THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2013 – 04213

IN THE MATTER OF

THE ESTATE OF RAYMOND DARDAINE, Deceased

Between

JIMMY WILSON

KENNETH MENDES

LESTER WILSON

Claimants

And

ROSA DARDAINE

Defendant

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr Gerald Raphael for the Claimants

Ms Earla Nyack for the Defendant

Dated: 16 March 2016

Reasons (Edited Oral Judgment)

1. The primary issue in this case concerns a will made on 12 February 2010 by Raymond Dardaine ("the deceased" /"the testator").

2. The will left his house at 4, Knightsbridge, Cascade to the defendant, who was his wife from 2004 and was his common law wife for 20 years before that.

3. Previous wills had left it to the defendant and his 2 adult children, Ann and Denise in equal shares. The last of these wills was made on 18 October 2005. The claimants are the executors of this 2005 will.

4. Both attorneys have adequately set out the law relevant to this case out of which the following main legal principles apply. The testator must have had testamentary capacity at the time he made the will. He must have known of and approved the contents of the will at the time he made it. The will must not have been prepared or executed in suspicious circumstances. In appropriate cases a medical certificate should be obtained. The burden is on the party propounding the will to show the testator knew and approved of the contents of the will. The court must carefully examine the circumstances relating to the preparation and signing of the will.

5. On behalf of the claimants, Dr Shaffe, a psychiatrist: looked at the testator's medical records from the Port of Spain General Hospital. Set out in those records is a notation that in 2008 the deceased had Alzheimer's disease. This was based on hospital notes. There is no clear evidence of who made the note or the circumstances in which it was made. There is no evidence of an actual diagnosis of Alzheimer's and no evidence of

treatment for it. What is clear, however, is that if a person has Alzheimer's, you do not get better. You get worse. It is a progressive disease. What may vary is the pace and extent of the disease. He was 81 years.

6. Two years had passed to the time of the present will. Ms Susan Gray, the attorney who prepared and took execution of the 2010 will, also noted that the testator had "a little Alzheimer's" to use "a colloquial expression".

7. It is also clear from Dr Shaffe's evidence that a person can have lucid intervals when they are aware of what they are doing and have a determined intent.

8. There was no psychiatric determination of condition. There was no examination. Essentially Dr Shaffe's best opinion must be that if the testator had Alzheimer's, it would have gotten worse, not better. That is as far as his evidence can go to show whether the testator had testamentary capacity or whether he would have been aware of what he was doing.

9. Immediately before his death on 1 September 2010, the testator was once again at the hospital. The records indicated he was a known Alzheimer's patient. He was also forgetful and disoriented as to time and place, at times. There was a note made on 6 August 2010 of "two years history of Alzheimer's disease with intermittent episodes of abnormal behaviour."

10. The evidence on both sides accepts he was forgetful and that there were signs consistent with Alzheimer's disease but the extent that this affected his awareness and ability to

make decisions is contested. Rosa Dardaine accepts he started to suffer from Alzheimer's in 2008. She said "it was gradual and most times he was good".

11. In this regard the actual evidence of the persons who saw and knew him closer to the time of the making of the will would be more important to the determination of this case.

12. In this regard there are three witnesses for the defendant, including herself, which has to be assessed as against those of the claimants.

13. The defendant herself said he knew what he was about. In her witness statement she noted how they had met being involved in the political activities of the PNM political party and that by 1985 they got close and she moved in with him with 3 of her children. She spoke of their relationship together and their contributions to the home. She noted that the deceased did not have much of a relationship with his children and disapproved of the lifestyle of one of them. She explained that he had ingested rat poison in 2008 but that this was because he was drunk. She knew him to be a heavy drinker. She was the only one to take care of him when he got ill. She and her children spent $24,000.00 on his funeral and his children did not contribute to it or to his care.

14. In cross examination she stated he had told her what he wanted to do about giving her the property. And that he wanted to get a lawyer. They knew Ms Gray, an attorney, from her jogging up and down the neighbourhood. She asked Ms Gray. Ms Gray spoke to him. During the execution, the will was read aloud to him. He answered Ms Gray and communicated with her.

15. Of interest she gave evidence in cross examination that she had put money into the property which has not been disputed by the claimants. She said:

"I have money in that property.

I roof that house.

Came from Jan Mottley.

I buy the wrought iron.

I got money from children.

They would send money from away."

16. She noted he signed the will.

17. There was also Stephan Edwards who witnessed the execution of the will. In his witness statement he said he was one of the persons who had witnessed the 2010 will. The other witness had since died.

18. He was liming at the deceased's home when he was asked to witness the will. At the time he signed the will, he says the deceased was in his right senses and he knew the people around him and what they were doing and he recognised all of the people who were liming there.

19. In cross examination he noted the defendant is his cousin. He knew her before he knew the deceased. There was the following evidence:

"The lawyer read the will to him.

She gave it to him to read it.

I saw him.

I saw him read the will.

He did not say anything after he read it.

The lawyer asked him if he understood it.

He said he understood it.

She read it to him a second time.

After she read it she gave him to sign.

She asked him if he understood what was in the document.

He said yes.

He shook his head."

20. He also noted the deceased signed the will strongly. There was no hesitation other than the ink running out of the pen.

21. The critical witness was, of course, Ms Susan Gray, who took the instructions for the will and prepared it and took execution of it.

22. In her witness statement she said she had known the deceased and the defendant from passing in front of their house from 10 years before. Every time she passed, she would call out. She noted they were "limers" and always had people in front of their house.

23. She had been doing legal work for the neighbours in 2009-2010 and would see the Dardaines when she went to the neighbours' home. She noted the defendant told her the deceased wanted to make a will one day in February 2010 and she then went privately and spoke to the deceased. She spoke to him and asked if he wanted to make a will leaving everything to the defendant. He shook his head and said "of course" in his "usual very well spoken tone". She returned on 12 February 2010 with the will. She asked for two witnesses and these came from 2 persons who were there liming. She asked the deceased if he remembered her. He indicated he did. She gave him the will to read. When he was finished she read it aloud to him. She asked him if he understood it and he shook his head in his usual way. She gave him it to sign which he did. He signed another copy. He recognised her and he was in his right senses. Even after that day he recognised her when she passed. She said he communicated to her in his usual way on the day he signed the will.

24. In cross exam this is how she knew the testator and his family:

"Was in practice for 2 years when made will.

Knew deceased.

Lived in same area.

Had a good relationship with family.

Spoke to him before made the will.

I usually jog there.

A client lives around.

Discussion is he wanted to prepare a will.

I would pass and say how going."

25. Further she said:

"I would not say it was Alzheimer's.

He would recognise me.

He would speak to me."

26. She said he had, to use a colloquial expression, "a little Alzheimer's". He was forgetful at times. There is this further evidence:

"His wife told me she wanted to speak to me.

I went and came back the following day.

I had a discussion with him.

Took him a draft.

I prepared a draft.

Of the instructions and took it with him.

Then I left.

Left it with deceased and left.

Answering a specific question.

Did not say before I prepared a draft of instructions and returned and enquired if that was his instructions. To verify it."

27. Later on in cross examination she stated:

"Then I went to him to get his instructions.

He said he wanted to do a will.

I said I will need to get instructions and I will prepare a draft.

He gave me instructions.

When I spoke with him re will I wanted to know what he wanted done.

It was his wife of several years.

He called her Rosa.

He wanted the place they were residing in to go to Rosa Dardaine."

28. Further:

"I asked him what assets he wanted disposed of.

I asked what assets to whom?

He said property to his wife.

I said his wife Rosa?

He said yes.

Rosa your wife?

He shook his head.

Of course."

29. She was asked specifically about getting a medical certificate:

"Did you think you should get a medical certificate or something from a psychiatrist?

A: Lucid intervals. He was clear. People at that age can be forgetful. No need to get a psychiatrist."

30. When Ms Gray went to execute the will, she met several persons there by the house liming.

31. She said:

"I went into the house.

He was seated inside.

The two witnesses were present.

I told him have to read it; then give to him; read it; witnesses were there; signed 2 copies; he signed both copies then the witnesses signed.

The defendant was outside.

When I went inside she was outside for duration.

Had conversation with the witnesses.

Rosa was outside.

With the grandchildren.

32. From the claimant's side, the psychiatrist gave evidence. I have alluded to aspects of his evidence already.

33. Ms Julien's evidence related to the 2005 will. There is no real contest about that will. Thus her evidence was not important to the determination of the 2010 will.

34. Jimmy Wilson also gave evidence. He said the deceased had a good relationship with his daughters from his knowledge but his knowledge is vague and not specific. He also spoke of Ann, one of the daughters, visiting him often but before the defendant was around and that the defendant posed an issue. He was asked whether this related to 20 years ago and he said yes.

35. He did not know of the deceased's marriage to the defendant in 2004. He found out about it after. This told me that the deceased did not share all of his personal business with this claimant.

36. He could not recall seeing the deceased around the time of 2010 February. He spoke of a 2008 incident when he saw the deceased carrying a plank of wood near the Ministry of Agriculture in St Clair and he took him home.

37. But what I got from him was that his contact with the testator was not very frequent in the period after 2008.

38. Lester Wilson also gave evidence. He had a good relationship with the defendant until an issue with a Maracas property arose which the deceased had owned and sold to him for $15,000.00.

39. He did not have a relationship with the deceased in his final months since he said the deceased could not recognise him. He could not recall seeing the deceased around January / February 2010.

40. Like that of Jimmy Wilson, his witness statement sets out general statements about having a good relationship with the deceased and gives evidence of the good relationship with the children Ann and Denise.

41. The cross examination of both witnesses showed that they were not as closely involved in the affairs of the deceased in the period after 2008 compared to the defendant and her witnesses. Part of this could be fallout from the sale of the Maracas Property to Lester Wilson.

42. The second claimant did not give evidence.

43. Based on the competing evidence, it is clear that the defendant's witnesses had far more contact with the testator in the time period when the 2010 will had been executed and for some time before.

44. In evaluating Ms Gray's evidence I found certain aspects of what would have been expected of a lawyer to be lacking. It would have been prudent for her to produce her instructions. She may have taken the extra precaution of having him medically examined. She may have also questioned him directly about why he was not leaving anything for his two daughters and why was he leaving the property to the defendant solely. These are matters which would have put the validity of the will beyond any question.

45. However, the court is required to make findings on a balance of probabilities. The court is not required to find that Ms Gray followed a perfect process. There is no specific requirement that medical evidence should have been obtained. Even so, the evidence of a general practitioner may not have been that helpful anyway. It would be rare in this jurisdiction that a report from a psychiatrist would be sought. I have no reason to think she had any interest to serve in the matter except the obvious one of defending the quality of her work. I have no reason to disbelieve her that she met with the testator, took instructions and satisfied herself about his ability to make the devises in question. Ms Gray can be seen to be an independent legal adviser.

46. She also articulated the process she undertook which I accepted would have been adequate in these circumstances for her to assess that he had the required testamentary capacity and knew and understood what he was doing. Ms Gray's evidence was of a number of interactions over a period of time and her taking instructions on a different day from the date of execution. These combined, goes to show that she was in a position to assess the testator and to set out what were her observations which helps the court to make a determination. This evidence is also supported by that of Mr Edwards. While there were some inconsistencies in the versions of the defendant and him about the events of the execution, I put these down to failing memories and the passage of time and each witness' ability to perceive the events. I found they largely agreed on the material matters of the testator's acknowledgement of what he was doing with his property.

47. I find as a fact that the testator had testamentary capacity on 12 February 2010 and that he knew and approved of the contents of the will.

48. The next issue is whether the will was prepared or executed in suspicious circumstances. We have the evidence of Ms Gray about how the will came to be done. Nothing is inherently suspicious about this.

49. There were three previous wills which had shown an intention to share the property among the defendant and the two daughters of the testator.

50. What then could account for this departure? The defendant said he wanted to leave the place to her and he had always told her it would be hers. She said he had educated the children. And the daughter in Canada did not have a relationship with him. Ms Gray seems to suggest she knew this as well.

51. On the other hand, I found it odd that neither of the deceased's daughters gave evidence in this matter. The evidence may have been helpful on whether the relationship with their father was strained or existed at all. There was no explanation as to why they did not give evidence. They could have easily shown how over the years they had contact with the deceased, on what occasions, when they visited and so on. It would have made it plausible to suggest that something was odd about the change of wills. The evidence of the Wilsons really could not address those matters directly. There were vague references to "as far as they knew", and so on. But it is clear that there was some cooling of relations since Rosa Dardaine had come into the picture, especially in the later years.

52. Two incidents were brought up. The deceased ate rat poison. The defendant's explanation was his drinking. And it had happened accidentally. The next incident was when he had to be brought home with the plank of wood. These could be attributed to one or more of several causes including the drinking, forgetfulness or the onset of Alzheimer's. None of these are however sufficient to displace the evidence before the court regarding the circumstances of the 2010 will.

53. The onset of Alzheimer's on the deceased is not determinative of the capacity of the deceased or whether he knew and approved of its contents at the time of execution.

54. I preferred the evidence of the defendant and her witnesses as giving an accurate account of his state of mind at the time of the will.

55. Further, the testator had spent 30 years with the defendant. He married her in 2004. She took care of him over the years. They shared a close relationship. Their place was a centre of activity where they entertained people over the years and shared many experiences. There is evidence that the defendant invested in the property. As his health gradually would have deteriorated with age, the defendant was the one who took care of him. This can be a very strong motivating consideration for elderly persons. It is not inconceivable, and in fact quite reasonable, to conclude that he changed his mind and decided that he would want to leave his wife in secured accommodation especially as his children were able to manage on their own. He may have wanted to give her some security. The will in itself excites no suspicion.

56. Given the above, the order is that I pronounce in favour of the validity and effect of the will of the testator, Raymond Dardaine, dated 12 February 2010 in solemn form.

57. As indicated above, no serious challenge was made to the 2005 will of the deceased and I found no reason to doubt it was properly executed and that it reflected the intentions of the testator at that time. The later will, however, prevails.

58. This claim was brought by the executors of the 2005 will in their capacity as executors. They had no benefit to gain other than the interest in carrying out their duty where they considered there may have been factors concerning the 2010 will which a court should properly examine. In those circumstances I will depart from the usual rule of costs following the event and order that each party shall bear his/her own costs of this claim. I thank the attorneys for their very helpful submissions.

Ronnie Boodoosingh

Judge