

Draft



[2018] JMSC Civ 154

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV 03473

BETWEEN	MARVA THORPE	CLAIMANT
AND	CURTIS MCPHERSON	DEFENDANT

IN OPEN COURT

Mrs. Dionne N.S. Meyler for the Claimant instructed by Dionne N.S. Meyler & Associates

Mr. Debayo A. Adedipe, Attorney-at-law for the Defendant

Heard: September 27, 2018 and December 19, 2018

Will - Validity - Fraud - Burden and standard of proof - Whether testator possessed testamentary capacity at the time of execution of Will - Whether signature on Will was that of the testator - Whether grant of probate should be revoked

STEPHANE JACKSON-HAISLEY, J

BACKGROUND

1. When Charles McPherson died on September 24, 2000 two Wills were produced. The first, dated January 8, 1993 was produced by his son, the Defendant, Curtis McPherson and was probated on December 28, 2001. The second, dated December 4, 1998 was produced by his grandniece, the Claimant, Marva Thorpe who also filed an application for probate of this Will but to date no Grant of Probate has been issued. The main subject matter of both Wills is property situated at 36 West Street, Black River in the parish of St. Elizabeth which is where both the testator and his wife Mabel

McPherson resided. In the first Will the Defendant is the executor and beneficiary of this property subject to life interest of the testator's wife, now deceased. In the second Will the testator's wife is the beneficiary of the said property. When she died, she left a Will in which she devised the said property to her step granddaughter and her grandniece, the Claimant herein. The resolution of this matter will determine the entitlement to this property.

2. On July 21, 2012 the Claimant filed a Fixed Date Claim Form in which she sought the following orders:
 - i. Revocation of a grant of Probate made to Curtis McPherson via a Will dated 8th January 1993 given by the Supreme Court of Judicature of Jamaica;
 - ii. A decree pronouncing for or against the validity of an alleged Will being the Will dated 8th January 1993 as there exists a later Will dated 4th December 1998;
 - iii. A revocation of the Grant of Probate made on the Will dated 8th January, 1993;
 - iv. An order that Curtis McPherson attend Court for examination and to answer questions;
 - v. An Order that all necessary and consequential directions be given;
 - vi. Cost; and
 - vii. Such further and/or other relief.

THE CLAIMANT'S CASE

- [1] The Claimant referred to the testator as her granduncle and indicated that she lived with him and her grandaunt Mabel McPherson from she was three years old up until she was thirty-five years old when in 1997 she migrated to the United States of America. Her biological father having died when she was six years of age she grew up calling the testator her father. She indicated that she took care of both McPhersons up to the time when she migrated and even after that she

continued to care for them by sending money to them and making frequent visits to see them. When the testator became ill she cared for him and after his death she took care of her grandaunt.

- [2] She is aware of the Will dated January 8, 1993 however according to her that Will was revoked by a later Will dated December 4, 1998, in which the property at 36 West Street, Black River in the parish of St Elizabeth was devised absolutely to Mabel McPherson. She indicated that she is aware that the Defendant applied for and received a Grant of Probate of this earlier Will in which he was chief beneficiary and executor. The property was left to him absolutely after the expiry of the life tenancy to Mabel McPherson, however, she asserts that at the time he applied for probate he ought to have been aware of the existence of a later Will in which she, the Applicant, was one of the named beneficiaries. Further, that on the 7th day of September 2006 a Citation was issued to the Defendant demanding that he return that Grant of Probate.
- [3] On the 19th day of September 2003 an application for Probate of the testator's later Will was filed in the Supreme Court but the Defendant filed a caveat on the 19th day of April 2001 against the Grant of Probate.
- [4] Mabel McPherson also died testate and the Claimant and the daughter of the Defendant are the named beneficiaries of the said property under her Will. An application for Probate of this Will was filed on January 12, 2012.
- [5] The Claimant has detailed that during the lifetime of the McPhersons she took care of both of them, did all household duties for them so much so that when Mr McPherson became physically ill she was the only person who took care of him, cleaning him up and caring for his daily needs. She said he had no mental inability at all until close to his death in 1999. Further, that the only sickness he had was that he could not urinate and she found out that he had 'stoppage of water'. A Doctor Hamilton attended to him on one occasion when the deceased removed a tube with which he had been fitted. According to her the testator knew her up to

the time of his death and contrary to what the Defendant says he was never in the habit of smearing any wall with his own faeces, nor was he confused or incoherent.

- [6] She pointed out that Janet Duggan, the Defendant's witness was not allowed in the house and never came to the house. She gave further evidence through amplification and indicated that at no time did she observe her grandaunt wiping faeces off the wall.
- [7] During cross-examination it was suggested to her that she never took care of Mr McPherson at any time and she responded that she took care of him up to the time she left Jamaica and also when she returned to the island in 1999. It was suggested to her that he was then suffering from Alzheimer's disease and she denied this. In fact, she said the only disease she was aware of him suffering from was a prostate problem. She was shown his death certificate and she accepted that it stated that Alzheimer's was a contributing cause of his death.
- [8] She admitted having submitted to the Parish Council a letter seeking permission to build on the premises. She was asked whether during Mr McPherson's lifetime, she wanted to build on the land and she denied this initially but later indicated that she wanted the McPhersons to have another income and that she merely wanted to help them. Her passport was tendered and admitted into evidence in order to show her visits to Jamaica. The citation to bring in Probate issued out of the Resident Magistrate's Court for the parish of St. Elizabeth and addressed to the Defendant was also admitted into evidence as an exhibit.

THE DEFENDANT'S CASE

- [9] The Defendant in his witness statement indicated that he is the son and first child of Charles McPherson who died on the 24th day of September 2000 and that his father died testate having made a Will on January 8, 1993. By virtue of that Will, the property at Black River was devised to the testator's wife as a life tenant and the remainder to him. Consequently, he applied for and obtained a Grant of

Probate of that Will on December 28, 2001. Following the death of the life tenant, the property was registered in his name with effect as of March 28, 2011. Further, that the niece of Mabel McPherson, Carlene Thorpe continued to live on the premises and he issued and served notices to quit on both her and the Claimant.

- [10] He is aware that the Claimant is relying on a Will dated 4th day of December 1998 under which she would be entitled to the property. He asserted that he has seen a copy of this Will and the signature on it is not that of his father whose handwriting he knew well. He also pointed out that his father did not have the mental capacity to make a Will in December 1998 as from as early as 1995 he started to display signs of dementia which developed into Alzheimer's disease and that by 1997 he had deteriorated to the stage where he was unable to recognise even family members. In the Easter of 1998 when he saw his father he was confused and incoherent. He also disputed that his father would have been able to sign any letter of authorisation to the Parish Council for the Claimant to build a house on the land. He indicated that his father's physician Dr. Audley Hamilton would often make home visits to care for him.
- [11] He is therefore asking the Court to pronounce against the validity of the purported Will dated 4th December 1998 as his father did not then have the mental capacity to make a Will and it was not signed by him.
- [12] During cross-examination he agreed that he never lived at the house. At first he indicated that he did not file any action against Mrs. McPherson but then he agreed that he gave her a Notice to Quit and sought recovery of possession against her. When he was asked whether he was aware that Mrs McPherson challenged his Grant of Probate he said he never heard of that. He also denied being aware that a citation had been issued revoking his Grant of Probate. He even denied being aware that the Claimant grew up with the McPhersons.

[13] The Defendant relied on the testimony of Janet Duggan. The essence of her testimony was that she and the Defendant share two children and that during the years 1996 to 1998 she was accustomed to visiting his father Charles McPherson at his home and also visiting the Defendant when he was in Jamaica and stayed at the said home. Further, that in 1996 she observed that the testator was clearly ill and unable to recognise people or respond appropriately to people he once knew. He would also refuse to bathe and smear the wall with his own faeces. In 1998 she also visited the home and he was in the same condition. He was incoherent and talking foolishness.

[14] The Defendant also relied on the expert witness Beverley Y East, a forensic document examiner of some twenty-six years. She was accepted by the Court as an expert witness. Counsel for the Defendant was allowed to and did put written questions to her. In her report she expressed that on November 19, 2015 she received certain documents from the offices of Attorney-at-Law Mr. Debayo Adedipe. They were as follows:

- i. Last Will and Testament of Charles McPherson dated 8th January 1993 (admitted to probate);
- ii. Last Will and Testament of Charles McPherson dated 4th December 1998 purportedly signed by Charles McPherson;
- iii. Last Will and Testament of Mabel McPherson dated 27th March 2007;
- iv. Handwritten letter dated 15th November 2000 purportedly from Mabel McPherson; and
- v. Handwritten letter dated 29th November 2000 purportedly from Mabel McPherson.

She examined these documents and was able to arrive at her conclusions based on the four significant principles of examining handwriting, movement, form, shading and spacing. Her conclusions were as follows:

- The signature on the 1998 Will is not the same as the signature on the 1993 Will and therefore not an authentic signature on the 1998 Will;

- The handwriting on Mabel McPherson's Will and the 1998 Will were written by the same person;
- The handwriting from both letters purporting to be from Mabel McPherson do not match the handwriting on either the 1993 Will or the 1998 Will however the signature at the bottom of the letter dated 29th November 2000 is consistent with the signature on Mabel McPherson's Will. Similar characteristics can also be found in the 1998 Will.

[15] Counsel for the Claimant in questioning Ms. East asked her whether the reference to the signature on the 1993 Will as being authentic or belonging to Charles McPherson was based on the fact that it was probated and she responded that it was not but that her opinion was based on the samples provided for examination. She was asked other questions to include whether or not an identification document bearing the picture of Charles McPherson purportedly signed by him would be a better document to use to authenticate his signature to which she responded not necessarily. She was asked if she would be willing to examine such a document and compare it with all the documents purported to be signed by Charles McPherson and she indicated that she would be willing but there would be an additional fee. No further challenge was mounted to the opinion of Ms East.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[16] Counsel for the Claimant submitted that the main issue to be determined is where truth lies. She asked the Court to find that the Respondent is not credible and asked the Court to examine his actions in order to determine whether he is forthright or not. She pointed out that although he knew that his Grant of Probate had been cited and therefore lacked validity he subsequently sought to use it to divest the Claimant of the property. She submitted that in giving evidence he was not forthright and did not answer questions put to him on this issue. Instead, his demeanour was dodgy and vague as he sought to evade these questions. He

relied on no medical evidence to support his contention that the deceased suffered from a mental illness. Additionally, the sole witness relied on by the Defendant Ms. Duggan is not an independent witness and her evidence is at best self-serving.

[17] She submitted further that the findings of the handwriting expert are based on information provided by the Defendant which is biased and so should not be accepted as being reflective of the true position. Therefore, the major finding that the signatures on both Wills were not written by the same person is not proof of any facts in issues since the specimen used to determine that finding was flawed.

[18] According to counsel the Claimant's case on the other hand is more consistent with the true position. She is credible and one example of her credibility is that although the Defendant suggested that she did not return to the island to take care of the McPhersons, her passport which was tendered into evidence is reflective of her frequent visits to the island. She contended that the Claimant was the one who took care of the McPhersons and hence the property was intended for her benefit hence the later Will was prepared to reflect that. Counsel sought to rely on the dicta in the case **Banks v Goodfellow** 1870 LR 549 and extracted the following excerpt to show support for her position:

"...the instincts and affections of mankind, in the vast majority of instances, will lead men to make provision for those who are the nearest to them in kindred and who in life have been the objects of their affection".

She asked the Court to find that it is more probable than not that the testator would have made provision for the Claimant as she was the one who cared for him.

She further relied on the case **Tyrel v Painton** 1894 LR 151 which casts the burden on the party propounding a Will to show that it expresses the true intention of the testator. She highlighted that the Claimant is not seeking to propound the later Will but rather to have the court revoke the earlier Will. She is asking the court to revoke this Will as the later Will is in fact the valid one.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

- [19] Counsel for the Defendant pointed out that the burden of proving that the 1998 Will is valid rests upon the Claimant. The Claimant however, did not tender into evidence that Will. He pointed out that although the Will is attached to the expert's report of Ms. East it was never identified by the Claimant as being the Will for which she is seeking the Court's pronouncement of validity.
- [20] He pointed out that the evidence on the Defendant's case is clear and consistent with the fact that Charles McPherson could not have had the testamentary capacity he is alleged to have had when the 1998 Will was executed. On the other hand, the Claimant denied being present in the island during the years 1997 to 1999 and so did not see the testator and so could not credibly say what the state of his mind was. Her evidence is in contrast to the independent evidence, being the death certificate, which indicated that Alzheimer's disease was a contributory cause of his death. He argued that this supports the evidence of the Defendant and his witness Ms. Duggan as to the unsoundness of the testator's mind during that period.
- [21] He asked the Court to find that Charles McPherson did not have a sound mind on December 4, 1998 and that during that period of time he was in fact behaving in the manner indicated by the Defendant and his witness and as a consequence the purported Will of Charles McPherson dated December 4, 1998 was not signed by him.
- [22] With respect to the law counsel asked the Court to take into account guidance provided in Tristram & Coote, Probate Practice, 25th edition p 664 where it was clearly expressed that the onus of proving that the Will propounded was executed as required by law is on the plaintiff or party propounding it. Further, that the onus is a shifting one and it is for the person propounding the Will to establish a prima facie case by proving due execution. Counsel went on to argue that the genuineness of a party's handwriting may be proved not only by the

opinion of experts but also of non-experts and the Defendant relies on both his own personal knowledge and the opinion of the expert. The Claimant on the other hand has wholly failed to prove that the second Will was signed by the testator.

Further, that the issuing of a citation does not have the effect of revoking a grant of probate, it only requires a surrender of the grant pending the determination of proceedings.

ISSUES

[23] The main issue for determination is whether the Will dated January 8, 1993 ought to be revoked based on the existence of the later Will dated December 4, 1998. In order to determine this main issue it is important to consider the following questions:

- I. Whether the testator possessed the requisite testamentary capacity to create Will dated December 4, 1998?
- II. Whether the signature on the Will dated December 4, 1998 is that of the testator?

THE LAW

[24] It has long been settled that a testator can only have one valid Will. In fact there is usually a provision in the later will which revokes the earlier one. Hence, the usual course is that the later Will is the valid one once it satisfies all the requirements of a valid Will. The case of **Banks v Goodfellow** 1870 LR 549 cited by counsel for the Claimant is instructive in setting out the test to determine mental capacity. The testator must be able to:

- i. understand the nature of the will and its effect;
- ii. have some idea of the extent of the property of which they are disposing under the will; and

- iii. be aware of the persons for whom the testator would usually be expected to provide (even if he chooses not to) and be free from any delusion of the mind that would cause him reason not to benefit those people.

If any of these requirements are unsatisfied then the Will is invalid.

DISCUSSION

[25] It is the Claimant's case that the 1998 Will is the last Will and Testament of Charles McPherson. The Defendant has responded that the later Will is invalid because it is not the Will of the testator for the reasons that at the time of the alleged execution of this Will the testator did not have the mental capacity to execute a Will and further that the signature purporting to be that of the testator is forged.

[26] In determining the main issue, I must address my mind to the credibility of the witnesses. Counsel for the Defendant has contended that the Claimant did not tender into the evidence the Will she is purporting to be valid. However, I do not believe the failure to do so is fatal as the handwriting expert spoke about it and all documents were tendered as a part of her report.

[27] When the Claimant gave her evidence indicated that she was the only one who cared for the testator during his illness but I noted that on her own evidence supported by her passport, she was not present in Jamaica throughout the time of his illness so I do not accept it to be true that she is the only one who cared for him. She insisted that she was not aware that one of the conditions from which the testator was suffering was Alzheimer's although the death certificate mentioned Alzheimer's as being a contributory cause of death. Although she lived with him for over twenty years and made herself out to be a caregiver for him in his later years, she was unable to say affirmatively whether he was literate. According to her, she has never even seen him sign his name. This is despite her admitting to having submitted a letter from the testator addressed to the Parish Council giving her permission to build on his land. She at first insisted

that she did not want to build on his land but then conceded that she had submitted a request for permission to the Parish Council to do so. She sought to explain this by saying that she merely wanted to help out the McPhersons. I found parts of her evidence to be inconsistent. I also found her to be far too evasive to inspire confidence. I did not find her to be credible.

[28] I have assessed the evidence given by the Defendant especially that given in cross-examination and have noted some instances of inconsistencies in his testimony. I note that although there is in evidence the citation addressed to him he indicates that he was not aware of this. I found this difficult to believe. Despite this however, taking into account his demeanour and his entire evidence I found him more credible than the Claimant. His testimony with respect to the signature on the later Will not belonging to his father finds support in the unchallenged evidence of the expert. It has been argued by counsel for the Claimant that the expert's opinion is based on information that is biased. I noted that the information was in fact supplied by the Defendant but this in and of itself does not mean it must be biased. Ms. East has indicated that she has been an expert in the field for many years. It was open to the Claimant to challenge the expert by calling evidence to rebut her findings but this was not done. Without any other expert opinion to challenge her findings, I am prepared to accept her findings as being accurate. I therefore accept the evidence of the Defendant and the handwriting expert that the signature on the 1998 Will is not that of the testator.

[29] The Defendant's testimony that his father suffered from Alzheimer's is supported by his witness. It has been alleged that she is not an independent witness however I have assessed her and despite the fact that she and the Defendant shared a long standing relationship, I found her credible. The Claimant's testimony with respect to the fact that the testator suffered from Alzheimer's disease is also supported by the death certificate. I recognise that the fact that the deceased was suffering from Alzheimer's disease at the time of his death in 2000 alone is not definitive of the fact that he must have been suffering from it in 1998 or that he could not have had the mental capacity to execute a Will,

however when that is combined with the evidence of the Defendant and his witness it does raise questions regarding his mental capacity.

[30] I therefore accept the evidence that during the year 1998 the testator suffered from Alzheimer's and it is more probable than not that he did not have the capacity to sign a Will at that time. I also find that the signature on the 1998 Will is not that of the testator Charles McPherson.

[31] There has been no challenge to the earlier Will as being a valid Will of the testator and I accept it as being valid and as being the last Will and Testament of Charles McPherson. There would therefore be basis on which revoke this Will.

[32] The orders sought on the Claimant's Fixed Date Claim Form are refused.

My orders are as follows:

1. Judgment is given for the Defendant.
2. The last Will and Testament of Charles McPherson, deceased, dated the 8th day of January, 1993 is the valid Will.
3. The Grant of Probate made on the 28th day of December, 2001 in the estate of Charles McPherson is allowed to stand.
4. Costs to the Defendant to be agreed or taxed.