[2020] JMSC Civ 76

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2013 HCV 04088

BETWEEN	**PATRICIA DEANS**	**CLAIMANT**
AND	**ALAN DEANS**	**DEFENDANT**

IN OPEN COURT

Mrs. Caroline Haye and Mr. Neco Pagon instructed by Caroline P. Haye, Attorney-at-Law for the claimant.

Mr. Lawton Heywood and Mrs. Natalia Heywood-Blake instructed by HEYWOODBLAKE, Attorneys-at-law for the defendant.

HEARD: January 20, 21, 22, 23, 24, 27, and May 6, 2020

Coram: J. Pusey J

BACKGROUND:

[1] The parties in this action are two of six children born to Mrs. Beryl Deans who died on December 24, 2014. During her lifetime Mrs. Deans acquired two properties, one at 31 Roehampton Close registered at Volume 1052 Folio 254 and the other at 49 Gilmour Drive registered at Volume 1213 Folio 80 of the Register Book of Titles and both in the parish of Saint Andrew.

[2] As she advanced in years it was her stated intention that the claimant would receive 49 Gilmore Drive upon her demise. She took no steps during her lifetime to pass the property to the claimant. However, after some persuasion by the defendant, she gave him instructions to prepare her Last Will and Testament leaving, among other gifts, 49 Gilmore Drive to the claimant.

[3] The Will, prepared by the defendant, who is an Attorney-at-law, was not signed at the time of the passing of Mrs. Deans, he having visited her the day of her death to have it executed and she was asleep. Consequently all of her estate falls into intestacy. The claimant's gift of 49 Gilmore Drive absolutely, could therefore not be realized as all the children of the deceased stand to gain a one-sixth share in both properties pursuant to the Intestate Estate and Property Charges Act.

[4] After the funeral the defendant called a meeting of the siblings and enquired whether anyone had a signed Will for their mother. He then told them of the unsigned Will in his possession. He explained how the estate would be distributed on intestacy and when asked whether he would be prepared to give his share in 49 Gilmour Drive to the claimant in accordance with the wishes of his mother, he and three other siblings refused.

[5] This claim by Patricia Deans is to recover damages for negligence against her brother, Alan Deans, for failing to have the Will executed by the deceased before her passing. She alleges that she suffered resultant loss of her gift, is an intended disappointed beneficiary and is entitled to damages. She further alleges that the deceased was terminally ill at the time she gave instructions to the defendant and he should have acted promptly in preparing and having the Will executed. She is supported in her claim by her sister Mrs. Carole Deans-Campbell, while Alan is supported by the other siblings in his defence. One of the siblings, Marcia, has died since the passing of her mother.

[6] The defendant denies being negligent and asserts that he prepared the Will and took it several times to his mother to be executed and she gave excuses and did not sign it.

[7] The facts proved in this matter are important to the determination of the issues to be decided.

THE CLAIMANT'S CASE

[8] The claimant along with her son Kirk Soutar, her sister Mrs. Carole Deans-Campbell, a tenant of Mrs. Deans deceased, Mr. Mervin Henry and the deceased's Caregiver, Miss Ercelyn Palmer all gave evidence that during her lifetime Mrs. Deans repeatedly said that 49 Gilmour Drive belonged to the claimant. They also spoke of how organized Mrs. Deans was and that up to the time of her death she was lucid and in her correct frame of mind. They knew nothing of her making a Will and never had discussions with her at any time about her making a Will.

[9] Mrs. Carole Deans-Campbell and the claimant stated that they knew nothing of a condition being attached to the gift of 49 Gilmour Drive to the claimant, to the effect that she had to return to Jamaica to live with her mother or she would not inherit the property.

[10] The Caregiver gave evidence that she never saw the defendant read any Will to the deceased while she was in hospital or at home. She said she was always in the company of the deceased and any of her children when they visited and would have seen such an activity.

[11] Mr. Kirk Soutar gave evidence that his grandmother, the deceased, explained to him that 49 Gilmour Drive belonged to his mother, the claimant. She told him all her children had property of their own in Jamaica except the claimant and she was giving that properly to her. She attempted to show him some documents in

a brown envelop but he told her not to, as he thought it was a Will and he could not stand the idea of her dying.

THE DEFENDANT'S CASE

[12] The defendant gave evidence that for some time he had been having conversations with his mother about her making a Will to put her affairs in order and she listened but did nothing in that regard. After her 70th birthday he explained to her the merits of making a Will. This conversation was repeated several times over a number of years until October 2012.

[13] On the 25th October 2012 the deceased sustained a fall and complained of stomach pains. When he visited her, as he usually does on a Saturday, he had a substantial discussion with her about the need for her to make a Will again and she agreed to think about it.

[14] The deceased suffered a stroke on October 28, 2012, affecting her dominant right hand. In November 2012 she was admitted to hospital and quarantined in relation to a stomach virus. He raised the issue of the Will with her again and she gave him, on November 12, 2012, the details of her wishes. He prepared the Will on November 13, 2012 and left the island on as short trip.

[15] When he returned, on November 23, 2012 he took the Will to her and read it to her and she asked that he not discuss it with anyone. She did not sign it then as she was in the hospital and said she would do so when she was in better health. She remained in hospital for about two weeks.

[16] The defendant visited his mother on December 8, 2012 at home and told her that if she did not sign the Will it would be invalid and she said she was not ready to sign it.

[17] On December 12, 2012 the deceased was again admitted to hospital and on the 17th December, 2012 was diagnosed with terminal stomach cancer. When she

was discharged form hospital he visited her at home on December 22, 2012 but she was half-asleep.

[18] On the morning of December 24, 2012 he visited his mother at home and she was in terrible pain. He had the Will with him for her to sign but as she was sleeping he asked the claimant to take it so she could sign it when she was awake and she refused to take it. He intended to explain the peculiarities of signing the Will to the claimant with neighbours as witnesses, but as she refused to take it, he left with it. Later that day he was called back to the home and witnessed his mother's passing.

[19] The defendant gave evidence that the claimant resides in the United States of America. From the 1990's his mother, who complained about being lonely, was promised by the claimant that she would return to Jamaica to live with her. For that reason, mother decided to give 49 Gilmour Drive to the claimant and no member of the family objected and would not have objected if she gave it to her for any other reason.

[20] He stated that when his mother told him the gifts she wished to make in her Will, she wanted the gift of 49 Gilmour Drive to be conditional on the claimant returning to live with her. He explained that it could create problems if she did not return before her death and suggested she should make the gift unconditional. She told him that she would leave that up to him. He therefore prepared the Will with the gift to the claimant being unconditional.

[21] After his mother's funeral he called a meeting of the siblings and enquired whether anyone of them had a signed Will. They did not and he told them about the unsigned Will in his possession. He explained the consequences of it not being signed and what would obtain on intestacy.

[22] A discussion ensued about the fact that the claimant would not receive her gift of 49 Gilmour Drive absolutely. Mrs. Carole Deans- Campbell offered her share to the claimant and polled to see if anyone else would do likewise. The defendant

said he would not and the other siblings said the law must take its course, with Horace's answer being unclear.

THE CLAIMANT'S SUBMISSION

[23] The claimant contends that there is an implied contract of retainer between the defendant and his mother to prepare her Last Will and Testament based on the conduct of the parties regarding the preparation of the Will. The determination of the matter will turn largely on the facts presented. There is also no real issue with the applicable law.

[24] The claimant also argue that the defendant has asserted that the reason the deceased refused to execute the Will was that the claimant did not return from the USA to reside with her and therefore should not receive the gift. By so doing, it is argued, the defendant put the deceased's state of mind in issue and opened the door for utterances she made during her lifetime about the gift, to be both relevant and admissible. Consequently the claimant led evidence from Mrs. Carole Deans-Campbell, Kirk Soutar, the Caregiver and the tenant concerning what they say the deceased said to them about the gift to the claimant. Counsel relied on the decision in **Subramanian v Public Prosecutor** [1956] 1 WLR 965 and **Reg. V Gregson** [203] Cr App R 34 to support the admissibility of this evidence.

[25] In relation to the issue of the existence of an implied retainer, counsel argued that a contractual duty exists between an attorney and his client either expressly or by implication. Relying on **Allen v Bone** [1841] 4 Beav 493, **Caliendo v Mishcon de Reya** [2016] EWHC 150 (Ch) (04 February 2016) and **Morgan v Blyth** [1891] 1Ch 337, counsel contended that the retainer contract can be implied from the a conduct of the parties. Counsel further relied on the decision in **Dean v Allen & Watts (A Firm)** [2001] EWCA Civ 758 for the proposition that on an objective consideration of the circumstances a tacit understanding or agreement to enter in to legal relations can provide the basis for an implied

contract of retainer. Counsel further argued that a contract can be implied by necessity and relied on **Bird Textiles Ltd. v Marks and Spencer plc** [2001] EWCA 274 for that proposition.

[26] In response to the defence's argument that the defendant and the deceased were engaged in a domestic arrangement as a son helping his mother to arrange her affairs, counsel relied on the decision by the Disciplinary Committee of the General Legal Council, Complaint No. 25/2009 **Leonard Wellesley v Lynden Wellesley** delivered on the 28th April, 2012, as, assumedly, binding precedent, for the proposition that a retainer contract can exist between an Attorney-at-law and a relative.

[27] Counsel argued that the contract must be sufficiently certain to enable the court to give effect to the intentions of the parties, relying on the case of **Hendricks v McGeoch** [2008] NSWCA 53 delivered on April 2, 2008.

[28] Counsel examined the evidence and concluded that there was an implied contract of retainer between the deceased and the defendant who got instructions and prepared her Will consistent with those instructions. The defendant therefore owed a duty in contract to his mother to see to the due execution of her Will in accordance with her instructions.

[29] In the alternative, counsel argued that the defendant owed a duty of care in tort to the deceased when he '*assumed the responsibility to assist*' her with the preparation of her Will and regularise her affairs. Counsel relied on the decision of the House of Lords in **Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.** [1964] AC 465 and **Burgess & Another v Lejonvarn** [2016] EWHC 40 (TCC). She argued, relying on the **Burgess** case for the proposition, that there is no distinction between the provision of advice and the provision of services where a special skill is exercised. The duty arises on the *assumption of responsibility* to carry out the service and the reliance of the client on the skill of the defendant.

[30] Council submitted that the court in determining whether a duty of care is owed in tort is not concerned with subjective thoughts and intentions, but should focus on the conduct of the parties – how they behaved and spoke to each other. Factors such as the payment of fees or the provision of indemnity insurance cannot assist the defendant in these circumstances, she argued.

[31] On the totality of the evidence, counsel argued, the defendant owed a duty of care in tort. He had the requisite knowledge that if the defendant failed to execute her Will what would obtain. His failure to have her execute the Will amounts to a breach of the duty of care and is negligent and he should be penalized in damages.

[32] Counsel posited that the defendant also owes a duty of care to the claimant, the disappointed beneficiary. The claimant was in his direct contemplation as a person who would be affected by his acts or omissions in discharging his duty properly. The decisions in **Ross v Caunters** [1980] Ch 297 and **White v Jones and another** [1995] 1 ALL ER 691 supports this proposition. The claimant is therefore entitled to damages to compensate her for her loss. In determining foreseeability the decision of the House of Lords in **Caparo Industries Plc v Dickman** [1990] 2AC 605 was relied on.

[33] Counsel argued that the negligence complained of is a failure by the defendant to act promptly to have the Will executed. What is proper expedition is a question of fact as determined in **Hooper v Fynmores (A Firm)** [201] Lexis Citation 1487. In the instant case the defendant was aware that the deceased was terminally ill and the need to act expeditiously. His failure to do so constitutes negligence.

[34] The claimant further argues that there is a conflict of interest with the Will not being signed. The allegation is that the defendant did not cause the Will to be signed as he would get a greater benefit of one-sixth share in the Gilmour Drive property on intestacy.

THE DEFENDANT'S SUBMISSION

[35] The defendant contends that the relationship between himself and his mother was a domestic arrangement and not a lawyer/client relationship. The drafting of her Will resulted from efforts by him to assist her in regularizing her affairs over many years. He prepared the Will and presented it to her on many occasions and she did not sign it, making excuses. Her failure to execute the Will does not constitute professional negligence, as the decision to execute it was that of the testatrix, and she had the opportunity to do so.

[36] In answer to the claim of professional negligence, the defendant further argues that there was no intention to enter into legal relations between the deceased and her son. What subsisted was a domestic arrangement of a good son urging his mother, over many years, to put her affairs in order. The existence of a retainer, counsel urged, is the foundation of the claimant's case and it imposes contractual, tortuous and fiduciary duties on the Attorney-at-law, however, this did not exist between the defendant and his mother.

[37] Counsel submitted that in order for the claimant to establish the existence of a retainer she must place before the court credible factual evidence from which the existence of a retainer can be inferred, in the absence of a written retainer.

[38] An implied retainer can be inferred if on an objective consideration of all the circumstances, an intention to enter into a contractual relationship can fairly and properly be imputed to the parties. There must be tacit understanding or agreement between the parties to enter such a relationship. He argued that **Hendrick v McGeogh** and **Allen v Bone** as well as **Leonard Wellesley v Lynden Wellesley** *Supra* are examples of the application of that principle.

[39] Counsel urged that the credibility of the claimant and the defendant is important in resolving the issues in this claim. The claimant has not demonstrated by credible evidence the existence of facts to support the existence of an implied retainer.

[40] He argued that the evidence of what transpired at the after-funeral meeting of the siblings on January 4, 2013 cannot be relied on to establish a retainer. In the cross-examination of the claimant she stated that she had no independent evidence that a retainer existed and she was relying on what was said by the defendant at the meeting to imply the existence of a retainer. What is alleged to have been said is strongly disputed by the defendant. For instance she agreed with counsel,

'that the defendant offered to help his mother with her Will as a good son with professional skills.'

[41] This cannot support the existence of a retainer and is more supportive of a domestic arrangement, counsel urged.

[42] In relation to the allegation of professional negligence, counsel argued that the facts constituting negligence has also not been established by evidence. The claimant's contention is that the defendant did not move expeditiously in getting the deceased to execute her Will. What is the claimant's evidence concerning this? The Particulars of Claim alleged admissions by the defendant including that,

> *"He carried out Mama's instructions to prepare her will but* ***he never had her sign it."***

[43] When this was put to the claimant in cross-examination she said what the defendant said at the meeting was,

> *"He said he was instructed to prepare the will* ***but it wasn't signed."***

[44] She went on to say that he never said *'I did not have her sign it'.* This bit of evidence, counsel urged, contradicts the assertion of negligence and in fact supports the defendant's assertion that he presented it to his mother but for whatever reasons, she did not sign it. There is no act of negligence proved.

[45] The claimant maintains that the defendant did not inform the meeting of his efforts to have his mother execute her Will but agree that he visited her every Saturday. Counsel urged that this is evidence that he had the opportunity to discuss the preparation of the Will and the execution of it.

[46] The claimants also asserts that the defendant had not read and presented the Will to the deceased as the Caregiver was always present when he visited and did not see any such activity. Counsel submitted that this evidence was put forward to shore up the weakness in the claimant's effort to establish negligence and to put to rest the defendant's assertion that he had presented the Will and she did not sign it. Counsel noted that this was not part of the statement of case in the Particulars of Claim or the witness statement of the Caregiver and seems concocted. Counsel asked the court to examine the credibility of this witness and decide if she would have been permitted to sit-in on visits between the deceased and her adult children.

[47] Counsel further submitted that the efforts of the claimant to bolster the allegation of negligence was not limited to the amplification of the caregiver's evidence but extended to efforts to invoke Canon 4 of the Legal Professional (Canons of Professional Ethics) Rules, though not pleaded. This relates to perceived conflict of interest alleging that the failure to have the Will signed, resulted in the defendant being entitled to more out of the estate than if the Will had governed the distribution of the assets. The defendant submits that had the Will not been made at all or the gift made conditionally the claimant would be in a less advantageous position than that provided for in the Will. If the claimant did not fulfil the condition in the Will, the gift would lapse. Any assertion that the defendant was motivated by a desire to gain more cannot be maintained upon an examination of the Will.

[48] Turning to the issue of liability of an attorney to third parties, Counsel argued that an Attorney-at-law who is instructed under a retainer also owes a duty of care to a third party who will be directly affected by his acts or omissions and it is

reasonably foreseeable that he will be so affected. That was the decision in **White and Jones** *Supra,* where the existence of a retainer was not in issue, but rather liability to third parties. The liability arises as an extension of the principle in **Hedley Byrne & Co.v Heller Partnes** *Supra* or as an application of the neighbour principle in **Donogue v Stevenson** [1932] AC 562. The court would have to find that a retainer existed between the deceased and the defendant before it could find that there is liability to the claimant.

[49] Further commenting on the credibility of the other witnesses, counsel submitted that the evidence of Kirk Soutar, Mervyn Henry and Evelyn Palmer have no value in determining the issues before the court.

[50] Counsel submitted that the intention of the claimant in instituting this action, admitted by her in evidence, was to carry out the wishes of her deceased mother that 49 Gilmour Drive was to be given to her. She said what was going on by her siblings was wrong and smelled bad. This is supported by the defendant's witness, Barbara Romero's views as to why litigation involving this matter and one instituted by Mrs. Carole Deans-Campbell was filed - to defy the rules of intestacy after efforts to get the other siblings to acquiesce in the claimant obtaining 49 Gilmour Drive absolutely, failed.

ISSUES

[51] The issues to be resolved in this claim are: -

- Was there an implied retainer contract between the deceased and the defendant for legal services to be provided for the deceased by the defendant?

- If there is an implied retainer, was there a negligent breach of that contract resulting in loss and damage to the claimant for which she should be compensated in damages?

ANALYSIS AND CONCLUSION

[52] An examination of the material before the court reveals that in relation to the applicable law there is no dispute. Stated succinctly – a retainer contract can be implied if, on an objective assessment of the circumstances, there is tacit understanding between the parties of an intention to enter into legal contractual relations. That is the basis of the decisions in **Allen v Bone** *Supra,* ***Morgan v Blyth*** [1891] 1 Ch 337 and **Caliendo and another v Mishcon De Reya (A Firm) and another** [2016] EWHC 150 (Ch). The **Morgan v Blyth** case decided that liability could extend to the estate of a partner in a law firm. This arguably could have been a precursor to the decision in **Ross v Caunters** that there is liability in negligence between Attorneys-at-law and their clients and which was extended to third parties in **White v Jones and Another.** The liability is predicated on an extension of the principle adumbrated by Lord Atkins in **Hedley Byrne & Co. v Heller & Partners** in contract or on the neighbour principle in **Donoghue v Stevenson**.

[53] In resolving the issue of whether on the evidence presented in this matter an implied retainer existed between the deceased and the defendant, an examination of the facts and circumstances is necessary. In **Morgan v Blyth** Sterling J put it this way,

> *In other words, you must have circumstances from which the proper inference is that there was a request to perform services.*

[54] To use the jargon, it is a question of fact. Once the issue of the existence of the retainer is settled, the chips will fall where they may.

[55] The witnesses whose evidence is pivotal to the issue of the retainer are the claimant, the defendant and Carole Deans-Campbell. The evidence of Kirk Soutar is primarily a supposition of what could have been in a brown envelop his grandmother tried to show him. He refused to look, so he can only speculate on

the contents. His evidence and that of the Caregiver and the tenant were admitted on the basis of **Subramaniam v Public Prosecutor**, merely for the fact that something was said about the claimant getting 49 Gilmour Drive, rather than the truth of that statement. There was a veiled attempt to take that evidence higher and suggest that what was said be accepted as the truth. In any event there is universal agreement that Mrs. Dean's intention was that the property was to go to the claimant, so it is not necessary to rely on that evidence. They therefore impact to a lesser degree the issues for determination.

[56] A retainer is a contract between a client and an Attorney-at-law whereby the attorney performs legal services for the client for a fee. There are many types of retainers. Retainers can be expressed or can be implied from the conduct of the parties or the circumstances of their interaction. Express retainers usually involve advance payments to the Attorney to secure his services.

[57] Retainers are impacted by the law governing contracts. All the elements of a contract, namely, offer and acceptance, consideration and an intention to create legal relations are required. A retainer is also impacted by the ethics of the legal profession as well as the rights and responsibilities of the Attorney-at-law as an Officer of the Court. Section 21 of the Legal Professions Act speaks to the taxation of Bills of Cost arising from retainers and so provides redress for unfair or disputed Bills of Cost.

[58] When a retainer is to be implied the authorities suggest that there must be tacit understanding between the parties that legal relations are being created. That is the purport of the decision in **Deans v Allen & Watt (A Firm)** *Supra.* It follows that the conduct of the parties is pivotal in the determination of this issue.

[59] At the outset it is noteworthy from the evidence that none of the siblings, except the defendant, knew of the existence of the Will in question. None of them discussed with the deceased the preparation of a Will except the defendant and his witness Barbara Romero, separately. Only the defendant took positive steps

to prepare a Will. The sibling's knowledge of the Will's existence was discovered at the meeting of January 4, 2013, after the funeral.

[60] It should also be noted that all the siblings are agreed that it was the deceased stated intention that the claimant was to receive 49 Gilmour Drive. It follows that on the claimant's case only the evidence of what transpired at the meeting of January 4, 2012 need be reviewed to resolve the issue concerning the circumstances surrounding the preparation of the Will. No other independent evidence from the claimant is forthcoming. The claimant's case in this regard is contained in her evidence and that of Mrs. Carole Deans-Campbell. I will therefore not review in its entirety the evidence of these witnesses but highlight the portions relevant to the resolution of the issue at hand.

The claimant's evidence

[61] The claimant became aware of the existence of a Will on December 24, 2012 when the defendant took it to be signed by the deceased who was asleep and he said he would return for her to sign it the following day.

[62] At the meeting the claimant recounts that the defendant said he had been 'instructed' by his mother between 12th and 31st October, 2012 to prepare her Will, but it was not signed. He received two certificates of tile for her two properties on October 12, 2012. He then explained the implications of the will being unsigned and how the estate would be distributed on intestacy. He said the intention of his mother to give 49 Gilmour Drive to the claimant did not matter, as she died intestate and all the children were entitled to 1/6th share in the property.

[63] She repeatedly said the defendant gave no information of the circumstances that led to him preparing the Will or his efforts to have the Will executed by the deceased. She said at the meeting no one asked why the Will was not signed.

[64] She said his admission that he received instructions from the deceased to prepare the Will and he preparing it in accordance with those instructions is evidence of the existence of a retainer between them. She rejected, and at one point said she did not know whether the circumstances was a domestic arrangement of a 'good son' with specialized skills assisting his mother to put her affairs in order, rather than a contractual one. She admitted that apart from what was said at the meeting, she has no independent evidence or information that a retainer existed.

[65] The claimant gave evidence that at the meeting the defendant was questioned about giving his share of the property to the claimant, and he refused. He was joined by all the siblings except Carole Deans-Campbell in their refusal to give their share in the property to the claimant.

[66] The claimant further said that at the meeting the defendant never said he told her to keep the Will and have mother sign it when he visited on the 24th December, 2012 and she was asleep.

The evidence of Carole Deans-Campbell

[67] Mrs. Carole Deans-Campbell also gave evidence about what transpired at the meeting. She recalled that the defendant asked if anyone had a signed Will for mother and then he said he had one and it was not signed. He told the gathering the terms of the Will - the claimant was to receive 49 Gilmour Drive and Roehampton was to be shared up. He explained what was to happen on intestacy and said if anyone wanted his share of 49 Gilmour Drive they could pay him for it. She, the claimant, and Horace said that 49 Gilmour was for the claimant and the defendant said '*Mama dead and gone so her wishes no longer matter*' as the Will is unsigned. He asked if anyone agreed with him that 49 Gilmour Drive was to be divided equally and Marcia, Barbara and Horace put up their hands. The defendant said he was the lawyer and he had discussed the effect of the unsigned Will with another lawyer, who agreed with his position.

[68] Mrs. Deans-Campbell said the first time she heard about the Will was at the meeting. She never ever discussed with mother the making of a Will and she is not surprised that Alan would have acted for his mother in the preparation of her Will.

[69] At the meeting she gave evidence that the defendant never spoke about the circumstances that led to the preparation of the Will or his efforts to have the deceased sign it. No one asked why the Will was not signed. He said with the unsigned Will, the property would have to be divided equally. She said she is not certain that the defendant made efforts to have the Will signed. She said she had no other information about the Will except what transpired at the meeting. She also said the defendant did not say at the meeting that he had for yeas tried to get mother to make a Will.

[70] These were the witnesses for the claimant, who had the burden to prove the existence of a retainer contract on a balance of probabilities.

[71] From this evidence it can be extracted that there were instructions given to the defendant by his mother to prepare her Will and he did so. He took it to her to have her sign it and she was asleep and he said he would return the next day for her to sign it. This could amount to an offer and acceptance – the deceased offered to utilize the services of the Attorney-at-law and he accepted the offer and performed a service for her. Nothing about the circumstances that led to this offer and acceptance is discernible form the evidence. Nor is there evidence about the reason the Will was not signed. Both witnesses are adamant that that information was not forthcoming at the meeting. There is therefore no evidence surrounding the preparation of the Will from which it could be inferred whether the elements of a retainer contract existed. Can the question – Did the parties intend to enter into legal relations? – be answered from the paucity of evidence presented? I think not.

[72] The law contemplates that relatives can contract. Where relatives do not express that intention, the question of whether they intended to enter into legal relations is instructive. The learned author M. P. Furmston in the 10th Edition of Cheshire and Fifoot's Law of Contract expressed the law in these terms;

> *The cases in which a contract is denied on the ground that there is no intention to involve legal liability may be divided into two classes.* ***On the one hand there are social, family or other domestic agreements, where the presence or absence of an intention to create legal relations depends upon the inference to be drawn by the court from the language used by the parties and the circumstances in which they use it.*** *On the other hand there are commercial agreements where this intention is presumed and must be rebutted by the party seeking to deny it. In either case, of course, intention is to be objectively ascertained.*
>
> ***Emphasis mine***

[73] The majority of the decided cases in this regard concern the agreements between husbands and wives such **Meritt v Merritt** [1970] 2 ALL ER 760, **Pearce v Merriman** [1904] 1 KB 80, **Balfour v Balfour** [1919] 2KB 571 and **Pettitt v Pettitt** 170] AC 777. In all of them the court examined the circumstances to ascertain whether an intention to create legal relations existed.

[74] The defendant in the matter at Bar has strongly urged that he acted in the preparation of his mother's Will as 'a good son' with specialized skills. No retainer contract was intended or existed. He approached his mother and urged her to prepare her Will. Eventually she was convinced and he prepared it in accordance with her wishes.

[75] In relation to the gift to the claimant being conditional, he explained the legal ramifications to her and she left it up to him. He is the only living person before the court who can provide evidence from which an inference concerning the presence or absence of an intention to create legal relations can be drawn. On the evidence presented nothing in the conduct of his mother or him or the circumstances points to any such intention. The mere use of the word 'instructions' without more cannot in these circumstances amount to a tacit understanding of agreement to be governed by the law of contract and retainer contracts in particular. So while there is an offer to provide services by the defendant and an acceptance of that offer by the deceased, the intention to be bound in contract has not been demonstrated in the evidence.

[76] The other element of a contract – consideration – is also not present on the evidence presented.

[77] Even if I am wrong in finding that there is no retainer contract between the deceased and he defendant, the issue of whether the defendant was negligent has be examined. The speech of Lord Atkin in **Donoghue v Stevenson** and Lord Reid in **Home Office v Dorset Yacht Co. Ltd.** [1970] AC 1004 disclose the principle that for there to be a finding of negligence, there must be a duty of care owed to the claimant, the breach of which has resulted in damage. **Ross v Caunters** extended the category of negligent acts to the relationship of an Attorney-at-law and his client while **White v Jones** extended the categories of persons in an Attorney-at-law/client relationship to third parties who suffer loss from the breech of that duty. The defendant it is argued owes a duty of care to the deceased and the claimant in the preparation and execution of the Will.

[78] On the evidence of both parties the deceased gave instructions about the terms of her Will to the defendant and he prepared the Will in accordance with those instructions. Mrs. Carole Deans-Campbell says she was not certain that the defendant made efforts to have the deceased sign the document but gave no basis for that uncertainty. The claimant and her witness said nothing was said at

the meeting about efforts to have the Will signed. It is clear from this that only the defendant gave evidence about what transpired regarding the signing of the Will. The claimant does agree that the defendant tried to leave the Will her for the deceased to sign it on the day she died. What therefore is the negligence complained of? It is that the deceased should have acted expeditiously, knowing that his mother was terminally ill, to get the Will signed?

[79] The defendant's evidence is that he made several attempts to have his mother execute the Will. He got instructions on the 12th November, 2012 and prepared the Will on the 13th November 2012. He was off the island for a few days and upon his return the deceased was in hospital. He took the Will to the hospital and it was read to the deceased who did not sign it, saying she would do so when she felt better. He kept the Will in his car and on seven other occasions he spoke to the deceased about signing it. She did not sign it for a number of reasons. Counsel for the defendant submitted that the signing by the deceased is an act of volition by the deceased. The defendant said she gave her reasons when he spoke to her about executing it and it was not his place to force her to sign it.

[80] In **White v Jones** the solicitor failed to draft a new Will for the testator conferring a benefit on the plaintiff from instructions he got in July and the testator died in September without signing the Will. He had gone on vacation and had failed to instruct anyone to prepare the Will timely. He was found liable to the intended beneficiary for the loss of her gift.

[81] In the instant case the defendant on several occasions had presented the Will for execution and was rebuffed. I reject the evidence of the Caregiver that she was present *at all times* when the defendant visited his mother and would have witnessed the Will being read. I accept the evidence of the defendant that he presented the Will to his mother and she did not sign it. I feel moved to believe this when the evidence is that she was reluctant to even agree to make a Will, for some time. His action as an Attorney-at-law and/or a 'good son' in making and

presenting the Will for execution, to my mind, cannot amount to professional negligence. I agree with the submission that the signing of the Will by the testator is an act of volition and so long as he prepared and presented it to her, he cannot have failed in his duty to her as a son or an Attorney-at-law, if she failed to sign it.

[82] The claimant alleges that the defendant was motivated to prevent the Will from being signed in order to get a greater share of the estate on intestacy. This is proffered as a basis for his negligent conduct surrounding the execution of the Will.

[83] An examination of the tenor of the Will is instructive. The gift of 49 Gilmour Drive in the Will is an absolute gift. The defendant says he opted to make the gift unconditional as his mother wanted it to be subject to the claimant returning to live with her. Whether this statement is true or not, the unconditional gift would be more advantageous to the claimant than if it was given conditionally or on intestacy. The conditional gift would have lapsed at the time of the testator's death, as the clamant had not returned to live with her.

[84] The assertions of the claimant seem to me to be based on whimsical suspicion rather than fact. What is the evidence from which it can be inferred that that was the motivation of the defendant?

[85] The claimant's evidence seems syllogistic and to have arisen from the position taken by the defendant at the after-funeral meeting, that he wanted his portion of that asset. An Attorney-at-law with over 40 years experience knew the implications of intestacy. He alone knew of the existence of the unsigned Will and its contents. If he was being motivated by greed he did not have to mention the Will he had prepared and intestacy would yield him the desired result. In the absence of evidence contrary to what he said, and based on his demeanour, I believe him when he said he made valiant effort to have his mother sign the Will over eight times and for a number of reasons she failed to. It is also clear from the evidence that she was reluctant to even discuss the preparation of a Will. It

should not therefore be surprising that she may have been a bit cavalier about executing it. The only evidence we have about these activities is that of the defendant. No one has been able to dispute this by any other evidence, only by conjecture. Neither is there any clear or convincing evidence that he was motivated by greed.

[86] There is an undercurrent in the evidence that could explain why four of the six children of the deceased, including the defendant, did not consent to the claimant receiving the full benefit of 49 Gilmour Drive. It seems from the defendant's evidence that the claimant failed to properly medicate the deceased after she sent the Caregiver away on the day the deceased passed. In his witness statement the defendant says that sending away the Caregiver was strange as the clamant was not a person to care for someone in the deceased's condition. There were also issues concerning the level of participation of the claimant in the funeral preparation. At the mortician she is said to have stayed outside in the car, which she denies and she left the 49 Gilmour Drive the day the deceased passed. When this is juxtaposed against the obvious division in the family over the distribution of the deceased estate, it could cause the cry of greed to seem hallow and baseless as there is a suspicion that other factors may be at play.

CONCLUSION

[87] An implied contract of retainer can subsist between and an Attorney-at-law and a client who is a relative, if circumstance subsist from which can be inferred a tacit understanding to create legal relations. Arising from such a retainer is a duty of care to the client and to persons directly affected by the acts or omissions of the attorney-at-law. The manifestation of an implied retainer is a question of fact and circumstances. So also are actions or omissions that can amount to negligence, giving rise to liability in damages.

[88] In the matter at Bar, circumstances did not subsist from which it can be inferred that an implied contract of retainer existed, giving rise to such liability. Instead a

domestic relation is evident, of 'a good son' assisting his aging mother. Above all else there is no evidence of any act or omission that amounts to negligence.

ORDER

[89] In these circumstances there is,

(1) Judgment for the defendant;

(2) Cost to be agreed or taxed.