IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCV 2013/0017

BETWEEN

WILLIAM KEITH THOMAS	**Claimant**
(EXECUTOR of the estate of Peter William Molyneaux, deceased)	
and	
JOSEPH FENTON	**1st Defendant**
RICHARD FENTON	**2nd Defendant**
ALBERTHA RYAN	**3rd Defendant**
(as personal representative of Mary Ryan, deceased)	

APPEARANCES

Mr David Brandt for the claimant.

Mr Ralph Francis for the defendants.

2017: DECEMBER 4, 6

2018: MARCH 5[1]

JUDGMENT

Concerning validity of a Will

[1] Judgement delayed only because the High Court does not sit constantly on Montserrat. Michaelmas Assizes ended on 07.12.17, with 05.03.18 being the first day returning for Hilary Assizes, and therefore the first day the judgment could be delivered.

1 **Morley J**: On Montserrat, by a Will dated 05.05.10, the claimant (Keith[2]) was appointed executor of the estate of the deceased (Peter), who, born 12.02.29, died aged 84 on 28.03.13. The Will left his personal property and possibly many parcels of land, in Davy Hill, Sweeneys, and Thatch Valley, valued in all on 15.04.13 at $4053699.84[3], to his carer since 2006 Donarene Lewis (Donna) also known as 'Faye', and her young daughter Shaneil Jones (Shaneil), then aged under 10. As part of the terms of the Will, the land was to be developed by Keith who is a civil engineer and chartered surveyor.

2 Peter had a nephew living adjacent to his home on Davy Hill, named Richard Fenton (Richard). Also, there is a niece named Albertha Ryan (Albertha) in Dorchester, US, and a nephew in St Thomas, USVI, named Joseph Fenton (Joseph). The niblings got nothing and were quickly suspicious that Peter's Will was invalid as *'not made voluntarily, was made in suspicious circumstances, and/or procured by means of undue influence'*. When Keith on 12.04.13 announced his intention to file for probate, Joseph and Richard filed on 22.04.13 a caveat against grant, and when probate was applied for on 26.04.13, Peter's aunt Mary Ryan filed a caveat on 05.06.13, (who later died within five months on 17.09.13 and was replaced in the action by Albertha on 30.09.13).

3 In response to the caveat, on 24.07.13 Keith applied to the High Court by fixed date claim form that the caveats be removed and that he be granted probate to execute the terms of the Will.

4 Despite in the past a history of schizophrenia, testamentary capacity has been conceded.

5 I have to decide if the Will was made under undue influence and the burden is on Richard, Joseph and Albertha to show it was. In parallel, I also have to decide if there were suspicious circumstances, and the burden is on Keith to show there were not.

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[2] For the purposes of this judgment, the parties and others will be referred to as bracketed for ease of reading, and no disrespect is intended by not writing out on each mention full names and titles or the legalese as to whether claimants or defendants.

[3] Any reference to $ refers to East Caribbean Dollars, unless otherwise qualified.

6 If the Will is set aside, then Peter will have died intestate, meaning the niblings and possibly other blood relatives might inherit his estate under **s4 Intestates Estates Act 2002 cap 3.04**, Donna and Shaneil get nothing, and Keith will not develop the land as executor.

The essentials

7 Over many years, Peter had a history of mental health issues which, though explored by the defendants, it was accepted did not mean he had lacked testamentary capacity. He had no children he knew, though thought he might have a son in the UK he had never met. He was one of five siblings all now dead, leading to his being uncle to 18 niblings.

8 In 2006, in Davy Hill he took in as tenants Donna and Shaneil, from Jamaica: he lived downstairs and they lived upstairs. Over time a relationship began, he moved upstairs into a twin room, there being a bedroom for each person, and Donna became his carer.

9 Keith met Peter in November 2009. Peter was then 80. He wanted to develop land he had assiduously acquired over the years, registering his title at the Land Registry. Keith's skills meant he could help. The plan was to turn land at Sweeneys into many residential plots, for which Keith would put in a road, water, electricity, and bring the plots to a point where they could be sold for high value as poised for home building. In addition, he wished to develop land at Thatch Valley which in April 2010 he showed Keith on three occasions, by walking 2.5hrs into the wilderness over rough ground, which Keith videoed in part, seen by the court, showing Peter to be lively and sprightly, though with a limp.

10 On 03.05.10, within weeks of the Thatch Valley adventure, Peter asked Keith to recommend a lawyer to write his Will. Keith recommended his friend Kharl Markham (Kharl), whom he had met in the 1990s as musicians. Kharl spoke with Peter alone, who had been brought to his offices by Keith and Donna. Peter said to him he wanted to leave all his property to Donna and Shaneil, and Kharl noted Peter was particularly fond of 'the little girl'. He was asked about his living relatives, mentioned a 'Steve' in prison, his possible son, and made no mention of his niblings, in particular saying nothing of Richard who was his neighbour. He appointed Keith as his executor, unknown to Keith, who while honoured, was not asked, nor informed by Kharl at

the time as to the solemnity and seriousness of executorship. Peter wanted the land developed, directing in his Will specifically:

a. in para 5, that *'all arrangements, understandings and agreements which I entered into with my Executor and Trustee Mr William Keith Thomas of Olveston Montserrat pertaining to the development and sale of lands at Sweeneys continue following my death'*; and
b. in para 6, that *'Mr William Keith Thomas continue all aspects of the management of my land at Thatch Valley Montserrat to include but not limited to entering into agreements for the sale of the said land with third parties after consultation'* with Donna.

11 Kharl did not tell Peter that he was an unpaid non-executive director in Keith's construction company Axuum (and Keith thinks also in Keith's planning company KTech).

12 Keith began work. He drew up plans for Sweeneys, paid for by being given a block of land worth $60000. Planning permission was granted on 07.07.10. Keith then cut a concrete road of 500m into the side of steep scrub, visited by me and the parties on 04.12.17, employing up to 20 persons, arranging for water and electricity, and erecting a shoring wall and safety barrier. To finance the work, Peter began selling plots of land, monies went in to his account at the St Patrick's Credit Union, and his account history shows that some monies were paid out to Axuum for work done.

13 This regular financial activity, while Peter was declining in mobility, though still sharp of mind, meant that to make running his affairs easier he decided to grant a legal power of attorney to Keith, first of a general nature on 10.02.11, and second specifically to do with his dealings in land on 01.03.11, both drawn up by Kharl.

14 Later as his health declined, on 22.06.12, nine months before he died, and no longer able to sign his name, he signed an 'x' to an agreement with Keith to carry out 'infrastructure services' at Sweeneys, again drawn up by Kharl.

15 Various affidavits have been offered in the case, from Keith, Kharl, the Credit Union, the Land Registry, Richard, Joseph, Albertha, and supporters of the niblings, but nothing from Donna. The niblings drew attention to her being paid $2400 per month to care for Peter, and yet

believed she had neglected him, as he had bedsores when finally taken to hospital in March 2013 where he died six days later, on enquiry his clothes had disappeared, and there are moments they recall of his being controlled by Donna and denied their company.

16 In the end, when Peter died the land development project stopped. Keith claims he is still owed about $320000 for work done. The caveats stopped Peter's plans for the work to continue after his death, and stopped Keith being paid, while the case has now taken 4.5 years to come on.

17 In a sense, I must decide on balance what has occurred here: was the land development and bequests to Donna and Shaneil Peter's dream to benefit Shaneil and equally her mother of whom he had grown deeply fond; or was it a cynical attempt by Keith, with Kharl's dishonest help, to exploit the declining years of someone who was wealthy in land terms, to give Keith overpaid work, and to make an exploitative Donna possibly rich, having overborne Peter's mind as a captive to get him to leave all to her.

Preliminary observations

18 There was a trial on 04 and 06.12.17, during which I heard evidence from Keith, Kharl, Richard, Albertha, Joseph, and Monica Williams, and I visited the Sweeneys. In particular on 04.12.17, I watched and paid careful attention to the video and pictures filed by Keith on 29.10.13 as exhibit KT3[4] of Peter and Keith in April 2010 venturing together into the ruggedness of Thatch Valley, and noted the presence during one such visit, on 08.05.10, of Donna and Shaneil, which importantly is three days after Peter signed his Will in their favour. Closing argument took place on 06.12.17, with liberty to file supplemental submissions by 11.12.17, leading to further filing from Counsel Brandt for the claimant, but nothing from Counsel Francis for the defendants.

19 Peter's medical notes (being 155 pages) were disclosed by Dr Krishnamurthy Gopal and filed on 15.10.13 and 15.11.13. On analysis, they disclose a diagnosis of schizophrenia in 1988 and 1997, with mention of his believing 'people were shooting at him' in 2008. He suffered a stroke

[4] See affidavit of Keith Thomas of 29.10.13, exhibit KT3.

in October 2011 and January 2013, and when admitted to hospital on 20.03.13, he profoundly lacked lucidity, suffering dementia and dehydration, and had significant foul-smelling bedsores which ultimately led to sepsis and contributed to his death, *interalia* from further stroke, on 28.03.13. Joseph in evidence recalled how Peter was interested in voodoo, and was suspicious of a person touching him, suggesting some mental illness. However, there has been no argument advanced by counsel at trial that his earlier diagnosis of mental illness plays any role in these proceedings, or that at the time he made his Will he was suffering mental illness, and importantly it has not been relied on, as said above, to suggest lack of testamentary capacity.

20 There was some discussion during the trial as to who would inherit if Peter died intestate. There were two full family trees filed, one for Peter Augustus Molyneux who was Peter's father [5], and another for John Nedd Greenaway[6], who was Peter's grandfather. It is not at all clear Peter's property would go to niblings (including Richard, Joseph, and Albertha) under **s4 Intestates Act cap 3.04.** It may be that all his estate would go to his surviving aunt Mary Ryan, who died soon after him in 2013, so that her children John and Katherine may be the primary beneficiaries under Mary's Will or on her intestacy; and/or to his surviving brother James, also said to have died, in 2015, but who has not been traced in the UK, so that his children Sylvia, Neville and Terry may be the primary beneficiaries; or exclusively to a son he may have had though is unsure, in the UK, who he never knew. However, for the purposes of this judgment, the question of who would inherit on intestacy does not need to be resolved as I am only concerned with whether the Will of 05.05.10 was valid.

21 Albertha wrote to the Commissioner of Police on 16.05.13, within three weeks of Keith applying for probate, to allege fraud and theft by Donna and Keith, about which there was no police action, so I put the criminal allegation out of mind.

[5] See affidavit of Richard Fenton of 27.01.14, exhibit RF1.

[6] See affidavit of Rosie Warner of 28.01.14, exhibit RW1.

22 Moreover, at one point in the heat of argument Counsel Francis asserted from the Bar, inadvertently striking very much the wrong note with the Bench, that folk on Montserrat '*never*' leave land to anyone who is not a blood relative, proving Peter must have been ill of mind or suborned, and that I would understand this better if a local (when I am not), which again I put out of mind.

23 I note that in the Will of 05.05.10, Peter specifically leaves the following land to Donna and Shaneil: at Davy Hill, his house and land at block 14/4/59; at Sweeneys, lands at block 14/10/51; and at Thatch Valley lands at blocks 15/3/12 and 15/3/24.

a. Concerning Davy Hill, there was an affidavit by Richard filed 27.01.14 challenging grant of title in 1987 to Peter by way of prescription, supported by affidavit from Rosie Warner filed 28.01.14, asking that his ownership of block 14/4/59 be set aside.
b. Concerning Sweeneys, in the exhibits filed in this action[7] there was in addition to parcel 51 reference to parcels 19, 45, 46, 47, 49, 50, 53, 54, 56, 58, 62, 70, 71, 72 in block 14/10 as belonging to Peter, and there is a purported transfer of parcels 56, 62, 70, 71, and 72 to Keith by Donna under a power of attorney for Peter on 25.06.12, pre-indicated by an 'x' from him on a document dated 22.06.12.
c. Concerning Thatch Valley, there was an affidavit from Abraham Greenaway filed on 06.12.13, supported by an affidavit from Joseph filed on 23.01.14, and Richard filed on 27.01.14, and Rosie Warner filed 28.01.14, concerning whether Peter did indeed own land at Thatch Valley, or whether it was *'family land…passed down for use via lineage in accordance with the custom in Montserrat'*, and to this end Joseph and Richard specifically ask that Peter's ownership of blocks 15/3/12 and 15/3/24 be set aside.

24 However, for the purposes of this judgment, the question of what land Peter rightly owned or prior to death legally transferred does not need to be resolved, nor what land at Sweeneys has been left to Donna and Shaneil apart from parcel 51, as I am only concerned with whether the Will of 05.05.10 was valid: any argument of what land can pass under the Will, or passed by gift or otherwise before it, should be a separate action.

[7] See affidavit of Keith Thomas filed 03.05.17, exhibits KT1, KT2, KT4, KT5; and affidavit of Joseph Fenton filed 24.04.17, exhibit JF1.

25 With this in mind, I wish to observe that there was considerable confusion generated as to what was the purpose of the action, particularly through defendant Counsel Francis at trial, and to an extent through both Counsel Brandt and Counsel Marcelle Watts (who was replaced by Counsel Francis) earlier making filings of materials and affidavits. In fairness to Counsel Brandt, when the action was at trial, he focused like a hawk on the Will's validity as at 05.05.10. However, prior to trial, a lot of material was variously dumped by the parties into the proceedings[8], with no chronology or consolidation, raising argument as to what Peter did own or should own, how much money Keith received into his companies Axuum and K-Tech largely after the Will was made in payment for his considerable preparation works at Sweeneys, whether monies paid to Peter for sale of land at Sweeneys between 04.08.09 and 01.07.11 amounting to $580180ec has gone missing, where was Peter's pension, whether Peter's signature may have been forged on withdrawal slips from his account, and whether Donna had enriched herself through her relations with Peter and did not much care for him in his closing days.

26 However, I remind myself that the action formally commenced by Keith on 24.07.13 was *'that the court shall pronounce for the force and validity of the Will dated 05.05.10 and decree probate thereof in solemn form of law*, *and 'an order that the caveats filed by the defendants do cease to have effect'*, while in opposition the caveats pleaded that the Will was invalid because they alleged *'it was not made voluntarily, was made in suspicious circumstances, and/or procured by means of undue influence'*.

27 It follows my task has been to assess the caveats when weighing the validity of the Will and not more. To this end, I wish to encourage counsel in future actions to concentrate on the issues pleaded, rather than raise multiple complaint, generating more heat than light, perhaps offering irrelevant and amorphous noise rather than with focus illuminating the answer like a gently carried candle in the dark.

[8] See filings as follows: Keith Thomas - claim 27.07.13, affidavits 14.10.13, 29.10.13, land registry documents 30.05.14, affidavit 03.05.17; Kharl Markham – affidavit 29.10.13; Richard Fenton – affidavits 06.12.13, 27.01.14, Joseph Fenton – affidavits 23.01.14, 24.04.17; Albertha Ryan – affidavit 06.12.13; Abraham Greenaway – affidavit 06.12.13; Monica Williams- affidavit 20.01.14; Rosie Warner – affidavit 28.01.14; Dr Krishnamurthy (155 pages of medical notes) – affidavits 15.10.13, 15.11.13; Peter Queeley (Peter's bank account at St Patrick's Credit Union, a/c 1063577) – affidavit 15.11.17.

The Story of Peter and Donna

28 Monica Williams recounts[9] how Donna and Shaneil, came to live at Peter's property at Davy Hill in 2006. She was the one who had asked Peter on Donna's behalf when Donna was suddenly homeless. Thereafter:

a. Sometime around 2007, Monica had a conversation with Donna in which Donna accused her of spreading a rumour that Donna had Aids, which soured their relations, so they no longer talked.

b. She later saw Peter on the porch and while trying to speak to him he was ushered away by Donna. It was the last time she saw him.

While in her affidavit of 20.01.14 she said this ushering event occurred after her return from Guyana in 2007, under cross-examination on 06.12.17 she said it was in 2006. Whatever the precise year, I find on balance that the last time she saw Peter took place much before 2010, and that his being ushered away, being too indistinct, does not disclose undue influence then being exercised by Donna over Peter.

29 Richard lived in the yard next to Peter at Davy Hill from 1996[10] (though in cross-examination said he was nearby, within a couple of enclosures with a building in-between). He recalls Donna becoming Peter's tenant in around 2006. He thereafter saw less of Peter. Peter was ill in 'mid- 2010' and could not move about much (which must be after Peter's visits with Keith to Thatch Valley as he can be seen on video to move sprightly, though with a limp). Richard was aware that Peter went to the hospital in 2011 and 2013. He asked to see Peter in March 2013, which he agreed in cross-examination on 06.12.17 was not denied, and he was upset to see bedsheets sticking to open bed sores, and insisted an ambulance be called. Peter died in hospital six days later.

[9] See affidavit of Monica Williams filed 20.01.14.

[10] See affidavit of Richard Fenton filed 06.12.13.

30 Joseph said in evidence on 06.12.17, though nowhere on affidavit, that he had seen Peter in November 2012. It was between 1-3pm, he was in bed, Donna was there, and he was allowed in without resistance. Peter was in a terrible state, not speaking, flat on his back, just moving his eyes. Donna said he had been ill for a while. Joseph did not do anything, but left him to the care of Donna. He added, in response to a question from the court, that it would be understandable to him if Peter might leave his estate to a person he had grown fond of, and who had a young daughter.

31 Albertha arrived from the US on Montserrat on 03.04.13 shortly after Peter's death and met Donna[11], learning she had been receiving an income of $2400ec per month to care for Peter, and the rent book regarding other tenants at Davy Hill was made available to her for viewing. Albertha observed that Peter had occupied a spartan twin room, with no tv, while Shaneil had a queen-sized bed with tv, Donna's room had an elaborate bedroom set and a 55-inch tv, and there was a 60-inch tv in the lounge. This stands in contrast to how when Donna first moved in to Peter's home in 2006, as Monica William's recalls, Donna only had a 14-inch tv, three plastic chairs, a folding bed and mattress and two washing tubs. Although some of Peter's clothes had been given on request by Donna to Albertha's cousin Jack (five shirts, four pants and a cap), Donna said there were no other clothes to give away, which Albertha did not accept, believing them distributed wrongly to friends of Donna. Suspicious of Donna, she tried to see Kharl to enquire of the Will, but he refused to see her.

The story of Peter and Keith

32 Keith was recommended to Peter in November 2009 by Elton Wade to do survey work on Peter's lands at Sweeneys. Peter told Keith he wanted to develop the land and was disappointed in a surveyor he had already paid $5000ec (who it appears elsewhere in the papers was a Mr Burke). On 25.12.09, Keith surveyed the land and agreed to be paid by being given a plot. He put in a planning application on 27.01.10 to subdivide parcel 14/10/19 into 24 plots for homes, approved with conditions on 16.02.10, and it appears on 07.07.10 permission was further granted to subdivide parcel 14/10/46 also into 24 plots.

[11] See affidavit of Albertha Ryan filed 06.12.13.

33 A relationship having begun between them in late 2009, in February 2010 Peter saw Keith in the Tropical Mansion Suites and said he wished to develop lands at Thatch Valley too. He wanted no one involved in his business but Donna, and who Keith did not know and had yet to meet. As said, Peter then showed Keith these lands he wished to develop at Thatch Valley. On 17.04.10, they drove to Silver Hills and together set off on foot to an area called Pond Gardens. A survey pole was noted, planted by the earlier surveyor. They returned on 24.04.10, when six other survey poles were noted, Peter pointing out Great Point. As said, both visits were captured on a video recorder.

34 At this point, having surveyed Sweeneys and obtained conditional planning permission on 16.02.10, it seems clear that Keith had Peter's confidence. Peter told Keith he wanted to make a Will and asked Keith to recommend a lawyer.

a. Keith arranged for Kharl to act, who is a friend of Keith from being musicians together in the 1990s and also a non-executive director of Keith's firm Axuum. Though the friendship and directorship were not mentioned to Peter, in evidence on 04.12.17 Kharl made categorically clear the directorship is a formality to help his friend from which he receives no financial benefit.
b. Kharl saw Peter at Kharl's offices on 03.05.10. He came with Donna and Keith who remained in an anteroom while Kharl and Peter spoke alone. Kharl made two pages of handwritten contemporaneous notes[12]. The notes show Peter wished Keith to be executor, to leave all his lands and bank account to Donna and Shaneil, and that all arrangements with Keith to develop the lands should continue with consultation with Donna.
c. Further, though not in the notes, Kharl said that Peter said he wished to leave his property to Donna as she looked after him and that he loved the little girl, Shaneil. Questioned as to other relatives, Peter referred to a son he may have but did not know in the UK, to a nephew named Steve in jail, and in particular did not mention Richard living near him, nor any of his niblings, and declined to leave property to anyone other than Donna and Shaneil.

[12] See affidavit of Kharl Markham filed 29.10.13, exhibit KM1.

d. Of interest is that the notes record with a question mark the need to verify the land block and parcel numbers.

35 The Will was drawn up and signed in a clear hand on 05.05.10, in duplicate, in the presence of legal assistant Vanessa Bruno and bank operations assistant Marsha Meade, at which point in time it came as a surprise to Keith he was to be the sole executor. In the presence of Keith and Donna and the witnesses he confirmed he understood and agreed the provisions of the Will. Peter was calm and not agitated or distracted.

36 Then on 08.05.10, Keith and Peter, plus Donna and Shaneil, set off into the Thatch Valley lands, captured in photos, as part of the dvd exhibit KT3 (which also captured on video the visits of 17 and 24.04.10)[13].

37 Peter and Keith were often in contact after. Peter did not behave as if out of his mind. He weakened in 2011 and on 10.02.11 signed a general power of attorney over to Keith who took control of his bank account and affairs in order to keep the land development project moving forward. There was then a further and specific power of attorney given to Keith on 01.03.11 to deal with land at block 14/10 in parcels 39, 48, 52, 53, 54, 56, 57 and 58, as plots at Sweeneys were being sold, monies received, and the money was then being put toward the land development costs. Moreover, Keith calculated that cost of developing Sweeneys would be $399584.64ec to be paid for by receiving five lots valued at $380935.05ec, namely 14/10 parcels 56, 62, 70, 71 and 72, to be transferred to him in June 2012[14]. However, the transfers did not complete, Peter became weaker and weaker, he died in March 2013, and the development work stopped with Keith being still owed $320000ec.

The law

38 For a Will to be valid on Montserrat, under **s7 Wills Act** cap 3.08, (revised as at 01.01.02):

> 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

[13] See affidavit of Keith Thomas filed 29.10.13, exhibit KT3.

[14] See affidavit of Keith Thomas filed 03.05.17, exhibits KT4 and KT5.

> 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.

39 There was possibly an argument available that the defendants, being niblings, do not have *locus* to bring an action to contest the Will, or raise the caveats, as they may not inherit on intestacy. However, this point was never argued in depth, it was raised more as a curiosity, offered to the court as a 'throwaway line'[15], and on a short review during the hearing of the **Intestates Act** (see above, para 20) it was agreed between the parties that the position was unclear. Moreover, in any event it could be said the defendants' action is in trust for the true beneficiaries on intestacy, whoever they are. Essentially, the defendants are relatives trying to keep what was once family land within the wider family, rather than allow it unchallenged to go to a stranger, and so I consider they have good standing in equity and have allowed the action to proceed.

40 Concerning disputes over a Will generally, there is dictum from Lord Neuberger MR in **Gill v Woodall and others 2010 EWCA Civ 1430** as follows[16]:

> Wills frequently give rise to feelings of disappointment or worse on the part of relatives and other would-be beneficiaries. Human nature being what it is, such people will often be able to find evidence, or to persuade themselves that evidence exists, which shows that the will did not, could not, or was unlikely to, represent the intention of the testatrix, or that the testatrix was in some way mentally affected so as to cast doubt on the will. If judges were too ready to accept such contentions, it would risk undermining what may be regarded as a fundamental principle of English law, namely that people should in general be free to leave their property as they choose, and it would run the danger of encouraging people to contest wills, which could result in many estates being diminished by substantial legal costs.

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[15] See claimant skeleton argument, filed 19.12.17, para 46.

[16] Quoted with approval by Pereira JA, as she then was, at para 5 of **Leish & Rooker v Marryshow, appeal HLVA 2010/0012 Grenada**.

> Further, such disputes will almost always arise when the desires, personality, and state of mind of the central character, name the [testator] cannot be examined other than in a second hand way, and where much of the useful potential second hand evidence will often be partisan and will be unavailable or far less reliable due to the passage of time.

41 In this context, it is no surprise to the court that Peter leaving land and his personal property to Donna and Shaneil has given rise to dispute by his relatives, alleging 'undue influence' and/or 'suspicious circumstances'

42 Concerning actual undue influence, there is often much misapprehension about its meaning, captured long ago in the judgment of Sir James Hannen when he said, using language in part out of fashion today, in **Wingrove v Wingrove 1885 11 PD 81**:

> There is no subject up which there is greater misapprehension. We are all familiar with the use of the word influence; we say that one person has an unbounded influence over another, and we speak of evil influences and good influences; but it is not because one person has unbounded influence over another that therefore when exercised, even though it may be very bad indeed, it is undue influence the legal sense of the word. To give you some illustration of what I mean, a young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make a Will in her favour, to the exclusion of his relatives, It is unfortunately quite natural that a man so entangled should yield to that influence and confer large bounties on the person with whom he has been brought into such relation; yet the law does not attempt to guard against those contingencies. A man may be the companion of another, and may encourage him in evil courses, and so obtain what is called an undue influence over him, and the consequence may be a Will made in his favour. But that again, shocking as it is, perhaps even worse than the other, will not amount to undue influence.
>
> To be undue influence in the eyes of the law there must be – to sum it up in a word – coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or she make a will in a particular person's favour, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the

person who becomes a testator is coerced in to doing that which he or she does not desire to do that it is undue influence.

The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything. This would equally be coercion, though not actual violence.

These illustrations will sufficiently bring home to your minds that even very immoral considerations either on the part of the testator, or of someone else offering them, do not amount to undue influence unless the testator is in such condition, that if he could speak his wishes to the last, he would say 'this is not my wish, but I must do it'.

There remains another general observation that I must make and it is this, that it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power, that the will such as it is, has been produced.

43 There is further analysis of undue influence, in a case concerning *inter vivos* transactions, offered by Sir Vincent Floissac CJ in **Murray v Dewberry & Matthew 1993, Civil Appeal no. 10 of 1993**. It was discussed in depth in the judgement of Thom J, as she then was, concerning an attempt by an executor to set aside *inter vivos* conveyances of land by the later deceased testator, in the case of **Creese v Joslyn 2004, St Vincent High Court civil claim no 243 of 2004**. Floissac CJ opined:

The doctrine of undue influence comes into play whenever a party (the dominant party) to a transaction actually exerted or is legally presumed to have exerted influence over another person (the complainant) to enter into the transaction. According to the doctrine, if the transaction is the product of the undue influence and was not the voluntary and spontaneous act of the complainant exercising his own independent will and judgment with full appreciation of the nature and effect of the transaction, the transaction is voidable at the option of the

complainant. This means that the complainant may elect to have the transaction rescinded if he has not in the meantime lost his right to rescission.

The modern tendency is to classify undue influence under two heads namely, Class 1 (actual undue influence) and Class 2 (presumed undue influence.) Class 2 is further classified under two sub-heads. The first sub-head is Class 2A which is descriptive of the legal presumption which arises from legally accredited relationships such as those existing between solicitors and client, medical adviser and patient, parent and child and clergyman or religious adviser and parishioner or disciple. The second subhead is Class 2B which is descriptive of the legal presumption which arises from a relationship where under the complainant generally reposed trust and confidence in the dominant party.

44 To my mind, a Will is an *inter vivos* event, in that it is settled when living, affecting the living (as survivors), and its terms may very well arise out of the same types of undue influence as can arise during transactions among the living generally. I do not agree with the argument offered by Counsel Brandt[17] that the analysis of Floissac CJ in **Murray v Dewberry & Matthew** (supra) cannot apply to a Will. Therefore, in my judgement, in this case, the court must look to see whether there was actual undue influence and separately to whether there was presumed undue influence.

45 For actual undue influence, in category 1, the defendants must show it arose. For presumed undue influence, the defendants must show a category 2 relationship existed which gives rise to the presumption, which must then be rebutted by the claimant. Concerning category 2, the question arises what was the nature of the relationship between Kharl and Peter, namely whether as solicitor and client in category 2A, and what was the nature of the relationship between Keith and Peter, namely whether as surveyor and client in category 2A or 2B.

46 Parallel to an enquiry into category 2 undue influence is whether the Will was made in suspicious circumstances. In **Edwards v Rawlins 2005, ANUHPB 2015/0513**, Blenman J, as she then was, opined at para 44:

[17] See claimant skeleton argument, filed 19.12.17, para 40.

On proof that the testatrix was of testamentary capacity that she duly executed the Will, a rebuttable presumption arises that she knew and approved its contents at the time of execution (see **Barry v Butlin 1838 12 ER 1089**). The evidential burden then shifts to the persons on 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 where 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 until the suspicion is removed.

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**).

47 It follows in this case if a suspicious circumstance exists, just as if a category 2 undue influence is presumed, it is for the claimant to rebut both.

Findings of fact

48 Reviewing the copious materials in this case, (and with I hope some measure of understanding for any repetition), I find as a fact the Will was in the proper form under **s7 Wills Act.** This is because it was in writing, signed at its end by Peter, and there were two witnesses[18].

49 I further find as a fact that concerning the making of the Will on 03.05.10, then later signed on 05.05.10, that there was no actual undue influence at that time, and that any presumed undue influence has been rebutted by the claimant case through hearing testimony. Specifically:

a. I am persuaded that Peter was not coerced, and genuinely, of free and clear mind, wanted to leave land and his personal property to Donna and Shaneil. This is because Kharl gave evidence Peter was particularly fond of the little girl, which I accept and is an understandable sentiment in a man facing his end, looking to a child as the future which

[18] See affidavit of Keith Thomas filed 14.10.13, exhibit WKT2, which exhibits the Will.

will follow him, noting her helplessness, and wanting to protect and provide for her, and her mother as her primary carer.

b. Donna came into Peter's life in 2006, so that by 2010 there was enough time to have passed for Peter to have developed an affection and strong connection to her and her daughter.

c. The one description, prior to the Will being signed, of Donna exercising influence over Peter was when Monica Williams saw him ushered away in around 2007, which is not enough information to show that Donna controlled Peter's pre-Will mind.

d. There is scant evidence Peter's niblings took any fulsome care of him pre-Will, or even after, so that it is understandable to the court how Donna evolved into his carer who in May 2010 he wished to benefit in his Will, which even Joseph agreed understanding in evidence on 06.12.17. I will deal later with Peter's unhappy state of health post-Will between mid-2010 and his death in 2013.

e. The clear-minded intention of Peter to benefit Donna and Shaneil is particularly clear from his taking them into Thatch Valley with Keith on 08.05.10, within three days of signing the Will, to my mind reinforcing it, as can be seen in the photographs in KT3 (being the exhibit filed on 29.10.13), which have all the hallmarks of a family outing.

f. Concerning Keith, as a surveyor he was not in category 2A, consistent with the dictum of Thom J in **Cresse v Joslyn** (supra), where at para 9 she specifically said a surveyor-client relationship does not fall within it, supported by the judgment of Floissac CJ in the **Murray v Dewberry & Matthew** (supra), who Thom J quoted at para 8 as saying that *the 'relationship between surveyors and their clients…is not a legally credited Class 2A relationship'*.

g. Concerning whether Keith was in category 2B, I find he was, in that it is clear Peter placed trust and confidence in him, advising Peter as to how best to develop the land, and in due course from 2011 being given power of attorney over his affairs. The presumption of undue

influence arises, but was rebutted on Keith giving evidence on 04.12.17. This is because I am satisfied as follows:

i. At the time of the Will being made, Keith only knew Peter six months, from November 2009 to May 2010, which was not enough time for Peter's mind to become enthralled and captured by Keith;
ii. It was clearly Peter's idea to develop the land, he had previously said he would to others, and the evidence shows that he approached Keith, not vice versa, having first instructed a surveyor named Burke, so that I find pre-Will it was Peter influencing Keith as to what he wanted done, and not Keith telling Peter;
iii. I accept on the evidence that Keith did not know Peter would make him his executor and it came as a surprise to him to learn it on 05.05.10, so that I find he was not angling or manipulating for it; and
iv. I was impressed with Keith and his steady manner, so I can well see why Peter freely chose him as executor; so that
v. At the time the Will was made, I am satisfied that Keith has shown he was not exercising undue influence over Peter.

h. Concerning Kharl, he was in a category 2A relationship with Peter, as the solicitor writing up the Will, meaning there was a solicitor-client relationship. The presumption of undue influence arises, but has been rebutted on Kharl giving evidence on 04.12.17. This is because I am satisfied as follows:

i. Kharl kept proper notes of the meeting on 03.05.10, showing an appropriate professionalism, in combination with the Will signed on 05.05.10 being in proper form, reinforcing that professionalism; and
ii. While it can be criticised that Kharl might be thought to have a conflict of interest, as Keith is his friend, and did not tell Peter of this close connection, (being musicians together in the 1990s, and of Kharl being a non-executive director of Axuum and possibly K-Tech), nevertheless I am satisfied that there has been, is, and will be, no direct or indirect financial benefit to Kharl, that the directorship is a formality, his being chosen as he is a lawyer, my having heard him swear to this,

and for me to find otherwise would be to consider Kharl an outright liar, which I am on his evidence and oath sure he is not; so that

iii. At the time the Will was made I am satisfied Kharl was not exercising undue influence over Peter.

50 I turn now to suspicious circumstances. They do arise, but only after the Will was signed.

51 Following the power of attorney in February 2011, as Peter weakened, there has been a steady running down of Peter's bank account, ostensibly to pay for the land development. It is difficult to know where the money has gone, and for what, while at the same time Keith says he is still owed $320000ec and it is not clear how this sum is calculated.

52 Moreover, Peter was found in ill health, bed-bound in a spartan room in November 2012 by Joseph, and then with obvious bedsores in March 2013 by Richard, leading to his being taken to hospital where six days later he died. This seeming neglect by Donna was in parallel to comfortable furnishings in adjoining rooms for her and Shaneil, and an income being paid to her of $2400ec per month from Peter's account.

53 On the evidence, and in the absence of any rebutting affidavit from Donna, the strong impression arises that, after weakening in 2011, Peter was from 2012 being left in his bed to die, while his bank account under power of attorney was being used as suited Keith's needs in pursuit of the development, though without clear accounting.

54 It may very well be that transactions concerning Peter's land and account which arose from 2012, and possibly from after the power of attorney in 2011, are challengeable.

55 However, in my judgment no suspicious circumstances arise pre-Will, so that the Will was properly made at the time, and so remains vaild.

Conclusion

56 What appears to have happened in this case is that Peter had a dream of developing his considerable land holdings, which as he aged he thought he should set in motion, finally

spurred on by his affection for Shaneil and her mother who were looking after him. He found Keith and was taken by his manner and abilities. He settled his Will in favour of Shaneil and Donna, specifically ignoring his niblings, possibly because he felt they had little interest in him. Anxious to see the land project succeed, he tried to settle its terms as instructions to Keith in his Will under paragraphs 5 and 6. To keep the project going, as he weakened he gave power of attorney to Keith. But having made his Will, and having begun to weaken, Donna and Keith began to change toward Peter, as can be human nature, so that it appears Donna began to do less for him, awaiting his passing, and Keith began to treat the account as his own, while perhaps believing his actions in Peter's ultimate interests in developing the land. It may be the flaw in Peter's dream was not the Will but the power of attorney, as it made him redundant while living, and so he found himself neglected, financially and as to his health.

57 In sum, this is a case which began as a happy plan but which has had a sad end.

58 While I find the Will is valid, I make the observation that its terms do not explicitly pass title to the following parcels of land at Sweeneys: 19, 45, 46, 47, 49, 50, 53, 54, 56, 58, 62, 70, 71, 72 in block 14/10.

59 I order that the Will be admitted to probate, and that the caveats are quashed.

60 It may be that, alive to the strength of feeling in the defendant affidavits, fresh litigation may now arise as to what land Peter rightly owned, and therefore can in law pass under the Will.

61 In light of the suspicious circumstances which arose post-Will, it was understandable that the relatives filed the caveats, so that this was a case rightly brought to the attention of the court, and therefore I make no order as to costs.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

5 March 2018