THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

**CLAIM NO: ANUHCV2010/0455**

**BETWEEN:**

**LA TANYA HUGHES**

**(Sole Executrix named in the last will and testament of Laban Hughes, deceased)**

Claimant

**AND**

**CLEMENT HUGHES**

**Lawful Attorney of ENA HUGHES**

Defendant

**Appearances:**

Ms. C. Kamilah Roberts for the Claimant
Ms. Laurie Freeland- Roberts for the Defendant

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2011: July 11, 12
November 3

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**JUDGMENT**

**INTRODUCTION**

[1] **REMY J.:** This action involves the validity of a will.

**BACKGROUND**

[2] LABAN HUGHES (the Testator), died on the 7th September, 2009. At the date of his death, he was survived by his wife Ena Hughes as well as eight children, five of whom were the issue of his marriage with Ena Hughes.

[3] The Claimant La Tanya Hughes is the illegitimate daughter of the Testator and is the sole executrix of the Will of the Testator dated the 25th May 2009 (the Will). Under the Will, the Claimant and the Testator's girlfriend Pauline Morrison are the sole beneficiaries.

[4] The Defendant Clement Hughes is the eldest son of the Testator and Ena Hughes and is the lawful Attorney of Ena Hughes.

[5] After the death of the Testator Laban Hughes, the Claimant, on the 17th November 2009, applied for Grant of Probate in the Estate of Laban Hughes. The Claimant was later served with a Notice that a caveat had been entered by the Defendant.

[6] The Claimant has instituted these proceedings by filing a Fixed Date Claim on the 14th January 2010, in which she seeks:-

(a) An order pronouncing on the force and validity of the will of Laban Hughes dated the 25th May 2009.
(b) An order for the removal of the caveat dated 28th September 2009.
(c) Damages.
(d) Costs.
(e) Further or other relief.

[7] The Defendant filed an Amended Defence and Counterclaim challenging the validity of the will, alleging that at the time of the execution of the Will, the deceased was not of sound mind, memory and understanding. The Defendant further alleged that the will was obtained by undue influence exercised by the Claimant and the girlfriend of the deceased, Pauline Morrison.

[8] The Defendant counterclaims:-

(a) A declaration that the Will is deemed null and void.
(b) In the alternative to (a), a Declaration that the property located in Clare Hall registered in the name of the deceased is property that was held in trust for the

wife of the deceased and the children thereof and does not form part of the Estate of the deceased.

(c) Cost.

(d) Interest pursuant to Statute.

(e) Such further or other relief as the Court deems fit.

**ISSUES**

[9] The issues that fall to be determined by the Court are as follows:-

1. Whether the testator Laban Hughes had the testamentary capacity to execute the Will dated the 25th May, 2009? Was the Testator influenced by undue influence exercised by the Claimant and/or Pauline Morrison? Is the will of the Testator valid?

2. Did the Testator hold the property identified as Registration Section: Cassandra Gardens and New Winthropes, Block: 42 1893B, Parcel: 111 in trust for his wife Ena Hughes and the children of the marriage.

**THE CLAIMANT'S EVIDENCE**

[10] The Claimant has testified and adduced evidence from two witnesses, namely Pauline Morrison and Attorney at Law Ralph Francis, to support her claim.

[11] In her Witness Statement, the Claimant stated that during the time that the Testator was hospitalized between May and early June 2009, she visited him daily and had the opportunity to speak with him and observe his behaviour and manner. She stated that the Testator "was able to communicate in a coherent manner and did not appear to be disoriented." The Testator carried on conversations with her as usual and even displayed his usual sense of humour. She stated that she experienced no difficulty in understanding or communicating with him. The Claimant stated that in or around the month of May 2009, the Testator instructed her to contact his Attorney, Ralph Francis to come and see him at the hospital. She stated that the Testator did not tell her why he

wanted to see Mr. Francis, but that she did contact Mr. Francis and that he came to visit the Testator. The Claimant stated that she was not present when the Testator executed his will on the 25th May 2009 and that the Testator had not previously discussed with her his intentions in relation to the Will. She further stated that she made no attempt to influence the contents of the Will in any way. The Claimant stated that the property at Clare Hall (where the Testator lived) was the sole property of the Testator and that Ena Hughes had no share or interest in the said property.

[12] Under cross-examination, the Claimant testified that while the Testator was hospitalized, he was not disoriented and was not weak. She stated that when the Testator was discharged in June, he was not able to walk, but that she did not know why he was not able to do so. She testified that before he "blacked out" and was hospitalized, the Testator was "walking slowly".

[13] The evidence of Pauline Morrison was that while the Testator was in hospital, she visited him daily and observed that he "was able to communicate with her in a coherent manner" and appeared to understand everything that was said to him. She stated that she observed the Testator making jokes with visitors "as was his usual personality". Ms. Morrision stated that she was not present at the hospital when the Testator signed the Will on May 25th 2009, and had no prior discussions with him in relation to the Will or his intentions.

[14] Under cross-examination, Ms. Morrison testified that she had been in a relationship with the Testator for eleven years prior to his death. She testified that the Testator "started to get ill" in June 2008. She stated that the Testator was weak and that he started having seizures in 2009. He was also diabetic. She stated that when the Testator was discharged on June 10th 2009, he was still weak and that the Claimant and herself had to assist him to walk.

[15] The final witness for the Claimant was Attorney at Law, Mr. Ralph Francis. In his Witness Statement, Mr. Francis stated that in the month of May 2009, he received a

message that the Testator wanted him to come to the hospital to speak with him in relation to his will. Mr. Francis stated that he took instructions for the preparation of the Will from the Testator on the 19th May 2009 and returned on May 25th 2009 to execute the Will. He stated that the Testator signed the Will in the presence of two witnesses, namely nurses Bernadine Abbott and Cecelia Matthew, and that he was present when they did so. Mr. Francis testified that there was "no doubt in his mind" that the Testator "had the capacity to create a will."

[16] Under cross-examination, Mr. Francis testified that he was not aware that the Testator was married and that the Testator never told him that he was. Mr. Francis testified that before taking instructions from the Testator, he called the Nurse so that "she could listen to the interaction between the Testator and himself". He stated that, based on her response, he thought that the Testator was "clear enough of mind" that he did not think it necessary to call a doctor to ask questions as to his capacity.

**THE DEFENDANT'S EVIDENCE**

[17] The evidence of the Defendant Clement Hughes (who was sued in his capacity as lawful Attorney for Ena Hughes) came from Clement Hughes himself and two other witnesses, namely Philmore Reginald Hughes and Dalmar Ainsworth Edwards.

[18] In his Witness Statement, Mr. Hughes stated that after the Testator became ill in May 2009, the Claimant began to exercise control over him. He stated that when himself and another sibling (his sister Denise) visited the Testator, they noticed that he was "weak, disoriented and at times incoherent" and that he was barely able to feed or care for himself. According to Mr. Hughes, his parents migrated to the U.S.A in the 1980's. His mother Ena Hughes became ill in 1986 and remains there because of her illness. He stated that the Testator returned to Antigua and resided in the family house and traveled back and forth between Antigua and the U.S.A. His visits became less and less until he stopped altogether.

[19] The evidence of Mr. Hughes with respect to the family house was that during the 1970's, an addition was built onto the house. An additional two bedrooms and a bathroom were built from monies received from Nurse Blackwell, the aunt of Ena Hughes. Mr. Hughes stated that the last renovations done to the property were paid for by himself and his brother. He added that one of his brothers sent monies down to the Antigua Commercial Bank in order to prevent the bank from foreclosing on a loan for the Testator that was in default.

[20] Under amplification of his Witness Statement, Mr. Hughes testified that renovations were done to the family house between 1998 to 2007 and that these were paid for by his brother Melville and himself.

[21] Under cross-examination, Mr. Hughes testified that his father, mother and his siblings migrated to the U.S.A. in 1982, and that his mother Ena Hughes has resided there ever since. He stated that his father never settled permanently in the U.S., but would "go and come". He stated that his mother became ill in 1986 and stopped working at that time. His father stopped traveling back and forth altogether from Antigua to the U.S.A in 1996.

[22] The evidence of Philmore Reginald Hughes (Philmore Hughes), the Testator's youngest brother was with respect to the marital home. The witness stated that he assisted with the purchase of the land and provided materials for the house (the family house) which was erected on the land. He added that at the time the house was being built, he worked at Bryson's Coca Cola Factory in Antigua where he was able to get a discount on materials, namely lumber, to build Ena and the Testator's home. He stated that both the Testator and his wife Ena contributed monies to pay for the lumber. He added that the house was always intended to be "the family home belonging to the members of the family and was never intended to be only the Testator's property".

[23] Under cross-examination, Philmore Hughes testified that the home was constructed in the mid-60's. Apart from the discount, he provided manual labour. He stated that

sometimes the lumber was dropped off at his house in Clare Hall and he had to get friends to assist him to "pull the lumber from his house to the land which he had purchased for his brother and his family". He paid for the lumber and his brother would re-imburse him. He testified that, although he never got money directly from Ena Hughes, he knows that she contributed towards the payment of the lumber.

[24] The final witness for the Defendant was Pastor Dalmar Ainsworth Edwards. His evidence as contained in his Witness Statement was that he had known the Testator for over fifty years prior to his death. This witness gave evidence that he visited the Testator in hospital and prayed with him there. He stated that the Testator lived in the family home with his family until they migrated to the U.S.A. in the 1980's. Ena Hughes used to be mainly at home conducting typing lessons.

[25] Under cross-examination, the Witness testified that he visited the Testator more than once while he was hospitalized in May to June 2009. After the Testator was discharged from the hospital, he attempted to visit him at the Claimant's house on one occasion but got no response when he "wrapped" on the door. He testified that he did not try to visit again as he received a telephone call from the Claimant, threatening to "put the police on him" if he called at her house again.

**FINDINGS OF FACT**

[26] Having listened to the witnesses at the trial and observed their demeanour, and having reviewed the pleadings and the evidence, I make the following findings of fact:-

(i) I must state from the outset that I did not find the Claimant and Ms. Pauline Morrison to be credible or reliable witnesses. The Claimant and to a lesser extent Ms. Morrison, have made Clement Hughes out to be a greedy, selfish and uncaring individual who had no love and affection for his father. I find no compelling evidence to substantiate this allegation. Further, much of their evidence was not relevant to the claim in so far as Clement Hughes was not sued in his personal capacity but as the lawful Attorney for Ena Hughes.

(ii) I am of the view that the Claimant sought to prevent close contact between the Testator and Clement Hughes as much as possible during his illness, especially during the period of his hospitalization (namely the period May to early June) and that this was done to discredit Clement Hughes in the eyes and mind of the Testator and to portray him in a negative light.

(iii) The behaviour of the Claimant while the Testator was hospitalized is particularly telling. Her evidence is that she never left the Claimant or his sister (Denise) alone with the Testator when they visited him at the hospital. The reason which she gave for this behaviour is that the Testator "told her not to move." We have only her word that he did so.

(iv) The Claimant's evidence is that on one occasion, when she arrived at the hospital, she found that Clement Hughes and his sister Denise had arrived before she did and were sitting on the bed and were speaking with the Testator. There is no evidence that the Testator was agitated or upset at this time; yet the Claimant testified that "she was afraid that they were upsetting him (the Testator) by visiting him." She goes on to say that she told the Testator "there and then" that "they" (meaning the Defendant) had changed the locks on the door to his bedroom. It seems incredulous, therefore, that the Claimant chose to inform the Testator of that fact while he was ill in hospital, especially given the fact that, based on her own evidence, she had no proof at the time that Clement had in fact "broken into" the Testator's bedroom. Her claim that she was concerned that the Testator did not get upset is, in the view of the Court, disingenuous.

(v) The Claimant also gave evidence that Denise came to the hospital to "give blood" to the Testator, but then "did not do so". It is her evidence that this caused the Testator some hurt and distress. When questioned under cross examination as to how that information reached the Testator, the Claimant responded that the Testator "asked her to check "and that she told him so. I have no doubt that this information was unsolicited.

(vi) The Claimant gave evidence that during the period of his hospitalization, the Testator instructed her to contact his Attorney Mr. Ralph Francis and to ask him to visit him at the hospital. Her evidence is that the Testator did not tell her why he wanted to see Mr. Francis, but that Mr. Francis visited the Testator as she requested. In his evidence, Mr. Francis stated that he received a message that the Testator requested that he visit him at the hospital "with respect to making a Will." Although Mr. Francis did not specify that the message came from the Claimant, the Court can reasonably conclude that the Claimant was the person who delivered the message, based on her own evidence that she did in fact contact Mr. Francis when asked by the Testator to do so.

(vii) I therefore find that the Claimant was being less than truthful when she stated that she did not know that the Testator intended to see Mr. Francis about his Will.

(viii) As to the witness Pauline Morrision, I did not find her to be a credible witness. Ms. Morrison gave evidence that she was not aware that the Testator had executed a Will in her favour in 2006, and only became aware of that fact when the Testator so informed her after he had executed the 2009 Will. She gave evidence that she did not even know where the Chambers of the Attorney Mr. Ralph Francis was located. The evidence of Mr. Francis, which I accept in preference to that of Ms. Morrison, is that Ms. Morrison accompanied the Testator to his Chambers when the Testator came to give instructions for the execution of the 2006 Will. Mr. Francis testified it was quite possible Ms. Morrison was actually present in the room while the Testator gave him the instructions for preparing the will, although he had no specific recollection of the fact.

(ix) I am therefore of the view that Ms. Morrison was aware of the fact and quite possibly the contents of the 2006 Will well before she claims she was told so by the Testator after he executed the 2009 Will.

(x) With respect to the evidence of the witnesses for the Defence, the Court is of the view that, on the whole, they were more credible than the Claimant and Ms. Morrison. The Court is however of the view that Mr. Ralph Francis was a credible and truthful witness.

[27] There are several inconsistencies in the testimony of the Claimant and that of Ms. Morrison. One such inconsistency is as follows:-

The Claimant testified that during the time that her father lived with her, which is after he was discharged from the hospital in early June 2009, he would ask her if she had heard from Clement Hughes. She further stated that if Clement Hughes had come to the house to visit his father, he would have been welcome because the Testator asked for him. Ms. Morrison on the other hand, gave evidence that when the Testator was taken to the Claimant's house after he left the hospital, he never spoke about Clement Hughes. She also gave evidence that the Testator said that he "did not want to see Clement" because Clement "cursed him at the hospital on the 25th May and called him a "scum bag" and told him that he was "evil." Ms. Morrison also testified that the Testator did not ask about Clement and that "all he said was that he wanted him (Clement) out of his house." She further stated that the Testator told her that "all his wife's children disappointed him."

[28] The Court is of the view that the above inconsistency in the evidence of the Claimant and Ms. Morrison is not slight or trivial; it moreover serves to fortify the Court in its finding that the evidence of these two witnesses is not credible or reliable.

**THE LAW**

[29] The law governing the execution of Wills in Antigua and Barbuda is the Wills Act Cap. 473 (the Act). Section 7 of the Act states as follows:-

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

[30] According to Tristram and Coote's Probate Practice[1]:-

[1] Tristram and Coote's Probate Practice, 30th Edition, page 813 para. 34.06

"The onus of proving that the will propounded was executed as required by law is on the claimant or party propounding it... It is for the person propounding the will to establish a prima facie case by proving due execution....."

[31] It is settled law that the presumption of due execution, "omnia praesumuntur rite esse acta", applies where a will is regular on the face of it with an attestation clause and the signatures of the testator and the witnesses in their proper places. In the case of **Sherrington v Sherrington**[2], the Court of Appeal overturned the trial Judge's decision that the will had not been duly executed, on the basis that, where the will containing an attestation clause was regularly signed by the deceased at its foot, and by two witnesses, "the strongest evidence was needed to reject the presumption of due execution."

[32] It is the submission of Counsel for the Claimant that the Will of Laban Hughes has been duly executed as the statutory requirements for due execution of a will have been complied with. Counsel further submits that:-

(a) The Will was executed by the Testator on the 25th May 2009 in the presence of two witnesses Bernadine Abbott and Cecelia Matthew. That Mr. Ralph Francis, Attorney at Law gave evidence in his Witness Statement and at the trial in relation to the execution of the Will.

(b) The Defendant did not proceed to effectively challenge the execution of the Will at the trial.

[33] The Defendant's Counterclaim stated that "the purported signature of the deceased does not resemble the deceased's signature or the signature of a person who had the capacity to sign a will." Further, in her Submissions, Learned Counsel for the Defendant contended that "no explanation was given for the nature of the signature of the Testator on the Will of 2009 which differed drastically from that of 2006, save and except that he was physically weak." Counsel however did not cross examine Mr. Francis who

[2] [2006] 3 FCR 538

witnessed the Testator's signature, or indeed any of the other Claimant's witnesses on that point and further failed to address that issue in her Submissions.

[34] I therefore accept the submission of Counsel for the Claimant that as the due execution of the Will has not been "effectively challenged" by the Defendant, the Claimant's evidence in relation to the signing of the Will by the Testator in the presence of the two Witnesses as required by the Act should be accepted. I find that no evidence exists to rebut the presumption of due execution.

[35] I will now deal with the issues to be determined, and will consider the law and submissions of Counsel as they apply to each issue.

**ISSUE No. 1 - Whether the Testator Laban Hughes had the testamentary capacity to execute the will dated the 25th May, 2009. Was the Testator influenced by undue influence exercised by the Claimant and/or Pauline Morrison? Is the Will of the Testator valid?**

[36] The law is settled that soundness of mind is indispensably necessary to constitute testamentary capacity. As stated in Halsbury's, Laws of England, 4th Edition, Vol. 50 at paragraph 274:-

> "It is necessary for the validity of a will that the testator should be of sound mind, memory and understanding, words which have consistently been held to mean sound disposing mind and to import sufficient capacity to deal with and appreciate the various dispositions of property to which the testator is about to affix his signature."

[37] In **Hoff and other v Atherton**[3], the Learned Judge had this to say:-

> "It is a general requirement of the law that for a juristic act to be valid, the person performing it should have the mental capacity... to make a valid will the law requires what is always referred to as testamentary capacity and , as a separate requirement, knowledge and approval of the contents of the Will. ... The former requires proof of the capacity to understand certain important matters relating to the Will..."

[3] Court of Appeal (Civil Division) [2004] EWCA Civ. 1554

[38] The Learned Judge went on to say that what those matters are were stated by Cockburn C.J. in **Banks v Goodfellow**[4]:-

> "It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and , with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insecure delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would have been made."

[39] The first limb of this test requires the Testator to understand the nature of the act and its effects. According to Parry and Clark's "The Law of Succession[5], this means that the Testator "must understand the broad effect of his wishes being carried out at his death though he need not understand their precise legal effect." The second limb requires the Testator to understand the extent of the property of which he was disposing. Parry and Clark state that what this means is that "the testator is not required to carry in his mind a detailed inventory of this property but he must recollect its extent in broad terms." The third limb of the test requires that the testator must have, in the words of Sir J. Hannen in **Boughton v Knight**[6], "a memory to recall the several persons who may be fitting objects of the testator's bounty, and an understanding to comprehend their relationship to himself and their claims upon him."

[40] The burden of proof that a testator has the necessary testamentary capacity to execute a Will is on the person propounding the Will "in the light of all the evidence before the Court." The onus is therefore on the Claimant to prove that the Testator had the necessary capacity when he executed the Will on the 25th May 2009. The Claimant relies on the evidence of Pauline Morrison, Ralph Francis and herself to discharge the burden of proof.

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[4] (1870) LR 5 QB 549
[5] The Law of Succession – 7th Edition, page 30
[6] (1873) LR 3P&D 64

[41] The evidence of the Claimant is that the Testator was hospitalized in May 2009 because he fell ill. She testified that she was not present when he fell ill, but "was told that he blacked out." She testified that the Testator was hospitalized for approximately three weeks. She stated that "they were running tests" on the Testator and that she was told that he had bleeding on the inside of his stomach and his blood count was low. The Claimant testified that, before the blackout, the Testator "was not ill; he was diabetic, and had no problem with his memory." The evidence of Ms. Morrision is that the Testator "started to get sick "in 2008. She stated that the Testator was weak and could not walk properly. He had seizures and these started in 2009.

[42] Both the Claimant and Ms. Morrison gave evidence that during the period of his hospitalization, the Testator was able to communicate with them, was coherent and did not appear to be disoriented. Neither of these witnesses was present when the Will was executed. The evidence of Clement Hughes, on the other hand, is that when himself and his sister Denise visited the Testator at the hospital, they noticed that he was "weak, disoriented and at times incoherent." He testified that during these visits, his father "recognized him at times"; but that at other times he did not think that the Testator was coherent. According to the witness, there were times when the Testator was coherent, but that sometimes the Testator "was just rambling"; at times "he kind of lapsed" and at times he could not understand what he was saying. He testified that he could not speak to whether the Testator was coherent at the time he made the Will, because he was not present. Based on my finding that I do not find the Claimant and Ms. Morrison to be credible or reliable witnesses, I find it necessary to treat their evidence as to the Testator's mental state while he was in hospital with some caution. With respect to the evidence of Clement Hughes on that point, the Court accepts his evidence that the Testator was weak and at times incoherent, but is of the view that the rest of the evidence of the witness with respect to the Testator's mental state has been slightly exaggerated.

[43] The witnesses Philmore Hughes and Pastor Edwards both gave evidence that they visited the Testator while he was at the hospital. Although Pastor Edwards stated that

he prayed with the Testator, the two witnesses provided no evidence which would have assisted the Court about the Testator's mental condition during their visit. There is also no evidence of the Testator's mental capacity from the nurses who signed as witnesses to the Will.

[44] The Court now considers the evidence of Mr. Ralph Francis, the Attorney who took instructions from the Testator and executed the Will. The evidence of this witness is that the Testator was, in his opinion, "clearly capable of making a will." He testified that when he arrived at the hospital and proceeded to the Testator's room on the 19th May 2009, the Testator called him by name "Ralph" and "proceeded to give him his life history". He stated that before taking instructions from the Testator, he first asked him various questions to ensure that he was of sound mind. He then called a nurse, Valerie Browne Williams to observe his interaction with the Testator.

[45] Mr. Francis testified that after satisfying himself that the Testator "had the necessary mental capacity", he went on to receive instructions. These instructions were that the Testator wanted his daughter La Tanya Hughes (the Claimant) to be the Executrix of his estate and that he wanted his estate divided equally between his girlfriend Pauline Morrison and La Tanya. He stated that the Testator did not tell him why he was changing his Will and he did not ask him why. He also stated that he did not know that the Testator was married and that he did not ask him whether he was.

[46] Under cross examination, Mr. Francis testified that if he had known that the Testator was married, "he would have wanted to know whether or not he was taking his wife into consideration when he was giving him instructions." He stated that he would have advised the Testator that if his wife in her own right had an interest in the property, that he could not dispose of it by will. He also testified that, if he had known that the Testator was married, he would have urged upon the Testator, "to clear his (Mr. Francis') mind" that if he would not be including his wife in the will, that there was some justification for that. He stated that even if "in law" the Testator did not have to bequeath anything to his wife, he (Mr. Francis) would still have pressed the issue. Mr. Francis

also testified that he would have "sought to be clear in his own mind" that the Testator was aware that he could not give what he did not own.

[47] Mr. Francis testified that "nothing alarmed "him that the Testator was including a family member in his will. He stated that he knew that the Testator had other children, "at least one", because the Testator "mentioned Clement (Clement Hughes)"

[48] Mr. Francis stated that he read over the Will to the Testator on the 25th May 2009 and satisfied himself that the Testator understood the contents of the Will before he signed.

[49] It is common ground that the Testator was seriously ill and was hospitalized when he executed the Will. As to the effect of physical illness or infirmity on mental capacity, Counsel for the Claimant quoted from **Banks v Goodfellow** (supra) where Cockburn CJ had this to say:-

> "It may be here not unimportant to advert to the law relating to unsoundness of mind arising from another cause – namely from want of intelligence occasioned by defective organization, or by supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement, such defect of intelligence being equally a cause of incapacity. In these cases, it is admitted on all hands that though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains."

[50 In the Defence to Counterclaim, the Claimant pleaded that "the Deceased's illness and the medication administered to him during his stay at the hospital did not affect his testamentary capacity to make a Will." Further, in her submissions, Counsel for the Claimant contends that "there is ...no evidence that the deceased was influenced by any mental disease or delusion and further no evidence that his physical illness or the medication administered to him in the hospital affected his testamentary capacity."

[51] In his evidence, Clement Hughes alluded to the fact that the Claimant had produced no medical evidence to support her contention. His testimony was that he would have been

happier if there had been such a report. According to Williams on Wills[7] "it has been suggested that solicitors should follow the 'golden rule' that a medical practitioner should be present where there are doubts about the testator's capacity." In **Key and another v Key and others**[8], the learned Judge Briggs J, further explained the 'golden rule' thus: "The substance of the Golden Rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings." The learned Judge however went on to state that " compliance with the Golden Rule does not, of course, operate as a touchstone of validity of a will, nor does non-compliance demonstrate its invalidity. Its purpose, as has repeatedly been emphasized, is to assist in the avoidance of disputes, or at least in the minimisation of their scope." Further, in the case of **Cattermole v Prisk**[9], the will of an elderly and infirm testatrix was upheld despite the failure to observe the 'golden rule'.

[52] In looking at the evidence as a whole, the Court must look at the Will itself. The dispositive provisions of the Will are as follows:-

> "Subject to the payment of my just debts, funeral and testamentary expenses I direct my executrix as follows:-
>
> That all of the rest and residue and remainder of my property real or personal whatsoever and wheresoever situate be divided equally between PAULINE MORRISON and my daughter LA TANYA HUGHES equally to be theirs absolutely."

[53] It is the submission of Counsel for the Defendant that the Testator was married at the time of the execution of the Will and "should have been aware of his wife and children's interest in the property which was always deemed to be family property." To counter this submission, Counsel for the Claimant invites the Court to note that the Testator made a previous will in March 2006 ( the 2006 Will), leaving his entire estate to Ms. Morrison.

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[7] 9th Edition page 52, para. 4. 21
[8] [2010] 2 WHC 408 (ch)
[9] [2006] 1 FLR 693

Counsel contends that the Testator had therefore already decided to exclude his wife and children from his will approximately three years before the disputed will was executed, "at a time when there was no real question as to his testamentary capacity."

[54] Ultimately, capacity is a question of fact, which the Court has to determine on the evidence as a whole. To borrow the expression of Briggs J. in **Key and another v Key and others**," (supra) ...The issue as to testamentary capacity is, from first to last, for the decision of the Court

[55] Based on the evidence in its totality, I am satisfied that the onus of establishing testamentary capacity has been discharged. I have arrived at this conclusion after taking into account several factors. On the one hand, I have taken into account the factors on which the Defendant relies as providing evidence that the Testator was not of sound mind memory and understanding. Clement Hughes contends that if his father (the Testator) was competent, he would not have excluded his wife Ena Hughes from his Will. He agreed that there was no question of the Testator's competency in 2006, but that the Testator "might have been coerced." He stated that the Testator's "conscience would tell him that his mother had a vested interest in the property" so that there had to be "something wrong if he made a Will leaving property to anyone without including his mother."

[56] It is not the function of the Court to pass sentence on the adequacy or fairness of a testator's disposition, or to decide in what manner he should dispose of his property, or to question his motive in doing so. As stated by Justice Erskine in the case of **Harwood v Baker**[10]:-

> "If he (the testator) had not the capacity required, the propriety of the disposition made by the will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition, though the justice or injustice might cast some light upon the question as to his capacity."

[10] (1840) 3 Moo PCC282

[57] I have also taken into account the evidence of Clement Hughes that when he visited the Testator in the hospital, the Testator was sometimes incoherent and that he was disoriented and sometimes "was rambling". As stated in paragraph 44 above, I have not given much weight to that part of the evidence of Clement Hughes. In any event, the law is settled that even where a person is shown to have been insane prior to the date of the will, that person can make a will during a lucid interval. In the case at bar, there is no evidence that the Testator was insane or suffering from any delusion either prior to or during the period that he was hospitalized.

[58] On the other hand, I have taken into account several factors on which the Claimant relies to prove that the Testator did have capacity to execute the Will. These are as follows: - the relative simplicity and straightforwardness of the Will, and the fact that the 2009 Will was not a significant departure from the 2006 Will which was executed at a time when no cogent evidence has been presented to the Court that the Testator lacked testamentary capacity. Further, I attached much weight to the evidence of Mr. Francis and I did so for a number of reasons; firstly, as stated above, I formed the view that he was a witness of truth and therefore placed reliance on his evidence that the Testator's memory was not defective. Mr. Francis gave evidence that the Testator called him by name "Ralph" and proceeded to "give him his life's history". As stated in Tristram and Coote's Probate Practice (supra), "it has been said that the grand criterion by which to judge whether the mind is injured or destroyed is to ascertain the state of the memory, for without memory the mind cannot act." – see **Murphy v Lamphier.**[11]

Additionally, the fact that the Testator was no stranger to Mr. Francis undoubtedly enabled him to assess whether the Testator's mental faculties were impaired. I therefore have given much weight to the opinion of Mr. Francis that the Testator had the capacity necessary to make his Will.

[11] (1914) 20 DLR 906

[59] I am therefore of the view that, on balance, the above factors are sufficient to weigh in favour of a conclusion that the Testator had testamentary capacity. Proof beyond a reasonable doubt is not essential.

[60] The second requirement for the validity of a will is knowledge and approval of the contents of the Will. The testator must have had the intention to make a will and must know and approve of its contents at the time when he executes it. In ordinary circumstances that is established by proof of testamentary capacity and of due execution, from which it is assumed that the testator did know and approve the contents of the will. The burden of proof lies on the person propounding the will; in this case, on the Claimant. The Claimant must "satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable Testator."

[61] According to Halsbury (supra), "although knowledge of the contents of a will and approval of it by the testator are essential to the validity of the will, this is normally assumed in the case of a competent testator from the fact that he has duly executed it." In the case at bar, the evidence of Mr. Francis is that he read over the will to the Testator, who thereafter signed the Will. There is nothing in the evidence before the Court to raise a "well grounded suspicion" that the Will does not express the Testator's mind. The Court is therefore of the view that the Testator knew and approved of the contents of the Will when he executed it.

**UNDUE INFLUENCE**

[62] Was the Testator influenced by undue influence by Pauline Morrison and/or the Claimant?

[63] Not only must a testator have the mental capacity to execute a will and know and approve its contents, but that will must not be made by the testator as a result of undue

influence or fraud of another person. In **Wingrove v Wingrove**[12], Sir James Hannen stated as follows:-

> "To be undue influence in the eye of the law there must be – to sum it up in a word – coercion." As stated by the authors of A Practitioner's Guide to Wills (3rd Edition, page 26, para. 3.7.3), "Undue influence is something that overpowers the volition of the testator. It is permissible to persuade a testator, but not to coerce him."

[64] What constitutes undue influence was further explained by Viscount Haldene in **Craig v Lamoureux**[13] as follows:-

> ".....In order to set aside the Will of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis. Under influence in order to render a Will void must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean."

[65] The burden of proof is not on the propounder to disprove the allegation of undue influence. It is on the person alleging undue influence. Any challenge to a will based on undue influence must be alleged and proved. The burden is not discharged by showing merely that the beneficiary had the power unduly to overbear the Testator's will; it must be shown that in the particular case the power has been exercised and that it was by means of the exercise of that power that the will was obtained.

[66] Counsel for the Claimant submits that there is no evidence that the Testator was influenced by fear or undue pressure to execute the Will and further that there is nothing to suggest that the Will as executed does not represent the wishes of the Testator. The contrary submission of Counsel for the Defendant is that the Testator "has been unduly influenced by the Claimant and Miss Morrison when he created the May 2009 Will." Counsel submits that "this contention ...also applies to the 2006 Will, in that Ms. Morrison has unduly influenced the Testator into creating the same."

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[12] (1885) 11 PD 81
[13] [1920] AC 349

[67] Counsel for the Defendant also contends that "there is a presumption of undue influence on the deceased who was isolated from his family and friends especially during the last weeks of his illness by the Claimant and/or Ms. Morrison." With the greatest of respect, the Court does not agree with this latter submission. There is no presumption of undue influence; what is required is positive proof of coercion, which in the view of the Court, the Defendant has not provided.

[68] On the evidence presented, the Court finds that the Defendant has failed to discharge the burden of proof. I find no cogent evidence of any improper pressure or actual undue influence being exercised by the Claimant or Ms. Morrison over the Testator in the execution of the Will.

**Issue # 2 - Did the Testator hold the property in trust for his wife Ena Hughes and the children of the family?**

[69] According to Halsbury's Laws of England (supra):- "where a person has property or rights which he holds or is bound to exercise for or on behalf of another or others, or for the accomplishment of some particular purpose or particular purposes, he is said to hold the property or rights in trust for that other or those others, or for that purpose or those purposes, and he is called a trustee.."

[70] According to Learned Counsel for the Defendant Mrs. Freeland Roberts, it is the contention of the Defendant that:-

(a) The family property which is registered in the name of the Testator was built by the Testator and his wife during their marriage and was further maintained by the parties and the children of the marriage; therefore, that the Testator held the property in trust for himself, his wife and children.

(b) Clement Hughes and some of his siblings contributed to the renovations and maintenance of the home, the last of which was paid for by the Defendant and one

of his brothers and that monies were also paid towards a loan that was in default in order to prevent the bank from selling the family home.

(c) An addition was built onto the house with monies which his mother Ena Hughes received from her aunt Nurse Blackwell and that money was given to the contractor who is now deceased.

[71] Learned Counsel for the Defendant submitted that:-

"Under the law of trust, the person or spouse claiming a beneficial interest where the matrimonial property is registered in the name of the other must prove either that there was a common intention, expressed or inferred, that she is to have a beneficial interest proportionate to her contribution (resulting trust) or a common intention, expressed or inferred, that she is to have a beneficial interest, or that she is induced to act to her detriment in the reasonable belief that by so acting she is acquiring such an interest (constructive trust)." Counsel cited the Privy Council case of **Abbott v Abbott**[14], where, she contends, "the Board concluded that constructive trust is generally the more appropriate tool of analysis in most matrimonial cases". Counsel urged the Court "to approach the issue of the matrimonial property and whether Ena Hughes, the surviving spouse, has any beneficial interest therein in the same vein as the Board in that case (Abbott v Abbott)."

[72] The submission of Learned Counsel for the Claimant, Ms. Kamillah Roberts is that:-

(a) The Defendant has failed to proved that the wife, Ena Hughes made a direct or indirect financial contribution to the acquisition of the property sufficient to justify the inference that it was the common intention of the parties that the property was to be shared jointly. There is no basis upon which the Court can infer the existence of a trust.

(b) The Defendant has failed to prove the existence of a trust in favour of the children of the marriage. In the absence of an express declaration of trust, it is

[14] [2007] UKPC 53

not enough for children of a marriage to make a general statement that they assisted their father with maintenance and renovations, and as such are entitled to a beneficial interest in the property.

[73] Learned Counsel Ms. Roberts relied on the following authorities: **Lloyds Bank Plc v Rossett**[15]; **Gissing v Gissing**[16]; **Burns v Burns**[17]; **Abbott v Abbott** (supra).

[74] In **Abbott v Abbott** (supra), a case cited by both Counsel for the Claimant and Counsel for the Defendant, the Privy Council analysed and considered four decisions of the House of Lords which dealt with the application of the law of trusts in determining the beneficial interests of parties to a marriage in property that is in dispute. These cases are **Pettit v Petttit**[18]; **Gissing v Gissing** (supra); **Lloyds Bank PLC v Rosett** (supra); and **Stack v Dowden**[19].

[75] In the Abbott case, Baroness Hale of Richmond who delivered the judgment of the Board, referred to the following passage from the decision in **Stack v Dowden** (supra) in which she stated, at paragraph 60 that:-

> "The law has indeed moved on in response to changing social and economic conditions. The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it."

[76] There is no dispute that the property properly identified as Registration Section: Cassada Gardens and New Winthropes, Block: 42 1893B, Parcel 111 is registered solely in the name of the Testator Laban Hughes and that Laban Hughes is the owner of the legal estate in the land. There is also no dispute that there is no express trust between the parties either created expressly or impliedly by the actual terms of some instrument or declaration.

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[15] [1991] 1AC 107
[16] [1970] 2 ALL ER 780
[17] [1994] 1 ALL ER 244
[18] [1970] AC 777
[19] [2007] 2 WLR 831

[77] According to Halsbury (supra):-

> "subject to any express declaration of trust, where property is purchased in one party's name but both parties contribute to the purchase price, the other party acquires an interest under a resulting trust proportionate to his or her contributions to the purchase price, or alternatively may make a claim under a constructive trust.

In **Llyod's Bank PLC v Rosett** (supra), Lord Bridge of Harwich had this to say:-

> "The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been."

[78] In the case at bar, there is no evidence adduced as to any agreement or arrangement between the parties; the Testator is dead and Ena Hughes, due no doubt to incapacity occasioned by her serious illness, together with the fact that she is and has been residing in the U.S.A on account of her said illness, did not give evidence in Court, nor was any evidence presented on her behalf by her lawful Attorney Clement Hughes with respect to any such agreement or arrangement.

[79] Lord Bridge in **Llyod's Bank Plc. v Rosett** (supra) stated that, it may be however that "there is no evidence to support a finding of an agreement or arrangement to share the beneficial interest, however reasonable it might have been for the parties to reach such an agreement if they had applied their minds to the question. In this situation, continues Lord Bridge:

> "..... the court, must rely entirely on the conduct of the parties, both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation, direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage installments, will readily justify the inference

necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do."

[80] There is no evidence before the Court of any direct financial contribution made by Ena Hughes towards the purchase of the land and / or the original construction of the "family home" erected thereon. The evidence of the Testator's brother Philmore Hughes is that he "assisted with the purchase of the lands and provided materials to the house." He stated that the land was purchased from Ms. Althea James about the mid 1960's but provided no evidence that Ena Hughes contributed to the purchase price of the land. Philmore Hughes also gave evidence that both the Testator and Ena Hughes contributed money to pay for the lumber that was purchased from Bryson's Coca Cola Factory where he was employed at the time. The witness Philmore Hughes testified that he purchased the lumber on credit at a discount as he was an employed and that he later received payments from his brother, the Testator Laban Hughes for the lumber. The witness stated that Ena Hughes sent monies to the Testator while she was working in England, which he in turn used to pay for the materials. He testified, however, that he did not receive any direct payments from Ena Hughes in relation to the lumber, and provided no receipts or other documentary evidence to substantiate his claim that Ena Hughes contributed to the purchase of the lumber. Nor was any such evidence presented by Clement Hughes as Attorney for his mother Ena Hughes.

[81] As to the renovations carried out to the property, the evidence of Clement Hughes as contained in his Witness Statement is that an additional two (2) bedrooms and one (1) bathroom were constructed from money received by his mother from her aunt, Nurse Blackwell. Although he claims that he accompanied his mother to the Bank and saw his aunt withdraw the money and give it to his mother and that he was present when the money was given to the contractor, Mr. Issac for the purpose of expanding the house, Clement Hughes was unable to state how much money was given to his mother, and further admitted that he did not know how much money was given to the contractor by his mother. The Court has no evidence from Ena Hughes or from the contractor with respect to this transaction. Philmore Hughes was also unable to provide any cogent

evidence as to the extension to the property, as based on his evidence, he had migrated to the U.S.A, when the extension was constructed.

[82] The law is clear that if the conduct of the parties does not justify the court in drawing the necessary inference – of common intention -, the court cannot impute to the parties a common intention which they did not have by forming its own opinion as to what reasonable persons in the position of the parties would have intended. In the case at bar, I can find no factual basis from which to infer or impute that the Testator Laban Hughes and his wife Ena Hughes had a shared or common intention with respect to the ownership of the property. There is nothing in the conduct of the parties which is referable to such an intention. In her submissions, Counsel for the Defendant contended that the Testator and Ena Hughes were never divorced. The Court if of the view that this fact is of no significance to the issue of a common or shared intention with respect to the ownership of the property.

[83] Further, it was made clear in the case of **Grant v Edwards**[20] that "even if a common intention is established, a claimant will not succeed unless he or she establishes that he or she has acted to his or her detriment on the basis of that common intention." Counsel for the Defendant submits that Ena Hughes was mainly a homemaker who devoted her life to her family. She worked from home conducting classes in typing and shorthand, and used the income derived therefrom towards the development of the home. Further, that whenever she was gainfully employed, mainly as a secretary, her income was used to pay bills and maintain the home. However, as stated by Fox LJ in **Burns v Burns** (supra), "the fact that one partner gratuitously cooks and cleans and looks after any children does not alone entitle him or her to any share in the house." The learned Judge further stated in that case that "...the mere fact that parties live together and do the ordinary domestic tasks is, in my view, no indication at all that they thereby intended to alter the existing property rights of either of them."

[20] [1986] 3 WLR 114

[84] With respect to the contention of the Defendant that the Testator held the property on trust for Ena Hughes and the children of the family by virtue of the fact that Ena Hughes and the children contributed to the extension and renovation of the property, there is no evidence, as stated above, of any evidence to substantiate the contention that Ena Hughes contributed to the extension and/or renovation of the property. No receipts were produced from either Ena Hughes, Clement Hughes or Philmore Hughes in that regard, or from the contractor who carried out the said extension or renovations. Further, there is no evidence that Clement Hughes or his siblings contributed to the extension and/or renovations. No receipts or bank records were produced to substantiate this claim. There is therefore no basis on which the Court can conclude that Ena Hughes or the children of the family can claim a beneficial interest. As stated by Lord Bridge in **Lloyds Bank Plc v Rosset** (supra) "I pause to observe that neither a common intention by spouses that a house is to be renovated as a 'joint venture' nor a common intention that the house is to be shared by parents and children as the family house throws any light on their intentions with respect to the beneficial ownership of the property."

[85] He who alleges must prove. Based on the above, I am of the view that the Defendant has failed to prove, on a balance of probabilities, that the Testator held The Property in trust for his wife Ena Hughes and the children of the family.

**CONCLUSION**

[86] Based on the totality of the evidence, I find that the Claimant has proved her claim on the balance of probabilities. In my opinion, the evidence establishes that the Testator Laban Hughes did have the testamentary capacity to execute the Will, that he knew and approved of its contents and that there is no evidence to show that he was coerced into executing the Will. I find further that the Testator did not hold the property more particularly referred to and identified as Registration Section: Cassada Gardens and New Winthropes, Block: 42 1893 B, Parcel: 111 in trust for his wife Ena Hughes and the children of the family. I therefore dismiss the Defendant's counterclaim and give judgment for the Claimant.

[87] **IT IS HEREBY ORDERED:-**

(1) That the will of Laban Hughes, deceased dated the 25th day of May, 2009 is valid and is deemed to be the last Will and Testament of Laban Hughes.

(2) That the caveat dated the 28th September, 2009 be removed.

(3) In the exercise of my discretion, I order that each party bear his or her own costs.

**Jennifer A. Remy**
**High Court Judge**