

**[64]** Finally, the Court was urged to consider the following:

- (i) There is no medical evidence from the Claimant to show that Mr. Graham's decision-making was impaired as a result of any physical or mental condition;
- (ii) The Claimant's personality of being straight talking and no nonsense;
- (iii) That Mrs. Graham was not involved in the preparation of the Will or giving of instructions though she drove him to Mrs. Richard's office;
- (iv) There is no evidence that she exercised any power that overbore the Will of the deceased;

- (v) Even the evidence of Mr. Jones that he stated that he did not want the gift but Mr. Graham insisting, showed that Mr. Graham was fully capable of making his own decisions;
- (vi) The insistence of Mr. Graham to give Mrs. Proctor) One Million Dollars from the RBC account shows that his will was not overborne by Mrs. Graham.

## **Analysis**

**[65]** The contention of the Claimant is that her father was unduly influenced to draft a new Will in March 2014 and in particular to make changes from a prior Will, which the Claimant views as not being in line with his desire or intent. This she says, is evident from the fact that the March 2014 Will varies significantly from the Wills prepared in December 2013 and February 2014. Her position is that Mrs. Richards was not his Counsel of choice and that given his dependence on Mrs. Graham for his care after the trauma of surgery, and having been left with an amputation, he was vulnerable to coercion and she in fact coerced him as alleged.

**[66]** Mention is made of the contents of the March 2014 Will being different from the December 2013 and the February 2014 Wills and that Mr. Graham was so mistreated by his wife that it is unlikely that he would have left a substantial part of his estate to her. On an examination of that argument, however, this change was not as unlikely as the Claimant asserts. In the two prior Wills, Mr. Graham made provisions for his wife to get all personalty, the largest share in the house upon his death and the residue of his estate. What that says is that whatever their problems, it was always his intention to make provision for his wife in regards to the house. From the Claimant's perspective, her father even threatened that it was easier to put the Claimant out and get a caregiver to help, but what is contained within that comment, if it is true, is at least the admission that Mrs. Graham cared for him. In the midst of her so-called mistreatment, and in the absence of the Claimant or Mr. Jones assisting him, Mrs. Graham did the lion's share of caregiving for Mr. Graham, especially after his amputations. So from the perspective of a man contemplating his death, whether because of his advanced years, or ill-health or

recent amputation, or depression, why not leave the lion's share of his modest estate to his wife? With all the issues the Claimant describes he always provided the lion's share of the property to his wife, though he entirely excluded his daughter and Mr. Jones in the final iteration.

**[67]** Also, with regards to the appointing of executors, why does the Claimant conclude that this change to make Mrs. Graham and her daughter executors was this great departure, when the December 2013 Will made the same provision. In fact the appointment of Mr. Jones as executor and beneficiary was a greater departure rather than his reversion to a position in regards to the executors, as in the December 2013 Will. If these Wills were drafted without her knowledge, why leave anything for her at all unless it was always his intention to leave something for his wife? He made provision in his December and February Wills when Mrs. Graham was absent so why is it considered suspicious to make provision for her when she is present? In other words, there is no indication in the December and February Wills that any consideration was given to this alleged mistreatment, as he made provision for his wife in them both.

**[68]** In fact, from the perspective of Mr. Graham, by the time the of the preparation of the March Will, he had been told by Mrs. Graham, in the presence of Mrs. Richards, that the resources in the RBC account were depleted. The prior provision was for the contents of the RBC account to be left for his daughter. At the time of the drafting of the December and February Wills, Mrs. Graham was not present and as such could not update Mr. Graham on the status of the account. On the evidence before the Court, at the time of the March 2014 Will, he was made aware of the depleted status of the account. So in the mind of Mr. Graham, despite knowing that the account was depleted from his medical care, and being unsettled by that knowledge, he sought to nonetheless state a specific sum to be left to his daughter to address that problem. So regardless of whether the funds existed in the account, in his mind, he was trying to leave a gift for his daughter that was in effect better than he had left before. The proceeds of an almost empty account would always be worse than a gift of One Million Dollars from his estate. The effect

of the gift may well be for another debate, but clearly it was Mr. Graham who made this provision to address the absence of much funds in the RBC account, the hope that he could still “build it up for Louise” and the belief that he was leaving a substantial sum from his estate for his daughter rather than the contents of an almost empty bank account. Whatever the state of the bank account, the fact that this provision of One Million Dollars from the estate was made, showed that Mr. Graham believed the account was depleted as he had been told and wanted to make provision for his daughter from his estate. Why would she coerce Mr. Graham to include a provision that not only did not benefit her but was outright disadvantageous to her? Is that fact consistent with the Claimant’s hypothesis of the Defendant exerting her coercive power on the frail and vulnerable Mr. Graham or is it consistent with some other hypothesis?

**[69]** Perhaps being caught between pleasing his daughter from a prior relationship and pleasing his wife he kept wavering in what he placed in his Wills. In the December Will he had them both as executors, as his mood changed he excluded his wife as executor in February, but he replaced his wife as an executor with the March Will. If the significant changes in March were coerced, who coerced the prior changes that did not benefit Mrs. Graham? The point of the questions, is that the fact of a party receiving a benefit, even if the Claimant views it as unfair, does not mean it was due to coercion as the testator may dispose of his property as he wishes, once it is his desire that is brought to bear on the decision (See ***Edward v Edwards***).

**[70]** As he did between the December 2014 Will and the February 2014 Will, he made changes as it pleased him, because he was displeased with his step-daughter and wife. Preparation of a new Will after just two months is also a short period, albeit not as short as a month, but that short period, on the Claimant’s case, is not to be viewed with suspicion, but the one month in virtually identical circumstances, should be. It is entirely conceivable that his worsening health and his disability, brought him face to face with his mortality and he truly believed that he would soon die, as the Claimant alleged. His back and forth was as to the right decision to please or provide for his wife and his daughter.

**[71]** The mere fact that any provision was made for Mrs. Proctor in the March 2014 Will, itself militates against the likelihood of undue influence by Mrs. Graham in particular. This especially as she knew their financial state. She knew what was and was no money in the bank account. It isn't that they were living in the lap of luxury from the RBC bank account, or it would not make sense that she was out working a job on shifts while her elderly and ill husband was at home. Had she in fact exerted the coercive power that Mrs. Proctor alleges, there is no way that there would have been such a provision, not for the contents of a depleted account, but for a specific sum from his estate. The hypothesis, rather than pointing towards undue influence, points toward an elderly man, contemplating his mortality, wanting to make some provision for his daughter in his Will, yet ensure this his wife of twenty-six years, was taken care of. I do not find that the changes to the March 2014 Will are demonstrative of anything but the fact that Mr. Graham was strong willed and wanted things done as he wanted them done.

**[72]** It was a part of the Claimant's case that Mrs. Richards was not Mr. Graham's Counsel of choice and that she was instructed by Mrs. Graham, or with her assistance, to draft a Will that did not reflect Mr. Graham's true desire. According to Mrs. Proctor, it was her father's desire to leave money for her and/or her children and that this Will did not reflect that intention. The evidence does not bear this perspective out at all and though she claims to have been her father's confidante in the last few years of his life, and regularly communicated with him via telephone, letters and her few visits to Jamaica, there was much she did not know about her father's affairs. She clearly had no knowledge that he had had a Will drafted in 2003 and that it had been prepared with the assistance of Mrs. Richards. She also did not know that he continued to utilize Mrs. Richards' legal services for a number of years to seek personal legal advice, as with when he had the accident, and acted for the family when Mr. Graham was the informal local agent for several of his family members. It was clear that Mrs. Richards was Counsel with whom Mr. Graham had interacted over the years, the family lawyer, was not known to Mrs. Graham prior to March 19, 2014, based on the evidence.

[73] By comparison, there was no history of Mr. Graham knowing Mrs. Stanley-Jones prior to December 2013. Mrs. Proctor does not seem to have known Mrs. Stanley-Jones either and Mr. Jones was proven to be quite unreliable on the issue of how Mrs. Stanley-Jones came to be instructed, as his witness statement said that it was he that had suggested her name but he then retracted that position to say that it was Mr. Graham who has suggested her name. In fact, while it was never an argument pursued on the Defendant's case, as strong an argument could have been made that Mr. Jones unduly influenced his uncle, as was made by the Claimant that Mrs. Graham did. Just as the Claimant alleged against Mrs. Graham, Mr. Jones took his elderly uncle to an Attorney-at-Law that he (Mr. Jones) suggested, who was not the family lawyer, and Mr. Jones had discussions with the lawyer about allegations of mistreatment by Mrs. Graham against Mr. Graham. Mr. Jones said that Mr. Graham relied on him for his visits to care for his feet, which he did not trust his wife to do and as such developed that dependency as he regarded this integral to the care of an elderly diabetic. In the same way as the Claimant alleged against the Defendant, Mr. Jones made the arrangements to attend to Mrs. Stanley-Jones and remained for the duration of the visit and there is no evidence that he was excluded in the giving of instructions, and even actively participated in whether this provision that benefited him, was included. Despite a similarly 'strong' case being able to be made on the Claimant's reasoning, the hypothesis that the Court is invited to draw from the circumstances of the December and February Wills is that they reflected the will of a man who was not coerced and possessed of the appropriate mental capacity to make these testamentary gifts and sufficiently knowledgeable of the property he was disposing of. Even with Mr. Jones selflessly insisting that he wanted nothing, Mr. Graham's will, prevailed (See *Banks v Goodfellow*, *Bloomfield v West*, *Sharp v Adam*).

[74] All accounts of the visits to respective Counsels' chambers is a clear indication that Mr. Graham was firm in where he chose to seek legal advice and in the provisions that he wished to be included in the Wills. There is absolutely no evidential basis for the Claimant's conclusion that Mrs. Richards was instructed by

Mrs. Graham on what to place in Mr. Graham's Will. The only reliable evidence of what happened at each Counsel's office comes from Mrs. Graham and the Attorneys themselves as Mr. Jones is wholly unreliable on that issue. I find Mrs. Richards evidence to be truthful when she said that she even advised Mr. Graham on the possibility of leaving a life interest for his wife, perhaps to enable him to make provisions for his wife during her life but leave the remainder interest in the real property to his daughter upon his wife's death. Mr. Graham insisted as to what he wanted included in his Will and I accept the evidence proffered for the Defendant on this point.

**[75]** The Claimant's case rested substantially also on the fact that Mr. Graham was very ill, had recently had amputation of his leg, was depressed and being mistreated by the Defendant and her daughter. These factors, it was argued for the Claimant, left Mr. Graham vulnerable to the influence of his wife who coerced him to give her the lion's share of his assets. Mr. Jones stated that his uncle had his amputation in 2007, while Mrs. Proctor did not say when her father's amputation was, but says that it was in 2013 that her father started to complain to her about Mrs. Graham leaving the bedroom and alleged mistreatment. On the Claimant's case, it is in part the fact of the amputation that made Mr. Graham so vulnerable. According to them, it made him more reliant on Mrs. Graham, created mobility issues for him and apparently was the cause of Mrs. Graham's apparent disdain for him.

**[76]** I prefer Mrs. Graham's version as to when her husband had his surgery to the position on the Claimant's case that it was sometime between 2007 and 2009 being when the surgery was done. It would not make sense that Mr. Graham had had his amputation since 2007 was making complaints about his wife from then yet remained in this abuse and 'rewarded' it by making arrangements for her in his Will, and ensuring that every iteration of his Will, to whatever degree, did so.

**[77]** All the factors that they claimed made Mr. Graham vulnerable to his wife existed in December 2013 and February 2014 and there is no allegation that he was too vulnerable to have known his mind and be a free agent to prepare his Will on either

of those occasions by that fact. Husbands and wives may well have much to say by way of complaint when they come to speak of each other, especially when each other are absent, but it is clear that Mr. Graham was a man who was now contemplating his death. Whatever his issues with his wife, she took care of him – prepared his meals and ensured his pills were organized, ensured he would exercise, worked to support the home despite the pension that he earned, and cleaned him up when the nurse was coming to clean his wounds and otherwise. None of these things were disputed. Apart from evidence of the nurse coming in after his surgery, there is no evidence of any caregiver being employed to assist Mr. Graham or of Mrs. Proctor being able to, as she was abroad. The extent of Mr. Jones' assistance was the care of his feet, and so it was Mrs. Graham who carried the 'lion's share' of responsibility for his care, especially after his several surgeries.

**[78]** There is the allegation of her hiding his car keys as part of her poor treatment of him. For an 86-year-old man that had poor eye-sight; only able to read with his glasses but not see well otherwise, would it have been mistreatment or an act of care to keep him from driving a car, if indeed she did hide his keys? Yes, the independent Mr. Graham would complain of this as he wanted the freedom of his younger years; to move around as he wished. We heard the evidence of Mrs. Graham that she did not even know of Mrs. Richards prior to March 2014 and may well not even have known of the 2003 Will; all proof that Mr. Graham was a man used to doing his own thing without having to rely on anyone, a no-nonsense man of strong character as described by Mrs. Richards. With Mrs. Graham working on shifts, she certainly was not as available to carry him around so could that have accounted for some of the complaints?

**[79]** It is entirely conceivable that Mr. Graham complained about his wife. It is entirely conceivable that being unable to drive and now unable to walk without a crutch, Mr. Graham was feeling more vulnerable than he had ever felt in his life being the strong-minded individual that he was described to be. However, even in that state, there was no one that was going to force or coerce him to do anything he did not want to. In all the three Wills that have been discussed in this case, he made

arrangements for his wife. Despite being told that the bank account was depleted, he made arrangements for his daughter. Yes, he was far from his best physical condition compared to prior years as Mrs. Richards expressed surprised when she saw that he had had an amputation. When what is 'conceivable' is discussed it is not the Court speculating, but the authorities suggest that the facts must not only be consistent with a hypothesis of undue influence but must be inconsistent with any other hypothesis. The discussion is merely to demonstrate that the proven facts are consistent with other hypotheses to include Mr. Graham's desire to please or at least provide for both his wife of twenty-six years and his adult daughter or her children in the testamentary dispositions under his Will.

[80] Based on the *Banks v Goodfellow* case, it is clear that Mr. Graham understood the nature of the testamentary gifts he was giving to his wife and daughter and that no disorder of the mind existed, a similar principle espoused in *Sharp v Adam*. The Claimants relied on *Davis v Barrett-Davis* in which our Courts have expressed the view that the standard of proof must go beyond just proving that there was persuasion but proving coercion. Has the Claimant proven that in this case? Has what the Claimants presented for this Court to consider proven on a balance of probabilities, facts inconsistent with any other hypothesis than that Mrs. Graham's coercive will overbore Mr. Graham's will or that she elicited some fraud in procuring the March 2014 Will (See the dicta in *Edwards v Edwards*)?

[81] With all the complaints that Mr. Graham had, according to the Claimant's case, why didn't he simply return to Mrs. Stanley-Jones or some other Attorney-at-Law of his choice to change his Will again? He was clearly alert enough to be giving all these accounts of what was happening to him and his desire not to return home so why not prepare a new Will after the March iteration? Mrs. Proctor proffers a possible explanation as she said her father handed her the February 2014 Will and said that is the one he intended to use. It seems curious that a man that kept changing his Will; having drafted at least four by the time of his death, would express a view that he believed an older Will should take precedence. Then why bother to go to the effort of preparing Will after Will, especially the last three over

a space of four months? Mr. Graham clearly understood the need to prepare a new Will to reflect his new wishes. Perhaps he did say that to Mrs. Proctor, to appear to be pleasing them both while knowing full well that what he desired was carried out in the March 2014 Will.

[82] The authorities suggest that for an inescapable inference of undue influence, the facts proven must be inconsistent with any other hypothesis. The Claimant must prove on a balance of probabilities, that the explanation for what occurred was that the testator's will was overborne by coercion rather than there being another explanation. Yes, Mr. Graham was quite ill and vulnerable with his amputation but as stated in ***Coles v Reynolds & Anor***, even frail and vulnerable individuals can make valid Wills.

[83] I find that the Claimant has failed to show any medical or other basis for a conclusion or suspicion, by itself, that Mr. Graham's decision-making was impaired as a result of his illness or his low feelings of loneliness and depression. I find that Mrs. Graham went with her husband as she said and that when she did so, she was acting on the instruction of her husband. I find that Mr. Graham, though not in the best of physical health and no doubt, being the strong-willed, no-nonsense man of action he had come to be known as, may have had low feelings and preferred to die rather than to be dependent on anyone.

[84] There is no evidence to support the conclusion that there exists this 'miasma of suspicion' that anything unsavoury occurred in the making of the disputed Will. I do not find that Mrs. Graham exercised any coercive power or undue influence over her husband but rather that Mr. Graham knew and approved of the contents of the Will and was of sound mind, memory and understanding when he executed the disputed March 2014 Will.

[85] On the foregoing findings, judgment on the claim and counter-claim are as follows:

- (i) *On the Claimant's Fixed Date Claim form, judgment is given for the Defendant;*

- (ii) *The Court declares the February 19, 2014 Will to be revoked by the March 19, 2014 Will, which is the Last Will and Testament of the deceased, James Graham;*
- (iii) *The Defendant, may now proceed to her application to obtain a grant of Probate, on the Last Will and Testament of the deceased, James Graham, dated March 19, 2014;*
- (iv) *Costs of the claim awarded to the Defendant, which are to be taxed if not agreed.*