ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM No. ANUHPB 2005/0513

IN THE MATTER OF RULE 27.2 AND PART 68 OF THE CIVIL PROCEDURE RULES 2000

AND IN THE MATTER OF THE ESTATE OF ELEANORA DICKENSON

(also known as **"Eleanora Dickenson",** also known as **"Maryanne Eleanora Edwards",** also known as "**Ellen Dickenson"), DECEASED**

BETWEEN:

AUBREY SYLVESTER EDWARDS

as Lawful Attorney of Gladys Victoria Edwards

Claimant

And

ROLSTON RAWLINS

Defendant

Appearances:

Mrs. Mary B. White for the Claimant

Mr. Steadroy Benjamin for the Defendant

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2008: March 20

September 29

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JUDGMENT

[1] **Blenman J**: Eleanora Dickenson, deceased, was Rolston Rawlins and Aubrey Edwards aunt; and the two of them are cousins. Aubrey lives in St. Croix and contributed financially to the upkeep of Eleanora and her sister Gladys. Gladys is Eleanor's only surviving sibling

and the former brought up Aubrey. Eleanor was a lady who acquired several properties. In her late years, and from time to time, several of her nephews and nieces resided with her. From around 1998, Rolston resided with Eleanora and did several chores for her. Her sister Gladys also lived with her. Aubrey paid caregivers to assist her. However, the relationship between Rolston and Eleanora was somewhat rocky. Eleanora was advanced in age in 2002; she was 86 years old. Rolston did not get on well with the caregivers.

[2] On the 25th July 2002, Rolston took Ms. Beverly Airall and Ms. Gloria Lake to Eleanor's home where it is alleged that she made a will, which they signed as witnesses. The purported will named him as the sole executor and leaves the bulk of her estate to Rolston and his family. No other relatives were present when the will was made. Rolston kept the will, and after Eleanora's death on 6th June 2004, he sought to have the will probated.

[3] In his capacity as Gladys' attorney, Aubrey has brought these proceedings and seeks to have the Court declare the will invalid. He seeks a declaration from the Court that he is Gladys' lawful attorney. Aubrey's main contention is that Eleanora did not know what she was signing. In support of this contention, he asserts that several years before, Eleanora had disposed of some of the land referred to in the will and that she never intended to allow Rolston and his siblings to benefit from her estate.

[4] Aubrey also contends that the two persons who witnessed the execution of the will, Ms. Lake and Ms. Airall, did not know that they were signing a will and, in any event, they signed the will before Eleanora. He also contends that Eleanora did not know or approve of the contents of the will and that it was made under suspicious circumstances.

[5] Thirdly, Aubrey asserts that the will was obtained by undue influence exerted by Rolston on Eleanora, who at the time was feeble. He also alleges that it was always Eleanora's intention that Gladys should inherit the bulk of her property. In contradistinction, the dispositions in the will are inconsistent with Eleanora's long held intentions.

[6] Accordingly, Aubrey contends that the will ought not to be probated, and seeks a declaration that Gladys be allowed to apply for Letters of Administration of Eleanora's estate.

[7] Alternatively, he asks the Court to allow Gladys to apply for the Probate of an earlier will, allegedly made by Eleanora.

[8] Contending that the will is valid, Rolston says that at the time when Eleanora made the will, she was of sound disposing mind and memory. Rolston maintains that the will was validly executed by Eleanora and that at the time of her doing so, she knew and approve of the contents. He alleges that the will was made based on her instructions.

[9] Further, he maintained that Eleanora executed the will in the presence of Ms. Airall and Ms. Lake and that they were both aware that they were signing the will as witnesses.

[10] Finally, he is adamant that he exerted no influence or pressure on Eleanora in order for her to execute the will.

[11] **Issues**

Several issues have been raised by the parties. I have sought to crystallise them as follows:

(a) Whether Eleanora had the testamentary capacity at the time of making the purported will.

(b) Whether the will was properly signed and witnessed.

(c) Whether Eleanora knew and approved of the contents of the will.

(d) Whether the will was obtained by Rolston's undue influence.

[12] **Evidence**

A number of persons deposed to affidavits in support of Aubrey's claim. However, a few of them did not attend Court to be cross examined. Mr. Aubrey Edwards, Ms. Dorcas Kirby, Ms. Nora David, Mr. Sylvester Joseph, Dr. Gloria Mason-Thomas, Ms. Ernestine Terry,

Ms. Marzel Marsh, Ms. Gloria Lake and Ms. Beverly Airall having desposed to affidavits, were cross examined. Mr. Rolston Edwards deposed to an affidavit in support of his defence. The parties have also placed before the extensive volumes of agreed documents.

[13] **Law**

Section 7 of the Wills Act Cap 473 Laws of Antigua and Barbuda provides that

> "no will shall be valid unless it shall be in writing; 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 the signature shall be made, or acknowledged, by the testator in the presence of two or more witnesses at the same time".

[14] **Mr. Steadroy Benjamin's submissions**

Learned Counsel Mr. Steadroy Benjamin argued that the will was validly executed. He said that Eleanora had the testamentary capacity when she signed the will. She also knew of the contents of the will and approved of it. In fact, she authorised the will to be drafted.

[15] Learned Counsel Mr. Benjamin took issue with the credibility of the witnesses, Ms. Airall and Ms. Lake, who attested the signing of the will, when they said that they were unaware that they had witnessed the deceased signing the will, until days after. Learned Counsel, Mr. Benjamin asked the Court to attach very little weight to Ms. Airall and Ms. Lake's evidence when they said they did not know they were singing a will. He said that Ms. Airall, who is the Deputy Accountant General and Ms. Lake, who is a Senior Civil Servant for over 25 years, did not speak the truth when they both said that they did not know what they were signing. He asked the Court to find that Eleanora signed the will and it was witnessed by Ms. Airall and Ms. Lake, who were both present at the time of Eleanora's signing.

[16] Mr. Benjamin stated that based on the evidence; there can be no doubt that at the time of the making of the will, Eleanora had the requisite testamentary capacity. In support of his contention, he referred to **Banks v Goodfellow [1870] LR 5 QB 549**. He maintained that

at the time of making the will and giving instructions for the will to be made, Eleanora was of sound disposing mind and memory.

[17] Mr. Benjamin argued that based on the totality of the evidence; there can be no doubt that Eleanora had the mental capacity at the date of the execution of the will. He also alluded to the fact that Eleanora executed a lease in favour of Aubrey one month after she had made the will, on 25th July 2002; this indicates that the time of executing the will, Eleanora had the requisite testamentary capacity.

[18] Mr. Benjamin stated that where a will has been drawn in accordance with the instructions of the testator, whilst of sound disposing mind, a perfect understanding of all the terms of the will, at the time of the execution of the will may not be necessary. See **Perera v Perera [1901] AC 354 PC**.

[19] Mr. Benjamin submitted that there are no suspicious circumstances which could lead the Court to declare the will invalid. He referred the Court to **Barry v Butlin [1838] 12 ER 1089; Tyrell v Painton [1894] P 159; Re R [1950] 2 All ER 117 and Wintle v Nye [1959] 1 WLR 291**, in support of his contention.

[20] Mr. Benjamin next argued that Eleanora knew and approved of the contents of the will. He said in so far as there is no ample evidence that the will was executed by the testator who had the testamentary capacity, Rolston "has discharged the prima facie burden placed on him that Eleanora knew and approved of its contents."

[21] Finally, Mr. Benjamin maintained that there was no evidence adduced by Aubrey in support of his contention that Rolston exerted undue influence on Eleanora. Counsel said that "undue influence ought not to be put forward unless the party who pleads it has reasonable grounds upon which to support it". See **Spiers v English [1907] P 122.** On the evidence, there was no force or coercion exerted on Eleanora at the time of making the will, therefore Mr. Benjamin asserts there was no undue influence. See **Partfitt v Lawless [1872] LR 21**.

[22] **Ms. Mary B Whyte's submissions**

Learned Counsel Ms. Mary B Whyte argued that the will is invalid. Counsel urged the Court to accept that Eleanora did not have the testamentary capacity; did not have knowledge of the contents of the will and therefore was unable to approve the contents. She says that at the time Eleanora signed the will, she was senile.

[23] Further, Ms. Whyte said that the will is invalid since the persons who witnessed the will did not sign it after Eleanora. The witnesses signed before Eleanora. Ms. Whyte also argued that there are suspicious circumstances in the case at bar, which Rolston has the duty to remove and he has failed to do so. She said that it is passing strange that some of the property which the testatrix is alleged to have devised in the will, she had disposed of several years before 2002. In addition, the dispositions in the will are inconsistent with Eleanora's long expressed view that her sister Gladys should be the main beneficiary of her assets. Another matter that arouses great suspicion, Counsel argued, is the fact that the will having been made in 2002, Rolston kept this information to himself until after her death in 2004. Another matter that attracts great suspicion is the fact that Rolston is the person who arranged for Eleanora to sign the will, when Gladys was away from home, and he stands to benefit tremendously under the will.

[24] In support of her contention that the Court should declare the will invalid, learned Counsel referred the Court to **Thomas v Thomas [1969] 20 WIR 58** in which it was held that it was not affirmatively established that the testator knew and approved the contents of the will. It was further held that where the Respondent takes an interest under the will, an onus rests on him to remove all suspicious circumstances and prove the righteousness of the transaction.

[25] In addition, learned Counsel Mrs. Whyte said that the will is invalid since Rolston exerted undue influence on Eleanora to get her to sign. She did not exercise her free choice in making the will.

[26] Learned Counsel Ms. Whyte referred the Court to **Re Brown Robinson v Sandiford [1963] 1 WIR 305 at page 312** in which Field J stated that:

> "The onus in respect of undue influence rests on the defence to establish directly or by proof of such facts and circumstances from which the Court could properly infer undue influence".

[27] Learned Counsel Ms. Whyte urged the Court to declare that Gladys is the only person who is lawfully entitled to Eleanora's estate. She also urged the Court to permit an earlier will, allegedly made by Eleanora to be admitted to Probate.

[28] **Court's analysis and finding of facts**

I have carefully reviewed the evidence adduced on behalf of Aubrey and that adduced on behalf of Rolston. I have also given deliberate consideration to the very lucid submissions of both learned Counsel. The following represents my findings of facts. From childhood, Eleanor assisted Rolston and his siblings. At one point, he migrated to Trinidad and having spent several years living in Trinidad he returned to Antigua and lived with Eleanora. Gladys treated Aubrey like her son and the relationship between them was harmonious. There is no dispute that Gladys and Eleanora, who were sisters, were very close. However, Aubrey had moved from Antigua several years. Nevertheless, I have no doubt that for the most part Aubrey took care of the financial needs of Gladys. He also assisted Eleanora. I accept that Eleanora always indicated that everything she owned should go to her sister, Gladys. Eleanora collected a pension. The relationship between Rolston and Eleanora was good originally, but later it was not as harmonious as it could have been. Rolston did several chores for Eleanora, but they were not as close as Eleanora and Gladys were.

[29] Eleanora died a widow and without issue on the 6th day of June 2004. She is survived by her last remaining sibling Gladys (who is elderly).

[30] Upon Eleanora's death, a will purportedly made by her on the 25th July 2002 was produced. Rolston is the sole executor and the bulk of Eleanora's estate is to go to Rolston

and his relatives. However, some of the dispositions in the will appear to be inconsistent with previous will allegedly made by Eleanora. In the disputed will, her sole surviving sister Gladys is given only a life interest in one of her properties. Further, Eleanora purports in the will to devise of property that she had disposed of several years earlier.

[31] The will was signed by Ms. Airall and Ms. Lake. They knew that they were witnessing the signing of the will. This was done at Rolston's behest. Having signed as witnesses, both ladies became suspicious and had misgivings. They wanted their names removed. They were genuinely concerned about whether Eleanora knew what she was doing. They made enquiries about having their names removed as witnesses.

[32] I am also of the considered view that Rolston was instrumental in having Eleanora sign the will on 25th July 2002 in the presence of Ms Airall and Ms. Lake. No one else was present. There is no evidence before me on which I can properly conclude that the will was drafted based on Eleanora's instructions. The evidence points very clearly to Rolston being instrumental in the drafting of the will.

[33] **Issue No.1**

Whether Eleanora had the testamentary capacity at the time of making the purported will.

[34] **Testamentary capacity**

In order for a will to be valid, the Court should be satisfied that the testatrix understood three matters: the testatrix must understand the broad effect of her wishes being carried out; the extent of the property she is disposing and the claims to which she ought to give effect. The testatrix must have testamentary capacity at the time when she executes the will. See **Banks v Goodfellow** ibid. This requires the Court to be satisfied that the testatrix had the following – (a) The nature of the act and its effects.

(b) The extent of the property of which he is disposing

(c) The claims to which he ought to give effect.

[35] The legal burden of proof always lies upon the person seeking to propound a will to prove that the testatrix had the testamentary capacity at the time. If that person fails to do so, the will would not be admitted to probate. The testatrix must have known and approved of the contents of the will. The will must be that of a free and capable testatrix exercising her genuine free choice and not a result of undue influence by another.

[36] On the evidence, there is no dispute that on the 28th August 2002, Eleanora executed a lease of one of her properties to Aubrey. This was done in the presence of Dr. Gloria Mason-Thomas, who also signed the lease. It seems strange to me that Aubrey could properly argue that Eleanora did not have the testamentary capacity to execute the will on 22nd July 2002, yet he wants the Court to believe that she had the mental capacity some one month and three days after, to execute a lease in his favour. It is not unknown that persons who have mental difficulties can and do have some lucid moments; I am far from persuaded, based on the totality of evidence that Eleanora did not have the requisite mental capacity on the date of the execution of the alleged will.

[37] On this issue, I accept the submissions of Learned Counsel Mr. Benjamin, in preference to that of learned Counsel Ms. Whyte. I am fortified in that based on the totality of the evidence, and I pause to state that there is no credible evidence before me on which I conclude that she did not possess mental capacity. Neither Ms. Airall nor Ms. Lake are medical doctors, accordingly they are not permitted to give medical testimony.

[38] **Issue No.2**

Whether the will was properly signed and witnessed.

[39] **Witnessing the will**

Ms. Airall and Ms. Lake, the two persons who witnessed the will, said that they did not know or that they were unaware of the fact that they were witnessing the will. During cross examination by learned Defence Counsel Mr. Benjamin, they were forced to resile from their positions. I must state right away that I do not find either of them to be credible on this

issue. I am satisfied that they knew that they were signing the will and intended to do so (as stated earlier).

[40] I am equally satisfied that each of them signed after Eleanora but that they had a change of heart since they were suspicious based on the circumstances surrounding the signing of the will. I refrain from saying that they were both part of Rolston's plan to have Eleanora sign the will while no one was present; but I have no doubt, having heard the evidence, that each of them knew that they were signing the will, but became concerned when they saw the old lady signing the will in very rushed circumstances and Eleanora's demeanour. I am fortified in my view since having examined the alleged will, each of the two witnesses had to sign at the bottom of the words "signed by the testatrix in the presence of us, both present at the same time and at the request and in the presence of each other hereunto described our names as witnesses", which is the attestation clause. In coming to my conclusion, I also place great store on the fact that both of the witnesses are experienced civil servants. It is clear to me that having signed the will and reflected on the circumstances which attended Eleanora's signing, the two witnesses became concerned or suspicious about whether the elderly lady genuinely wished to make the will. It was that concern that caused them to consult a lawyer in order to have their respective names removed.

[41] In view of the totality of circumstances, I have no doubt that each of the witnesses signed the will after Eleanora and in the presence of each other and were at all times aware that they were witnessing the execution of a will.

[42] **Issue No.3**

Whether Eleanora knew and approved of the contents of the will.

[43] **Knowledge and approval**

I now come to address whether Eleanora knew or approved of the contents of the will. The legal burden of proof always lies upon the person propounding a will to prove that the testatrix knew and approved of its contents at the relevant time. It is for the person who is

propounding the will to prove to the Court that the instrument is the last will of a free and capable testatrix. See **Barry v Butlin [1838]** ibid and **Cleare v Cleare [1869] LR 1 p 657-658.**

[44] On proof that the testatrix was of the testamentary capacity and that she duly executed the will, a rebuttable presumption arises that she knew and approved of its contents at the time of execution. See **Barry v Butlin** ibid at p 484. The evidential burden then shifts to the person opposing the will to rebut the presumption. If he does so or if the presumption is not applicable, those propounding the will must produce affirmative proof of the testatrix's knowledge and approval. The presumption does not apply wherever the surrounding circumstances raise a well grounded suspicion that the will does not express the mind of the testatrix. In that event, the will is not admissible unless the suspicion is removed.

[45] An example of suspicious circumstances is where a party is active in obtaining a will under which he takes a substantial benefit. See **Fulton v Andrew [1875] LR 7HL 481**.

[46] Further, in **Tyrell v Painton [1894] P 151**, the testatrix who was ill made a will in favour of her cousin, the plaintiff. Two days later, the defendant's son brought her another will prepared by himself in favour of his father. The testatrix executed the will in the presence of the son and a young friend of his. No one else was present and the existence of the will was not known to anyone else until after the death of the testatrix a fortnight later. The Court of Appeal held that the circumstances raised a well grounded suspicion, and the defendant had failed to remove that suspicion by proving affirmatively that the testatrix knew and approved of the contents of the will in favour of the defendant.

[47] In the case at bar, and from the totality of the circumstances, a well grounded suspicion that the will does not express the mind of Eleanora exists. The fact that it was Rolston who took the typed will for Eleanora to sign at a time when no one else was at home, together with the fact that he stands to benefit immensely raises great suspicion. The Court must be vigilant and zealous in examining the evidence in support of the instrument. In passing I repeat, I have no doubt that the witnesses Ms. Beverly Airall and Ms. Gloria Lake having

witnessed the signing on the will had misgivings so soon thereafter. I accept that they were not satisfied that Eleanora was voluntarily and freely making the will but felt obliged to assist Rolston. I believe that he hurried the witnesses out of the house once they had signed as witnesses.

[48] Of significance is the fact that the Court is even more suspicious that the will does not express the mind of the testatrix, based on the fact that Rolston and his family are to benefit immensely from the will. As in **Tyrell v Painton's** case no one else was present and the existence of the will was not known until after Eleanora's death. I ask the question, why did Rolston wait until Gladys was away to have the 86 year old frail lady execute the will. Not even the caregivers were present. This, against the background of the rocky relationship between himself and Eleanora raises great suspicions. She gave no one instructions to draft the will.

[49] Of greater importance in raising the Court's suspicion, is the fact that the will seeks to dispose of several pieces of property that Eleanora had conveyed several years before the alleged date of execution. In addressing the suspicions raised, the Court is required to pay close attention to the surrounding circumstances that attend the execution of the will. To put it mildly, Rolston did not paint a very good picture when he testified that Eleanora knew and approved of the will. I found him to be a less than credible witness. I have no doubt that he timed the execution of the will when no one else was present.

[50] In **Tyrell v Painton** ibid, it was held that whenever a will is prepared under circumstances which raise a well grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed.

[51] In **Re R [1950] 2 All ER 112** Wilmer J held that:

> "In dealing with a question of knowledge and approval of a will the circumstances which are held to exercise the suspicions of the Court must be circumstances attending or at least relevant to, the preparation and execution of the will".

[52] I am afraid that based on the evidence adduced, Rolston has failed to remove the well grounded suspicions. In this regard, I find the principle stated in **Thomas v Thomas** ibid very instructive and apply them.

[53] In fact, the entire execution of the will is clouded in such great suspicion and Rolston has failed to even meet the threshold required to prove positively that she knew and approved of the contents of the will. It is passing strange to say the least that he took the two ladies, hurriedly, to witness the will and they have described the testatrix as being frail and weak. I have no doubt that the witnesses were uncomfortable with the genuineness of the execution of the will and had a change of heart after they were guided by their good conscience, though belatedly. All, however, is not lost.

[54] In view of the totality of evidence, I have no doubt that Rolston has failed to remove the tremendous suspicion that the testatrix did not know or approved of the contents of the will. On this ground alone, it is my considered opinion that the will dated 25th July 2002 is invalid.

[55] **Issue No.4**

Whether the will was obtained by undue influence.

[56] **Undue influence**

On this issue of undue influence, Rolston maintained that at no time did he coerce, force or pressure Eleanora to execute the will. He disputes that she signed the will under undue influence.

[57] For his part, Aubrey is adamant that Rolston exerted pressure or force on Eleanora to sign the will and he says that she did not do so on her own free will. In support of his contention, he relied on Ms. Airall and Ms. Lake's evidence that Rolston who took them to Eleanora's house surreptitiously to witness the will. He took them on a day, as stated earlier, when Gladys was not home. In fact, no one was at home. He rushed the witnesses to sign and after they had done so, he rushed them away. After the execution of the will,

and when the witnesses wanted to have their names "removed" Rolston refused to comply. Aubrey asked the Court to accept that Rolston did not treat Eleanora or the caregivers well, and this must have sapped her strength when she signed the will.

[58] The legal burden of proof of undue influence lies on the person alleging it. See **Craig v Lamoureaux [1920] AC 349.** It is for Aubrey to prove that the will was made as a result of undue influence. Taking into account the evidence the claimant adduced, which I accept, that Rolston did not treat Eleanora very well, it is clear to me that Aubrey has discharged the onus that is placed on him. There is no doubt in my mind that Rolston exerted pressure or force on the little old lady to sign the will (in which he stands to benefit tremendously).

[59] Having examined the totality of the evidence carefully, I draw the inference that when Eleanora executed the will, she did so as a result of the pressure or force of Rolston. Undue influence takes many forms including coercion or duress. The case of **Re Browne, Robinson v Sandiford** ibid is very instructive. Based on all of the surrounding circumstances, the Court finds it very easy to infer that Rolston was the main architect of the will and that the will does not reflect the true wishes of Eleanora. She was pressured by Rolston to devise several properties to him and his relatives. Further, I do not for one minute believe that Eleanora willfully made the will leaving the bulk of her properties to Rolston and his relatives. I am satisfied that he was accustomed to being hostile to the two old ladies and their caregivers. He improperly took advantage of and exerted undue influence over the old lady, at a time when no one was present to rescue her from him. Accordingly, I have no doubt, based on the foregoing, that the will dated 25th July 2002 is invalid in as much as it was obtained as a result of undue influence.

[60] **Other remedies**

I am not of the respectful view that it is proper for the Court to make any declarations on Eleanora's previous will that was allegedly made in 1990. The Court would need to hear evidence in relation to its execution. Accordingly, there is no need nor is it proper for this Court to make any pronouncement on the 1990 will in so far as that will was not the focus of this litigation. It will be necessary, in due course, for someone to apply either to prove

the earlier will or to prove the intestacy of the testatrix, Ms. Eleanora Dickenson, if the conclusion is reached that the 1990 will is invalid.

[61] **Conclusion**

Judgment is hereby given for the claimant against the defendant. In view of the foregoing premises, I make the following orders: The purported will dated 25th June 2002, made by Eleanora Dickenson is invalid and shall not be admitted to Probate on the following grounds:

(a) Eleanora Dickenson did not know or approve of the contents of the will.

(b) The will was obtained as a result of the undue influence of Mr. Rolston Rawlins applied on her.

(c) Mr. Rolston Rawlins shall pay Mr. Aubrey Edward in his capacity as the Lawful Attorney of Ms. Gladys Edwards, costs in the sum of $10,000, as agreed.

[62] I thank both learned Counsel for their assistance.

Louise Esther Blenman

High Court Judge