[2014] JMSC Civ. 185

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

SUIT NO. 2014/P00230

In the Estate of Slidie Basil Joseph Whitter, late of Cromarty, Fairview, Montego Bay in the Parish of St. James, deceased, testate

Lord Anthony Gifford, Q.C and Emily Crooks, instructed by Gifford, Thompson & Bright for the cautioners-Lyndee Oscar & Basil Whitter

Adley G. Duncan, instructed by Adley G. Duncan & Co. for Angela Whitter

Heard: August 11 & October 31, 2014

CAUTION – TESTATOR WHO SUFFERED FROM DEFECTIVE EYESIGHT OR IS BLIND- ATTESTING WITNESSES' EVIDENCE – BURDEN OF PROOF – PRESUMPTION OF DUE EXECUTION OF WILL – NEED TO PROVE THAT TESTATOR KNEW AND APPROVED OF CONTENTS OF WILL

ANDERSON, K. J

Background

[1] On February 5, 2014, a Caution was entered by Lyndee Oscar and Basil Whitter in the estate of Slidie Basil Joseph Whitter, in the following terms – 'let no grant be sealed in the estate of Slidie Basil Joseph Whitter late of Cromarty, Fairview, Montego Bay, in the parish of St. James, Deceased, Testator, who died on the 19th day of August, 2013 without notice to Lyndee Oscar Basil Whitter.

[2] A warning to Cautioner was sealed on March 24, 2014 and issued at the instance of Angela Whitter, Executrix of the estate of the said Slidie Basil Joseph Whitter and who is, in that capacity, seeking to propound a will which she alleges, was executed by the deceased – Slidie Basil Joseph Whtter, on July 31, 2008.

[3] Angela Whitter is the deceased's widow, while Lyndee Oscar and Joseph Whitter, are two of the deceased's children.

[4] An Acknowledgment of Service was entered by the Cautioners on April 4, 2014 and in that Acknowledgment, they listed their interest as follows: 'Lyndee Oscar…is a beneficiary under the will of Slidie Basil Joseph Whitter…and is also a potential beneficiary under the laws of intestacy (Intestate Estate and Property Charges Act).' 'Basil Whitter … is a potential beneficiary under the laws of intestacy (Intestate Estate and Property Charges Act).'

[5] It should be noted that the deceased's estate is undoubtedly, significant in value. This court has taken judicial notice of the Oath of Executrix which was filed on February 14, 2013 and deponed to by the deceased's estate's executrix – Mrs. Angela Whitter. In that document which was filed by Mrs. Whitter in an effort to have the deceased's will probated, Mrs. Whitter has deponed that the net personal estate of the deceased is $575,012,000.00 whereas the net real estate of the deceased is $182,000,000.00. additionally, this court has taken careful note of the contents of the deceased's alleged will, which is now in dispute and which is dated July 31, 2008. That alleged will is described in that manner as quoted, because, the cautioners are contending that is not a valid will and should not therefore, be admitted to probate, by this court. In that alleged will though, the deceased's executrix is undoubtedly the largest beneficiary and in that respect is the largest beneficiary by a significant extent. It therefore has come as no surprise to this court, that there is a dispute over the validity of this will, since, in my experience, human nature tends to be such that oftentimes, whenever there is significant monetary value at stake between persons, there tends to be significant

dispute between those persons, this even in circumstances wherein those persons are either family members, or may have once considered themselves as 'friends.'

[6] By means of notice of application for court orders filed on April 4, 2014, by the cautioners, the cautioners sought an order for directions and an order that the attesting witnesses to the alleged will of Slidie Basil Joseph Whitter dated the 31st day of July, 2008, be required to attend court and to give evidence of their attestation of the said will and also an order that attorney-at-law – Clayton Morgan, who drafted wills for the said Slidie Basil Joseph Whitter, prior to the said will, produces for the court, the said wills which he drafted.

[7] That application made it clear to this court, that if the alleged will of the deceased dated July 31, 2008, was not to be admitted to probate, the deceased would not therefore have died intestate, since that application suggested that the deceased had in fact made prior wills. If indeed that be so, then it would be the last in time of those prior wills that would likely be admitted to probate by the registrar. Anyone claiming to be interested in the estate of the deceased, if the deceased were to have died intestate, could, it seems to this court, only be 'interested in the deceased's estate' for present purposes, if that person was also challenging the validity of the last in time of any of the deceased's prior wills. That though was not a legal issue which was addressed to me by either party and as such, my comments on same, as contained in this paragraph of these reasons for ruling, should be considered as no more nor less than obiter dicta (by the way) comments.

[8] The grounds of that application for court orders should be noted, since those grounds essentially set out the specific nature of the cautioners' contention as to why the alleged will should not be admitted to probate. The grounds were, in summary, as follows:

i) At the time of the alleged affixing by the deceased, of his signature, on the said will, the deceased had lost sight totally, in his eyes. The alleged will contains no attestation clause, certifying or at least, signifying, that the

deceased knew what he was signing to, when he signed that will, as, there having been no attestation clause contained in that alleged will, there is no indications in the face of the alleged will, that the contents thereof were read over to the deceased prior to his having allegedly signed to the same, nor is there any indication on the face of that will, that the deceased understood and agreed with the gifts which he had allegedly bequeathed to others, by means of the said will.

ii) Another attorney-at law who had acted for the deceased for many years up until the time of his death, namely Clayton Morgan and who was instructed to draft the wills for the deceased at dates earlier than the date of the alleged will and that attorney was never informed by the deceased, about the will which is dated July 31, 2008.

[9] The alleged will was in fact, undisputedly, drafted by attorney – Adley George Duncan and the two witnesses to that will both bear a similarly pronounced, but differently spelt last name, and, as far as this court is aware, bear no blood relation to one another. Their names are: Suzette Johnson- Gale and Stacey-Ann Gayle and they were, when the alleged will purports to have been signed to by the deceased (July 31, 2008), a receptionist/account clerk (Miss Gale) and Secretary (Miss Gayle) respectively. Miss Gale was, when the alleged will was signed, a receptionist and account clerk at the law firm of Ripton McPherson, which was then located at 39 Union Street, Montego Bay. At that time, Miss Gayle was employed as a secretary at the same location, but was then employed by Mr. A. Duncan – attorney-at-law. Neither Miss Gayle nor Miss Gale, are any longer similarly so employed. Miss Gale is currently employed as a dressmaker, whereas Miss Gayle is currently employed as a teacher.

[10] That application for court orders, made by the cautioners, was granted by this court and in obedience to two court orders in that regard, both Miss Gale and Miss Gayle attended in chambers on August 11, 2014 and then provided oral testimony to this court as regards the circumstances surrounding the alleged execution of the alleged will by the deceased. Attorney Clayton Morgan also attended in chambers on that date and provided oral testimony as to his having drafted one will for the deceased and that will, which was admitted into evidence at that hearing which was held before me as the

presiding judge, was admitted into evidence. Mr. Morgan, Miss Gale and Miss Gayle, were permitted to be and were in fact questioned by both counsel.

[11] Attorney Clayton Morgan was the first of the three witnesses to testify. By means of his testimony, there was admitted into evidence and marked as Exhibit 1, a will described therein as the 'last will and testament' of Slidie Basil Joseph Whitter of Cromarty, Fairfield, in the parish of St. James, businessman. That will purports, on its 'face' to have been signed by Mr. Whitter and witnessed by two persons, on March 12, 2007. It was Attorney Morgan's testimony, that the witnesses to that will, were both employees of his, at the time when that will was signed by the testator (Mr. Whitter) and witnessed by them. He further testified that both the testator and the attesting witnesses had signed on each page of that will and that all of those signatures were executed in his office at the same time and in the presence of the witnesses and himself. This court has noted, from having viewed that will, that said signatures are either at the bottom of each page, or very near to the bottom of each page thereof. Certainly, on all pages, the testator's signatures were purportedly executed in the presence of each witness, at the bottom right hand corner of each page of that will whereas, the attesting witnesses' signatures were, on each page, also affixed to the lower right hand corner thereof, just above the testator's purported signature. No doubt, this was a procedure (the signing of the testator and attesting witnesses) on each page, which was designed to make it clear that the testator was agreeing to the contents of each page of that will. This court draws that inference and furthermore, has drawn the inference that such procedure would have been one which the testator and attesting witnesses would have been requested by the attorney who drafted that will and who was present throughout the execution thereof by the testator and the attesting witnesses, to comply with.

[12] Attorney Morgan also testified that he has been legal counsel for Mr. Whitter for quite a long time and that during that time, he has been aware of Mr. Whitter consulting counsel other than he, on various matters. It should be noted that this court had accepted as entirely truthful and factually accurate, attorney Morgan's brief testimony which was provided to this court.

[13] Suzette Johnson Gale testified as the next witness. Her testimony was that she is now a dressmaker, but on July 31, 2008, was employed as a receptionist and account clerk at attorney Ripton McPherson's law firm, which is located on Union Street in Montego Bay. She testified that the first time that she saw the purported will of Basil Whitter which was purportedly witnessed on July 31, 2008, was when the secretary – Stacey-Ann Gayle called her and told her that they were both going to witness a copy of Mr. Whitter's will. At that time, according to her evidence, Miss. Stacey-Ann Gayle worked for attorney Adley Duncan and both her office and Mr. Duncan's office were then in the same building, which had more than one office in it and their offices were in close proximity to one another. Her testimony continued and will not be quoted extensively, verbatim, for the purpose of brevity.

[14] It was undoubtedly though, the essence of her evidence, which remained consistent in this respect, throughout the course of her entire testimony, that –

> *'Mr. Whitter was in the office and Mr. Duncan. Then they told me the nature of the documents that I'm going to sign and Mr. Duncan read the documents to Mr. Whitter and then Mr. Whitter said he needed some corrections to be done to the document and when the document was completed, he (Mr. Duncan) read it over to Mr. Whitter and then, that's the time I signed it and Stacey signed it too. We watched him sign the document and after we watched him sign the document then both of us sign after.'*

[15] This court has noted from the purported will of Mr. Whitter, as dated July 31, 2008, which was exhibited, that Mr. Whitter's purported signature is only located on one page of the said purported will, that being the page thereof and below penultimate which signature of the purported testator, are the signatures of the purported attesting witnesses, namely: Suzette Gale and Stacey-Ann Gayle.

[16] This court has also noted and deems it to be of significance that the purported will now under challenge, this being the purported will of Mr. Whitter, as dated July 31,

2008, does not contain within it, any attestation clause whatsoever. Attorneys who draft wills without utilizing attestation clauses in each such will, do so at great risk to their clients' estates. An attestation clause is, as has been stated by the authors: **Parry & Clark,** in the text – **The law of succession, in the 11th, Edition thereof (2002)**, at paragraph 4-18*, '…an attestation clause is highly desirable because it facilitates the grant of probate.'* The typical example of an attestation clause will vary, depending on any reading impediment which the purported testator may be suffering from, at the time when his or her will was purportedly executed by him and witnessed by two other persons, present at the same time. If there is no reading impediment faced by such a purported testator, then a typical attestation clause will read as follows:

> *'Signed by the said X in our joint presence and then by us in his.' In circumstances though, wherein the testator is either illiterate or is blind, the attestation clause would typically read as follows: 'signed by X after the same had first been read over to him in our presence and had appeared to be perfectly understood and approved, by him in the presence of us both.'*

[17] The purpose of an attestation clause is obvious. Its purpose is that it serves to notify a court, in which that will's validity is being challenged (that being the will containing an attestation clause), that the testator fully knew and approved of the contents thereof. Its presence in a will, gives rise to a presumption of due execution. This is particularly useful where the attesting witness' memories are lacking and also, when attesting witnesses are dead.

[18] Even in circumstances wherein an attestation clause exists though, in a situation wherein the testator or testatrix, at the time of his or her execution of the will containing that clause, was then either illiterate or either partially or fully blind, for apparent reasons, the entire contents of that will must be read over to that testator or testatrix, before he or she is invited to execute same. Once such reading over has been done and the testator or testatrix has executed said will, at a place which is below the gifts and instructions therein, or is executed, 'at the foot or end thereof' (per section 6 of the Wills Act), then that form of execution will be deemed by a court as being entirely valid.

See: **Fincham v Edwards** – [1842] 3 Curt. 63. If the testator could not speak or read and write and if he gave instructions for his will by signs, the court requires evidence as to the signs used, establishing that the testator understood and approved of the contents of his will. See**: In the Goods of Geale** – [1864] 3 Sur. and Tr. 431**.** This court will at a later stage, in these reasons for ruling, address the issue of the absence of an attestation clause in the relevant alleged will. For now, these reasons will return to considering the other evidence given during the hearing in chambers.

[19] It was also Mrs. Johnson-Gale's testimony, that Mr. Duncan (attorney-at-law), read to Mr. Whitter slowly, the words on each page of the 2008 purported will. She gave further evidence that before Mr. Whitter signed the said purported will in her presence, there were corrections that were made to same, by Miss Gayle – who, as needs to be recalled, was attorney Duncan's secretary at the material time. It was Mrs. Johnson-Gale's testimony that Miss Gayle knew what corrections were to have been made to that purported will, because, Mr. Duncan made notations on the will and gave it to Miss Gayle to do the amendment. Mrs. Johnson-Gayle did not though, give any evidence as to how the corrections which she gave evidence that Mr. Duncan (attorney-at-law) had made, by means of notations made on the will, came to have been made.

[20] It must, at this juncture, be noted that during the hearing before me, Mrs. Johnson-Gale only gave oral evidence while under cross-examination. There was no re-examination of her, conducted. Also, Mr. Duncan (attorney-at-law), never posed any questions to Mrs. Johnson-Gale.

[21] It must be stated that at no time during the course of his cross-examination of Mrs. Johnson-Gale, equally as too, during the course of his cross-examination of Miss Gayle, did cross examining counsel, Mr. Gifford, Q.C., suggest to either of them that they were either mistaken in respect of any aspect of the evidence which either of them had provided to the court, or that either of them was being untruthful in respect of any evidence which either of them had provided to the court.

[22] It has long been the jurisprudential thinking, that in a criminal case the failure to put one's case to a witness being cross-examined by a party, was always detrimental to the case of the cross-examining party. This was thought, in past jurisprudential thinking, to always be so, since the failure to put one's case, deprived the opposing party of a specific opportunity to refute one's specific case. It still is part and parcel of common law based jurisprudential thinking, that in circumstances wherein one has an alternate case to put forward before the court, it is imperative for that case, to be suggested to those opposing that case by means of their evidence, who can either, in their evidence while under cross-examination, accept or refute that evidence of theirs. See: **R v Callaghan** [1979] 69 Cr App Rep 88 & **R v O'neill** – [1950] 34 Cr App Rep 109, esp. at pp.110 & 111, per Lord Goddard, C.J.

[23] Whilst it is now fairly well settled law, that in criminal cases, the failure to completely put one's case is, other than in a few very limited circumstances, always detrimental to the case of the cross-examining party, this is not always to be taken as being equally applicable to civil law disputes. It is indeed sensible that this be so, since particularly in circumstances wherein no contrary case or evidence is being put forward by a party, then it must be meet and right for no suggested contrary case to be put forward before the court, by the cross-examining party, during the course of the time wherein that party is cross-examining the opposing party's witnesses. The failure to put a contrary case to the opposing party's witness in cross-examination, does not in circumstances such as that, in and of itself, entitle a court to accept the evidence given by the opposing party. Thus, in Cross & Tapper on Evidence, 8th ed., at p. 317, the learned authors have stated as follows:

> '*Any matter upon which it is proposed to contradict the evidence-in-chief given by the witness must normally be put to him so that he may have an opportunity of explaining the contradiction, and failure to do this may be held to imply acceptance of the evidence-in-chief, but it is not an inflexible rule and it has been held inappropriate to proceedings before lay justices and less applicable to parties, influencing the complainant in a sexual case.' See also:* ***Brown v Dunn*** *– [1893] 6R.67 (H.L.).*

[24] It is also now settled law, that even in circumstances wherein the evidence of a party or a party's witness has not been contradicted this does not mean that a court which has heard such uncontradicted evidence, is obliged to accept same as being either accurate in all respects, or truthful in all respects, or accurate or truthful in any respect. Not only is this not so with respect to sworn evidence which has been provided orally to the court, see: **Industrial Chemical Co. (Jamaica) Ltd. v Ellis** – [1986] 35 W.I.R. 303**,** but it is also not true, with respect to sworn evidence which has been provided to a court by means of affidavit, or in other words, on paper. Thus, if the contents or aspects of the contents of a witness' affidavit evidence are either incredible or inherently improbable, or if that evidence is contradicted by other evidence- not necessarily being any evidence provided by an opposing party, but is contradicted by any other evidence provided by either party, it will always be, in such circumstances, open to the court which has heard such evidence, not to accept it, or to act on it, in a manner which is unfavourable to the party who which has provided such evidence to the court. See: **National Westminister Bank Plc v Daniel** – [1993] 1 WLR 1453 and **Syham Jewellers Limited v Cheeseman** [2001] EWCA Civ. 1818.

[25] It must be recalled in respect of the matter at hand, that the party who opposed the purported will of Mr. Whitter, which is dated July 31, 2008, has called no evidence in specific or direct opposition to the case of the party who is propounding that purported will. The reason for that party's failure to call any such evidence in opposition though, must of necessity, be obvious, since, at the material time, which is when that purported will was executed, the persons present were the purported testator, who is, of course, now deceased, the attorney who drafted that purported will - Mr. Adley Duncan – who now acts as the attorney for the party who is propounding Mr. Whitter's widow-Angela Whitter and the two witnesses who have testified in support of the validity of the purported will which is now being propounded, namely: Suzette Johnson-Gale and Stacey-Ann Gayle.

[26] In the circumstances, this court does not at all consider it to have either been necessary or expected, for the party in opposition to the purported will of Mr. Whitter which is being propounded, to have either suggested to Mrs. Johnson-Gale, or Miss Stacey-Ann Gayle, that either of them was mistaken or untruthful in any aspect of their evidence, or in the entirety of their evidence. Indeed it would have been entirely improper in law, for cross-examining counsel, to have made any such suggestion, bearing in mind that the party opposing the purported will which is being propounded, had no contrary case to put forward by means of evidence on behalf of the cautioners – Lyndee Oscar and Basil Whitter. Equally, it does not follow, that because there was no evidence that was provided to this court, on the cautioners' behalf, in specific opposition to the propounding party's case as to the alleged validity of Mr. Whitter's purported will of July 31, 2008, that this court is or was obliged to have accepted such evidence. Accordingly, this court has considered all evidence provided to it orally by the three witnesses which testified - one of whom testified on the cautioners' behalf, namely: Attorney Clayton Morgan - that testimony though having been limited to matters pertaining to that attorney's legal work, over a period of time, for the deceased and to the deceased having, prior to his death, executed a will dated March 12, 2007, which will was drafted by Attorney Clayton Morgan on Mr. Whitter's instructions.

[27] This court, has also taken judicial notice of an 'affidavit of due execution' which was filed on February 14, 2014 and which was deponed to by Miss Stacey-Ann Gayle - who alleges that she witnessed the execution of the will by the late Mr. Whitter. Also, this court has taken judicial notice of an affidavit which has been deponed by Miss Emily Crooks, Attorney-at-Law, and which was filed on April 4, 2014.

[28] In the 'affidavit of due execution' Miss Gayle has deponed to having witnessed Mr. Whitter (the deceased) having signed to the will which is referred to as an exhibit attached to that affidavit. Although that affidavit does not expressly so state and although this court has not seen attached to that affidavit, any will referred to therein, this court draws that which must be the only reasonable inference, this being that said affidavit was referring throughout to matters pertaining to the purported execution and

witnessing of the July 31, 2008, purported will. It is also Miss Gayle's evidence as set out in that brief affidavit, that the deceased executed that will by signing his name in the testimonium clause thereof 'as it now appears meaning and intending the same to be his final signature of the will in the presence of Suzette Johnson- Gale and me, both of us being present at the same time and we thereupon attested and subscribed the said will in the presence of the deceased.' She has further testified by means of that affidavit, that the will was read over to the testator and after he had indicated that he had full knowledge and was fully aware of that will's contents and approved of those contents, he signed the said will in the presence of herself and Mrs. Suzette Johnson-Gale, at 39 Union Street Montego Bay. She has deponed in that affidavit to the testator's signature appearing feeble, because 'the testator was advanced in age and his hand appeared to be shaking.'

[29] This court has taken judicial notice of that evidence from Stacey-Ann Gayle, but in reality, has not placed great weight upon it, since it is conspicuously lacking in detail. This court though, has placed great weight upon Miss Gayle's oral testimony which was provided to it, as also, has it placed great weight upon the oral testimony of Mrs. Johnson-Gale - whose testimony is accepted as being, in large measure, not only truthful, but also, accurate and certainly as not being either obfuscatory or contrived.

[30] The affidavit evidence of attorney Emily Crooks is accepted by this court as being both truthful and mostly accurate, but it certainly cannot and has not carried great weight or any weight at all, in leading this court towards drawing the conclusion which the cautioners, who are represented by her, as junior counsel to Lord Gifford in these court proceedings, would no doubt wish for this court to draw. In fairness to Miss Crooks though, it is to be carefully noted firstly, that not only was that affidavit of hers never, at any stage, being relied on in specific support of the cautioners' contention that probate of the July 31, 2008 will ought not to be ordered by this court, but also, secondly, Miss Crooks' written submissions to this court, which followed upon the oral testimony of Mr. Morgan (Attorney-at-Law) and Mrs. Johnson-Gale and Miss Gayle, was never at all sought to be relied on, in specific support of the cautioners' said contention. This court

has drawn that conclusion because, no specific reference was made to that affidavit evidence in the written submissions which were prepared and signed to by Miss Crooks, but also because, it is notable, that that affidavit evidence of Miss Crooks has long pre-dated the oral evidence given by Mr. Morgan and Mrs. Johnson-Gale, as well as Miss Gayle. Miss Crooks' affidavit was deponed to and filed on April 4, 2014, whereas, that oral evidence was given to this court during the month of August, 2014. Furthermore, in the last paragraph of Miss Crooks' said affidavit evidence, she has clearly asked, although not specifically so therein stated that, 'under the circumstances this Honourable court will grant the Orders sought in the Notice of Application-' this clearly being a reference to her clients' application for 'directions' and for and order that the attesting witnesses to the alleged will dated July 31, 2008, be required to attend court and give evidence of their attestation of the said alleged will.

[31] Miss Crooks' affidavit evidence supports the evidence given orally, to this court during the chambers hearing by attorney Clayton Morgan, albeit that this is not surprising, since such supportive evidence, which is contained in paragraphs 3, 4, & 5 of that affidavit, relates to matters that were allegedly told to Miss Crooks during a telephone conversation which she had with Attorney Morgan. Miss Crooks depones to having been informed by Mr. Morgan that he had acted as counsel for Mr. Whitter for many years and that the attorney - client relationship … Mr. Morgan further informed Miss Crooks that he was instructed to draft wills for Mr. Whitter and that the last will which he drafted, was drafted, 'sometime in 2007.' Mr. Morgan told Miss Crooks that he was not aware of instructions having been given to any other attorney-at-law for the drafting of any other will, after 2007.

[32] For the record, this court must categorically state at this juncture, that the fact that Mr. Morgan may not, at the time when he spoke with Miss Crooks via phone, have had any knowledge of any instructions having been given to any other attorney-at-law for the drafting of any other will, after 2007, cannot at all, properly be equated with Mr. Morgan having any knowledge, one way or the other, as to whether such instructions were in fact given by Mr. Whitter to any other attorney. It was after all, Mr. Morgan's own

evidence in the chambers hearing which was held before me, that he knows that Mr. Whitter used the services of attorneys other than he, to do work for him, from time to time. Furthermore, there can be no doubt that Mr. Whitter must have given instructions to Mr. Duncan (attorney-at-law), to draft a will for him and that, pursuant to those instructions, Mr. Duncan did in fact draft a will, which is dated July 31, 2008. The matter which is in reality, now in dispute, is whether Mr. Whitter fully knew of and assented to all the contents of that will. The signature of Mr. Whitter, which is to be found at the end of that will and above the signatures of that will's attesting witnesses, is not, as will be recognized when the law is considered more closely, further on in these reasons for ruling, conclusive, in and of itself, as to whether Mr. Whitter fully knew of and assented to all of the contents of that will.

[33] Accordingly, Miss Crooks had gone on in her affidavit evidence and deponed to having been informed and verily believing, that at the time of execution of the alleged will, in respect of which a grant of probate is now being sought, the testator was being treated by consultant ophthalmic surgeon - Dr. Paul Kinnear and the testator had, by that time, completely lost sight in both of his eyes. Three reports from Dr. Kinnear, have been attached to Miss Crooks' affidavit. Those attached reports do not make it clear to this court, that as at July 31, 2008, Mr. Whitter had no vision in either of his eyes. In Exhibit 'ec3' which is attached to that affidavit, it is certainly made clear by Dr. Kinnear, that Mr. Whitter had developed sudden loss of vision in his right eye, on July 9. Whilst Dr. Kinnear has not stated the year when Mr. Whitter suddenly lost vision in his right eye, it is clear to this court, based on this court's careful consideration of the contents of the other two reports of Dr. Kinnear, which were also attached to that affidavit, that the year in which Mr. Whitter lost vision in his right eye, would have been - 2008. What is unclear to this court though, is the state of vision in Mr. Whitter's left eye, as at July 31, 2008. This is because, in the attached report marked 'EC12,' Dr. Kinnear has clearly stated in an ophthalmic medical report dated January 3, 2008, that 'the vision, in the right eye is good at 6/9 and is reduced to less than 6/60 in the left eye.' (3rd paragraph, 1st line)

[34] In the circumstances, this court does not accept it as being accurate that as at the date of July 31, 2008, the testator - Mr. Whitter, had completely lost sight in both of his eyes. Whilst there is undoubted evidence, which this court accepts, that as at July 9, 2008, Mr. Whitter no longer had any sight in his right eye, this court is unable to and cannot properly conclude, in the absence of there existing any specific medical evidence which would serve to support any such finding of fact, that as at July 31, 2008, Mr. Whitter also did not have any vision at all, in his left eye. Whilst it is clear to this court, that as at that date, his level of vision in that eye was less than perfect, it is unclear to this court, at this time, what the precise level of vision which Mr. Whitter had in his left eye, as at July 31, 2008, was.

[35] Whilst therefore, Miss Crooks, has deponed to having been informed and verily believing that, 'at the time of execution of the alleged will for which a grant of probate is now being sought, the testator who was at the time being treated by consultant ophthalmic surgeon, Dr. Paul Kinnear, had completely, lost sight in both of his eyes, this court does not accept that conclusion of Miss Crooks, as being an accurate one and/or one which should be accepted by this court and acted upon. It is a conclusion drawn by Miss Crooks, which ought not to be accepted and acted upon, because, firstly it is a conclusion which she is not properly entitled or enabled to draw, in the absence of there existing any ophthalmic training on her part and in the absence of Dr. Kinnear having specifically so stated, or even so much as impliedly suggested in either of his reports which have been attached to Miss Crooks' affidavit. Secondly though, whilst Miss Crooks has deponed to having been informed and verily believing that assertion of hers, she has not at all stated the source of that information, based upon which, presumably, she formed that belief of hers**. Rule 30.3 (2)(b) of the C.P.R.** requires that this be done in respect of any interlocutory application. This is not an interlocutory matter at this stage, in any event, and as such, hearsay evidence may very well not be admissible at all, in these proceedings at this time. This court though has given consideration to that evidence of Miss Crooks, notwithstanding that this matter is no longer at an interlocutory stage, in the event that this court is wrong as regard the latter – mentioned point. Because this court has drawn the inference, which seems to be the only reasonable one

in the circumstances, that such information was derived by Miss Crooks from the one or the other, or a combination of the ophthalmic medical reports of Dr. Kinnear. It seems though, in that regard, that in Miss Crooks' affidavit evidence, she drew a conclusion as to the state of vision of the testator's left eye, as at the end of July, 2008, which certainly, is by no means, expressly borne out by any of the ophthalmic medical reports, or even by a careful consideration of all of those ophthalmic medical reports together. Indeed, such a conclusion could not properly have been made by Miss Crooks, based either on those reports considered in aggregate, or separately, as a matter of reasonable inference, because, those reports are for the most part, drafted using terminology which cannot be readily understood by anyone other than one who, at least, is specially medically trained, if not, opthalmically medically trained. Miss Crooks does not, in her affidavit evidence, purport to have any such training.

[36] As will be readily recognized from a careful consideration of the relevant law in any event, it will be understood that even if a testator is blind, he or she can effect/make a valid will. Accordingly, even if it were proven that Mr. Whitter was blind at the time when the will dated July 31, 2008 was purportedly executed by him and witnessed by two other persons in his presence, that cannot, in and of itself, invalidate said will. In the circumstances, the evidence as to what transpired on July 31, 2008, in the office of Mr. Adley Duncan, attorney-at-law, immediately prior to Mr. Whitter having signed his alleged will of that date, is of paramount importance. In these written reasons therefore, I will next go on to consider the evidence of the other attesting witness - Miss Stacey-Ann Gayle, who was then functioning as the secretary of attorney Adley Duncan.

[37] Miss Gayle testified about the alleged will which is dated July 31, 2008. She wrote on that will the date '31st July.' The '2008' was typed, she testified. She also gave evidence that she signed her name to the said alleged will, which was through her, exhibited and marked as exhibit 2 and that she had written her name, address and occupation, on same. Exhibit 2 reflects that such was done. She testified that she had typed that alleged will, which was drafted for her, by attorney Adley Duncan. According to her, Mr. Duncan had handwritten the draft on yellow paper and that she had started

to input this on her computer, probably, 'about two weeks before.' In the context of some of the preceding questions which were asked of her and which she answered, this court understood that when Miss Gayle made reference to, 'two weeks before' she meant, two weeks before July 31, 2008. She gave testimony that 'as of July 31, 2008, she had printed the document which was entered into evidence as Exhibit 2 (the alleged will) and that in fact, she had printed same on July 31, 2008, as it was then no longer a draft document. She assembled the pages of that document and placed on it, a green corner. Exhibit 2 does in fact have on it, a green corner. According to her evidence, there was an appointment for that day, with Mr. Whitter and that after having accompanied Mr. Whitter and Mr. Duncan into Mr. Duncan's office, she was then instructed to call Miss Gale, which she did. It was Miss Gayle's testimony, that by then, Miss Gale had already been informed by Mr. Duncan that it was desired for her to witness the signing of the said alleged will.

[38] Her evidence continued by stating that Mr. Duncan started to read the alleged will to Mr. Whitter, this in the presence of herself and the other attesting witness and then, at the same point in time, Mr. Duncan's reading of that alleged will was stopped as Mr. Whitter stopped Mr. Duncan to make specific amendments to that alleged will, which had not, as this court understands the evidentiary sequence and context, by then, been signed/executed by Mr. Whitter. It was Miss Gayle's evidence that those amendments were made at the side of the will, in pencil, by Mr. Duncan. Prior to her evidence in that regard, having been given to this court, Miss Gale had testified that the corrections were made by Mr. Duncan as notations on the alleged will.

[39] Miss Gayle's testimony continued by stating that she then left the room and made corrections as noted and returned to the room with the corrected version. When she returned, once more, at that time, present in Mr. Duncan's office, were Mr. Duncan, Mr. Whitter, Miss Gale and Miss Gayle. At that time the entire will was read over from the beginning. Miss Gale's evidence completely supports this version of the relevant events. After the alleged will as corrected was re-read to Mr. Whitter, Mr. Whitter then proceeded to sign the same immediately whereafter, Mrs. Johnson- Gale signed same

and wrote on it, her name, address and occupation. According to the evidence of Mrs. Johnson-Gale, after she and Miss Gayle had watched Mr. Whitter sign the said document, this having been after corrections as to same had been completed, both herself and Miss Gayle signed it. Mrs. Johnson-Gale's evidence also was that Mr. Duncan had read over that alleged will to Mr. Whitter, after the correction to it had been completed.

[40] The evidence of Mrs. Johnson-Gale and Miss Gayle is consistent also, as to the entire document (the alleged will) having been read over to Mr. Whitter, by Mr. Duncan and neither of those witnesses gave evidence that Mr. Whitter ever read that document, at any time prior to his having allegedly signed same. This court does not accept the submission of one of the cautioners' counsel - that being Miss Crooks, that Mrs. Johnson-Gale gave evidence that after the amendments were made to the alleged will, Mr. Duuncan only read over to Mr. Whitter, those amendments which had, by then, been made. The portion of questions and answers which is most pertinent in that regard, reads as follows:

'Q - Who gave the document to Stacey?
A - Mr. Duncan.
Q - What did she do with it?
A - She went and correct it.
Q - Did you stay with her?
A - No, I went into my office, then after she corrected it, I came back in.
Q - When Mr. Duncan came back, what did he do?
A - He read the document to him.
Q - When the second reading was finished, what happened?
A - Mr. Whitter signed the document and Stacey and I witnessed his signature.'

[41] It is therefore apparent to this court, in the absence of even a hint from any witness' evidence, of anything to the contrary as having occurred, that after having made the corrections to the alleged will, that the corrected version of same was

thereafter read over to Mr. Whitter, who then signed same, thereby evidencing both his understanding and approval of same, whereafter, the attesting witnesses also signed to same, in his presence, after they had witnessed his execution of same.

[42] There were indeed some minor inconsistencies between the evidence of Mrs. Johnson-Gale and Miss Gayle, but those inconsistencies, rather than evidencing deliberate untruthfulness on the part of either of those witnesses, suggest instead, that those witnesses were not deliberately misleading this court, but instead, were in certain respects, mistaken as regards a few relatively minor aspects of their respective recollection of the events of that day, insofar as their witnessing of the relevant events immediately prior to Mr. Whitter having signed the said alleged will, is concerned. As such, this court accepts both of those witnesses as being witnesses who were truthful and mostly accurate, in terms of their evidence. In having reached this conclusion this court has borne in mind that the events which those witnesses were recounting to this court in August of 2008, clearly, occurred more than six (6) years prior to their date of testimony before this court. The minor inconsistencies, between those witnesses' evidence, will not, for the sake of brevity, be recounted in these reasons.

The law

[43] As earlier stated in these reasons, it is not good practice to draft a will without an attestation clause in it. It is though entirely acceptable in law and does not in any respect, render a will invalid, for a will not to have as part of it, an attestation clause. Indeed, unsurprisingly, counsel for the cautioners, in their written submissions, have accepted this.

[44] **Section 6 of the Wills Act of Jamaica** provides that –

> *'No will shall be, valid unless it shall be in writing, and executed in manner hereinafter mentioned; that is to say it shall be signed at the foot or end thereof by the testator, or by some other person, in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and*

subscribe the will in the presence of the testator, but no form of attestation shall be necessary.'

[45] There is no doubt, that the presence in a will, of an attestation clause, raises a stronger presumption that the will was duly executed than if no such clause is present. A presumption though, of due execution on the part of the testator, does exist, in circumstances wherein the actual observance of all due formalities can only be inferred as a matter of probability. See in that regard, **paragraphs 4-18 and 19-24 of the text – The law of succession, by Parry & Clark, 11th Ed., 2002**.

[46] Where on the other hand, there exists, evidence as to the manner in which the will was executed by the testator and witnessed by the attesting witnesses, the presumption, which is embodied in the latin maxim, 'Omnia praesumuntur rite esse acta' can and does play no role whatsoever. In other words, the presumption of due execution, does not apply so as to strengthen the quality of the evidence which exists as to the execution of the relevant will.

[47] As stated at **paragraph 19-24** of the text previously cited, "The maxim, 'omnia praesumuntur rite et solleminiter esse acta may apply if the observance of all the formalities required for due execution is not proved by the evidence of witnesses. To quote **Lindley, L.J. in Harris v Knight** – [1980] 15 P.D.170, at page 179*:*

'The maxim, 'omnia praesumuntur rite esse acta,' is an expression, in a short form, of a reasonable probability, and of the propriety in point of law of acting on such probability. The maxim expresses an inference which may reasonably be drawn where an intention to do some formal act is established. When the evidence is consistent with that intention having been carried into effect in a proper way: but where the actual observance of all due formalities can only be inferred as a matter of probability'…. The maxim is not applicable if observance of the formalities is disposed by the evidence.'

[48] It is very clear therefore, that the said presumption, just as is the case with all other legal presumptions, does not apply to strengthen existing evidence which

addresses the specific matter(s) addressed by that very presumption. To the contrary, it applies in circumstances wherein no such evidence, or at least, no such sufficient evidence, addressing the specific matter(s) addressed by that presumption, exists. In the present case, that evidence clearly exists. It exists both in affidavit form and also, viva voce and in the circumstances, the said presumption had no applicability whatsoever and therefore, will be addressed no further, in these reasons.

[49] The evidence that exists in the case at hand, has compelled this court to come to the conclusion that the relevant will ought to be admitted to probate. The testator, although blind, clearly approved of the contents of the will which he executed and which was witnessed in his presence, by both attesting witnesses. He executed the said will, at the foot or end thereof and the attesting witnesses signed same, below his signature. In other words, it is very clear that the requirements of **section 6 of the Wills Act**, have all been met. The relevant will, in its entirety, was read over to him in the presence of the attesting witnesses. Where he, the testator, wished corrections to be made to the original draft of the will, which was initially read over to him, he pointed out and made known to his attorney, who was then present, what were the corrections that he wished to have made to same. It was one of the attesting witnesses who typed the corrected version of the original draft, with the relevant corrections having been noted by that same attorney, on that original draft. Thereafter, the revised draft will was read over to the testator and he clearly approved of same and knew of same, as a consequence of which, he executed same, in the presence of the attesting witnesses and without having suggested that any further correction thereto, needed to have been made. The knowledge and approval of the testator, to the contents of the relevant will has been duly proven. See: **Fincham & Edwards** – *(op. cit.);* **Christian v Intsiful** [1954] 1 WLR 253; **Pearl Clarke v Vivian Beckford and Alma Cater** – SCCA No. 69/91

[50] Finally, it is to be noted that even a testator who is deaf, dumb and illiterate, or in other words, to use more appropriate terminology, mentally disabled, hearing impaired and illiterate, as also, blind, can execute a valid will. What is important, in such a circumstance, is that it be proven that the relevant testator knew and approved of the

contents of the disputed will. **Section 6 of the Wills Act**, permits someone to execute the will on the testator's behalf. As such, the same rule applies in that circumstance. See: **In the Goods of Geale** – *(op. cit.)*; **In the Goods of Owston** – [1862] 2 SW. & **TR. 461, In the estate of Holtam** – [1913] 108 L.T.732.

[51] The burden of proof did indeed rest on the shoulders of the person who is propounding the relevant will in the case at hand, this being the testator's (deceased's) widow. This court has concluded that said burden has been overwhelmingly met, in fact, way beyond it being more probable than not. In the circumstances, it is ordered that the last will and testament of the late Slidie Basil Joseph Whitter, is to be admitted to probate.

[52] Finally, this court wishes to thank the parties for the respective written submissions which were provided to it by them and wishes them to know that it did carefully take into account the respective submissions so provided, which were filed by no later than the last date ordered for same to have been done, that having been August 29, 2014. As such, this court has taken into account the respective written submissions which were filed on August 28, 2014, as also, the authorities attached to the written submissions of counsel for the cautioners. This court though, has seen on the court file, further submissions which were filed in response to the cautioners' submissions. Those further submissions were filed by attorney Adley G. Duncan, on behalf of the deceased testator's widow and were filed on October 1, 2014, not only without any prior approval of this court, but also, directly contrary to this court's order, as regards the filing of submissions. In the circumstances, this court has not at all, taken the contents thereof into account, for the purpose of rendering its ruling herein and is disallowing the party propounding the relevant will, from recovering any costs related to the preparation and filing of same. That party is to file and serve the requisite order.

[53] There is one other point which was not argued before me and which will only therefore be given very limited comment on, in those reasons. It is a matter of procedure. This matter came before me upon a hearing in chambers during this court's

long vacation period, as an urgent matter. I am though, not at all convinced that it was dealt with appropriately by counsel for the parties, from a procedural standpoint. It was dealt with as a trial in chambers, in circumstances where no prior order of this court had been made for there to have been a trial on August 1, 2014, or for there to have been a trial in chambers. This was really 'contentious probate proceedings' as per **rules 68.54 & 68.55 of the C.P.R.** Accordingly, these proceedings should have been lodged before this court, by the cautioners as claimants, using a fixed date claim form. Thereafter, the usual civil procedure processes governing fixed date claim form proceedings would have been applicable thereto. One of those processes is that it would have been open to this court to have ordered the attesting witnesses to attend court for examination and to answer questions and also, to have ordered attorney Morgan to bring in to court, the testamentary document which was in his possession. Such an order though, should have been made by this court, such that those persons would have appeared at court upon the scheduled trial date of a then pending fixed date claim form proceeding. In the matter at hand, not only has no fixed date claim form been filed by anyone, but also, none of the usual civil procedural processes applicable to fixed date claim form proceedings, were ever undergone and neither party's counsel, when they appeared before me on August 1, 2014, brought this to the court's attention. As things now stand though, this matter is to be considered as concluded in this court.

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Hon. K. Anderson, J.