[2014] JMSC Civ. 86

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010 HCV 00560

IN THE MATTER of the Estate of DUDLEY IAN HORNER of Coolshade Drive, Kingston 19, St Andrew

BETWEEN	**JEANETTE HORNER- BRYCE**	**CLAIMANT**
AND	**EDGAR MARTIN**	**FIRST DEFENDANT**
AND	**MAVIS BRYSON**	**SECOND DEFENDANT**

IN CHAMBERS

Garth McBean & Carl Dowding, instructed by Pickersgill, Dowding & Bayley Williams for the claimant.

Kayann Balli, instructed by Balli & Associates for the first defendant.

Heard: November 28, 2013 & April 11, 2014

TWO WILLS – ONE WILL DATED LATER IN TIME THAN THE OTHER – MENTAL CAPACITY OF TESTATOR – MENTAL HEALTH ACT –UNDUE INFLUENCE

ANDERSON, K., J

[1] The deceased undisputedly made two wills, one of which is fully and thus, properly dated, with that date being: November 16, 1997 and the other of which is only partially dated with that partial date being- '2007'.

[2] Neither of the witnesses to the partially dated will, have testified. Equally too, neither of the defendants have testified. Furthermore, the second defendant had filed no

defence whatsoever, whether in the form of an affidavit in response to fixed date claim form, or in the form of a 'defence'.

[3] It should be noted that these court proceedings were initiated by the claimant as fixed date claim form proceedings and thus, whilst they remained as fixed date claim form proceedings, no default judgment as against the second defendant, could have been obtained. See rule 12.2 (a) of the Civil Procedure Rules (C.P.R) in this regard. These proceedings were however converted to claim form proceedings, by order of this court, as made by Mr. Justice Rattray, on January 27, 2011. Thereafter, the claimant filed particulars of claim, in accordance with this court's order as made on January 27, 2011 and the first defendant filed a defence in accordance with that same order of this court.

[4] Stripped to its nub, the claimant's claim, is that the deceased made two wills, one of which is invalid in law and the other of which, is not. The only valid will made by the deceased – Mr. Dudley Ian Ward Horner, is, she claims, the will which is properly dated, with the date – November 16, 1997.

[5] The claimant is the daughter and only child of the deceased. The claimant's mother pre-deceased her father. The claimant's mother, according to an averment which had been made in paragraph 2 of the particulars of claim, died in 1992, whilst her father died on September 12, 2009, at 84 years of age.

[6] In the circumstances, the claimant stands to gain from the estate of the deceased, to a significant extent, if the '2007' will were to be declared invalid, since under the will of November 16, 1997, Lot #9 –Bushy Park, in the parish of St. Catherine, has been bequeathed to the claimant and the claimant's two daughters namely: Nadya Bryce and Shani Bryce, as joint tenants in equal shares. On the other hand, if the '2007' will is not declared invalid, neither the claimant nor her daughter will benefit from that said premises at Lot #9 – Bushy Park, St. Catherine, since, in the '2007' will, the same was wholly bequeathed to one Roy Martin.

[7] Of course, with respect to the same property referred to in both wills, ordinarily, the will which was executed later in time, will be deemed to have revoked the former will, in respect of that property. There was no evidence given at trial by the first defendant and thus, this court cannot and has not taken into account, for the purpose of rending its judgment herein, that, or any of that, which has been stated in either the first defendant's witness statement, or in his supplemental witness statement. It is worthy of note though, if only for the purpose of satisfying curiosity, that in the first defendant's supplemental witness statement, it had been recorded in paragraph 1, that the first defendant, is, 'also known as Roy'. Thus it may very well be that the 'Roy Martin' referred to in the '2007' will, could be construed as referring in fact to, Edgar Martin, who is the first defendant. This court though, has, for present purposes, drawn no conclusion and is in fact unable to draw any conclusion in that regard, since no evidence was presented to this court at trial, as to same.

[8] The claimant is contending, by means of her particulars of claim, that in 2007, the deceased – Dudley Ian Ward Horner, did not have the mental capacity to lawfully make a valid will, since at the time he would not have had the mental capacity to have understood the effect of what he was proposing to have done, upon his death, by means of that '2007' will which he executed. It should be noted that there exists no dispute whatsoever, from the sole evidence presented to this court at trial, which was the claimant's evidence, that this court had, on November 23, 2007, made an order appointing a committee, with the claimant being a member thereof, to manage the affairs of the said Mr. Horner – who of course, was then alive. This court could only have done that, if this court was satisfied by evidence from a medical doctor that at that time Mr. Horner was suffering from a mental disorder. See sections 2 and 29 of the Mental Health Act, in that regard.

[9] Bearing in mind that the '2007' will bears only a year, as its date and bearing in mind that it is necessarily implicit in this court's order of November 23, 2007, that at that time, the person who is now deceased and whose wills are the subject of this claim, namely: Dudley Ian Ward Horner, clearly could not manage

his own affairs due to his then mental disorder, it must follow inexorably, that such evidence alone, may very well have been sufficient to justify this court in declaring the said '2007' will invalid in law. There is more though, insofar as, for the purposes of this claim, the claimant has placed before this court, overwhelming expert evidence which points in one direction only. Prior to addressing such evidence any further on in this judgment though, this court will address another ground raised by the claimant as being a basis for this court declaring the '2007' will as invalid, that being the ground of 'undue influence' and will also address its mind as to whether, there being no defence filed by the second defendant and thus, no issue joined as between the claimant and the second defendant, a judgment can now be obtained against the second defendant. It should be noted, in consideration of this aspect of this claim, that there has, as far as this court has, thus far, been able to discern, not even been an acknowledgement of service filed by the second defendant, in response to this claim.

[10] In respect of the present claim, the claimant should have undergone the necessary processes, pursuant to part 12 of the C.P.R., to obtain a default judgment against the second defendant. Provided that the conditions as set out in either or both rule 12.4 and/or 12.5 of the C.P.R. had been met, or have been met, then the registrar of this court, must, once a request is made as per Form 8 of the C.P.R., for the registry to enter that default judgment, do so. At present though, it does not appear to this court as though, any such request has, as yet been made and therefore, this court, is not at present, properly in position to adjudicate on any issue joined between the claimant and the second defendant, this simply because no issue has, as yet, been so joined between them and indeed, it may very well be that no such issue will ever be joined as between them. Until either issue is joined between the claimant and the second defendant though, or alternatively, a default judgment is entered in favour of the claimant,

as against the second defendant, then the present claim must, of necessity, still subsist as between the claimant and the second defendant. The only other alternative now available to the claimant, in order for judgment on this claim to properly be able to be delivered by this court hereafter, based on the claimant's evidence which was presented at trial and the legal issues with which this court is now faced, is for her to withdraw her claim against the second defendant. If she were to do so, of course no prejudice to her could possibly arise, since she really has led before this court, no evidence of their having been any 'undue influence' having been exerted upon the deceased by either of the defendants, at any time. As such, there was, in any event, no proper or at least no prudent basis, upon which the claim against the second defendant could, in the circumstances, have been pursued, with any realistic prospect of success. Furthermore if the claim were to be withdrawn as against the second defendant, no order of cost could be made against the claimant in favour of the second defendant, since the second defendant has never sought to defend the claim. In the circumstances, this claim was not properly managed, either by the parties', counsel or by this court, as it should never have proceeded to trial without certain issues as referred to in this paragraph of this judgment, having first been settled.

[11] As things have evolved in that regard however, I had brought all of that which is set out in the preceding paragraph of these reasons for judgment, to the attention of the respective parties' counsel, during a hearing which was held in open court, prior to my oral judgment on the claim having been made known. Upon this court having done so, the claimant's attorney – Mr. McBean, informed this court that the claimant should be considered by this court, for the purpose of its rendering of judgment in respect of this claim, as having withdrawn her claim against the second defendant.

[12] As such, this court having concluded that the '2007' will is invalid, due to the mental incapacity of the deceased at the material time – that being the time when he signed to and had his signature which his affixed to that will, witnessed by others, declared said will to be of no legal effect and awarded judgment on this claim in favour of the claimant, as against the first defendant. The deceased lacked the required testamentary capacity when he made the 2007 will and thus, that will is void and of no legal effect see: **Banks v Goodfellow** – [1870] L.R. 5 Q.B. 549, esp. at p. 565, per Cockburn, C.J. These are the then promised, reasons for judgment.

[13] There only remains one other matter to be addressed in these reasons for judgment and it is the matter of undue influence as alleged by the claimant. Suffice it to state that the claimant has wholly failed in proving that patently unfounded allegation, as regards the 2007 will. The failure to prove said allegation though, will make no difference to the outcome of this case, as the proven lack of testamentary capacity, of the deceased at the material time, suffices in proof of this claim.

[14] The court's judgment orders are as follows:

(i) Pursuant to an undertaking by Mr. Garth McBean, Attorney-at-Law, on behalf of the claimant, the claimant's claim against the second defendant shall stand as discontinued with immediate effect provided that the requisite notice of discontinuance shall be filed and served on both defendants. Same shall be filed and served before April 25, 2014.

(ii) It is declared that the 2007 will of Dudley Ian Ward Horner, deceased, is invalid and of no effect.

(iii) It is declared that the last will and testament of Dudley Ian Ward Horner, deceased, is his will dated December 16, 1997, as witnessed by Gordon Steer and Suzette Kirkland.

(iv) Costs of this claim are awarded to the claimant as against the first defendant with such costs to be taxed if not sooner agreed.

(v) The claimant shall file and serve this order.

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Hon. K. Anderson, J.