JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 24 /04

BEFORE: **THE HON. MR. JUSTICE PANTON, P.**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

BETWEEN **GLENROY JENSEN** **APPELLANT**

AND **PAMELA FRANCIS** **RESPONDENT**

Raphael Codlin, Burchell Brown and Barrington Frankson for the appellant

Kirk Anderson and Ms. Cindy Lightbourne, instructed by DunnCox for the respondent

December 15,16, 2008 and June 19, 2009

PANTON, P.

1. This appeal challenges the decision of Harris, J. (as she then was) wherein she ordered the grant, to the respondent, of letters of administration with the will annexed in respect of the will of the late Gladys Jensen dated January 14, 1987. Harris, J. also ordered that the appellant be restrained from entering upon premises situated at 157 and 159 Hope Road, Saint Andrew, and that he gives an account of all the personal estate of the testatrix including rent and mesne profits coming into his hands since the death of the testatrix.

The Dispute

2. The deceased and the parties were related, the appellant being an adopted son, and the respondent a cousin. The dispute springs from the fact that there was an earlier will, dated September 7, 1974, which made the appellant a beneficiary whereas the 1987 will has naught therein for him. The respondent's father is named in the latter will as executor. However, he has died and the respondent is his executrix. The respondent and her parents are beneficiaries under the will.

3. The learned judge heard evidence over a period of five days during November and December, 2003 and on February 20, 2004, she delivered a written judgment. It is undisputed that the deceased lived at her own premises at 9a Ravinia Road, prior to December, 1986 and thereafter up to the time of her death on November 10, 1990, at the residence of Mr. and Mrs. Anthony Sanson, parents of the respondent. While residing with the Sansons, the deceased made a will naming Mr. Sanson sole executor. He, his wife Olive and the respondent, their daughter, are among the legatees and devisees named in the instrument. Mr. Sanson died on December 7, 1992. The respondent, as an executrix of the estate of her father, was granted probate of his will on March 27, 1997, hence her standing in the instant suit.

4. The circumstances surrounding the change of residence of the deceased and the making of the 1987 will were the areas of dispute before the learned

judge. The appellant contended that the deceased was removed from her residence, and the house sold against her will. He also contended that the will was fraudulently executed as his mother was not in a mental state to execute a will, and in any event she would not have wanted to disinherit him. In his witness statement, he stated that:

> (a) "...the signatures on both Wills purporting to be that of my late mother are significantly different and the latter signature ... seems to be done by a young steady hand;..."
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> and
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> (b) "...it is clear that the Sansons are determined and intent on bringing their fraudulent scheme to fruition...".

The Evidence

5. The learned judge heard evidence from the following persons:

> (a) the respondent;
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> (b) Janet Mignott (attorney-at-law);
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> (c) Marjorie Thomas (witness to the 1987 will);
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> (d) the appellant;
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> (e) Dr. Royston Clifford (pathologist); and
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> (f) Dr. John Royer (psychiatrist).

Miss Thomas gave evidence that she, Mr. Gilbert Haughton James and the testator were in a room at the home of the Sansons when the testator showed her a document and informed her that it was her will. She saw the testator sign it, and then requested her and Mr. Haughton James to sign it as witnesses. Both

individuals signed in the presence of the testator. The learned judge was very impressed by Miss Thomas' candour and regarded her as a most credible witness with an outstanding demeanour. She accepted her evidence and concluded that "the execution and attestation of the paper writing accorded with the provisions of the Wills Act".

6. Miss Mignott, an attorney-at-law, prepared the will at the request of the deceased, for whom she had done other legal work. She had known the deceased for about two to three years prior to the preparation of the will. The deceased had summoned Miss Mignott to her house to prepare the will. The deceased was "very distraught" at that time, according to Miss Mignott. Under cross-examination by the attorney for the appellant, Miss Mignott said that the deceased had told her that the appellant had been abusive to her, both physically and verbally, to the point that she had become afraid of him. She expressed the wish to change her will so as to exclude him from any benefit therefrom. Miss Mignott had suggested to the deceased that she should not disinherit the appellant, but the deceased was "adamant" on the point. The conversation in relation to the abuse took place at the Ravinia residence. Miss Mignott suggested to the deceased that if she was afraid of the appellant, then she should go to reside elsewhere.

7. The respondent was cross-examined at length, by learned counsel, Mr. Burchell Brown, at the trial. During the cross-examination, she said she had

actually seen the appellant hit the deceased. The circumstances were that the deceased, having been at the witness' parents' home for a while, had returned to her house to collect some of her belongings. The appellant came to her new residence insisting that he wished to speak to her. She reluctantly came outside to speak with him. The appellant shouted at her, slapped and pushed her. The witness called out to the appellant to desist and threatened to call the police. The respondent said that she had never seen the deceased acting strangely, and denied that she was a mentally unwell person who was acting stupidly before she was taken by the respondent's parents, and up until she died. She disagreed that she and her parents had manipulated the deceased. The respondent, still under cross-examination, said that at the time of her death, the deceased was in good condition for a person of her age. She denied that the deceased was emaciated and affected by bed sores at the time of her death. So far as the business affairs of the deceased were concerned, the respondent's father attended to them while acting on the instructions of the deceased. She denied suggestions that she and her parents were merely interested in the assets of the deceased and had been just waiting for her to die.

8. The appellant's evidence was in sharp contrast with that given by and on behalf of the respondent. He said he loved his mother who was the best human being he knew. As a Christian, "she walked the walk", he said, and had no reason to disinherit him. The deceased had instilled in him the idea that a man who beats a woman is a coward. He denied verbally or physically abusing the

deceased, and said that the evidence of the respondent and Ms. Mignott had been fabricated. The deceased, he said, was acting strangely and in his view she was completely senile from about December 1985. He was of the view that she needed professional care and supervision, and was incapable of handling her affairs. The deceased was a rich woman who had told him that he would have benefited substantially from her will.

9. Dr. Royston Clifford, a consultant forensic pathologist, performed a post-mortem examination on the body of the deceased. He found that the body was severely emaciated and dehydrated, with a number of bed sores on the buttocks and right shoulder. The brain of the deceased showed congestion only, without any evidence of trauma or injury. In Dr. Clifford's opinion, death was due to dehydration, malnutrition and bronchopneumonia. The doctor was of the view that the bed sores indicated that the deceased had not been properly taken care of. Under cross-examination, Dr. Clifford said that it is common for persons who are in their eighties to contract pneumonia and that pneumonia affects one's appetite, resulting in loss of body weight. Wasting of the body implies that a lot of weight had been lost. He was not in a position, he said, to say whether the malnutrition, dehydration and bronchopneumonia were all connected.

10. Dr. John Royer, a consultant psychiatrist, gave evidence that he examined the deceased on February 19, 1990. To him, she appeared well cared for. His comprehensive report included a note that she had a condition of abnormal

movement of the mouth. This is a known side effect of drug or of some degenerative condition. She was at the time of examination not in a position to make a will as she did not have an idea of her possessions and was unable to state the names of her nearest relatives. Her speech showed impediment in areas of judgment, orientation, memory, mood, general knowledge and comprehension. In his professional judgment, she had senile dementia and possibly Alzheimer's type. In his view, the nature of her condition may have lasted for four years or more prior to the time of the examination. Dr. Royer conceded though that he never performed any of the tests necessary for the determination of Alzheimer's disease.

The Judge's Findings

11. As stated earlier, the learned judge was impressed by the candour of Miss Marjorie Thomas whom she regarded as a credible witness with outstanding demeanour. So far as the other witnesses were concerned, the learned judge found as follows:

> i. Re Miss Mignott: she was a credible witness. Her evidence led the judge to conclude that the general powers and faculties of mind of the deceased were such that she had the capacity to conduct a rational and sane conversation, sufficient to enable her to give clear and unequivocal instructions to Miss Mignott, in her capacity as an attorney-at-law.
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> ii. Re Dr. Royer: the learned judge pointed to the fact that the doctor's examination took place more than three years after the making of the will. That being so, his evidence was unable to assist the court as to

> the mental competence of the deceased on the date of the making of the will.
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> iii. Dr. Clifford: the judge concluded that his evidence contained nothing of assistance so far as determining whether the deceased was of sound mind, memory and understanding when the will was made.

12. The learned judge found that the deceased knew and understood the extent of her assets, was aware that she was disposing of her properties to the donees of her choice and understood the nature and extent of the claims on her of those whom she excluded. She chose to exclude the defendant and his child. The judge considered the question of undue influence. She said that the fact that the respondent and her parents benefited from gifts under the will, coupled with the special relationship between them, gave rise to the presumption of undue influence being exercised over the deceased in the making of the will. The equitable title of the beneficiaries, she said, would remain incomplete unless and until the presumption is rebutted. Having considered all the evidence and the submissions, she held as follows:

> "It is clear from the evidence adduced, that the testatrix was a free agent when she made the will. It was the product of her own volition. It was not procured by the importunity of either the claimant or the Sansons. There is nothing to show that when it was made, she was at a manifest disadvantage by pressure, or fear of the Sansons, or the Claimant, or that they overpowered her wishes, thereby impairing her judgment in the preparation and execution of the Will".

The grounds of appeal

13. Fourteen original grounds of appeal were filed on March 22, 2004. They were followed by seventeen supplemental grounds dated 27th November, 2008, making a grand total of thirty-one grounds for our consideration. It is fair, I think, to say that they, for the most part, challenge the judge's assessment of the witnesses called, her failure to accept the witness statements of others, and her failure to find that the deceased was incapable of making a valid will due to senility. In respect of the failure to accept as evidence the contents of certain witness statements, the witnesses involved were Level Constantine Ricketts, Gwendolyn Gaynair and Dr. Aggrey Irons.

14. **Grounds dealing with the assessment of the witnesses**

- "The Learned Judge erred in finding for the Claimant/Respondent and accepting her evidence when the totality of the evidence suggested that there was a lack of testamentary capacity on the part of the testatrix. She was obviously mentally incapacitated and the subject of undue influence."

- "The Learned Judge erred in accepting the evidence of the Claimant/Respondent particularly that of Miss Mignott when she gave no detailed and credible account of the actions of the defendant, consistent with the statements of the qualified doctors that examined the testatrix."

- "... The Learned Judge erred in relying, if she did so, on the evidence of Miss Mignott in relation to the Testamentary capacity of the testatrix, in view of the fact that Miss Mignott is not a medical doctor, and not one or (sic) experienced in identifying the signs of senility, and who at the time of taking instructions with regard to the alleged Will was not familiar with

> the general disposition of the testatrix and would not have been actively trying to identify signs of senility in the testatrix."
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> - "The Learned Judge erred in assessing the evidence of Dr. Royer and in holding that, for the most part, the evidence of the Claimant/Respondent was supported by that of Dr. Royer in that the testatrix was being properly cared for by the Sansons."
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> - "The trial judge erred when she failed to see that Mrs. Thomas who lives next door to the Sansons and visited on several occasions was clearly not speaking the truth when she said she did not know Mrs. Jensen well enough to decide whether she had been acting strangely."

15. From these grounds, it will be seen that the assessment is being questioned in respect of the respondent, as well as Miss Mignott, Dr. Royer and Miss Thomas. The learned judge, it has to be noted, saw the witnesses and was in the best position to assess them. An appellate court may not lightly discount or set aside the findings of fact made by a trial judge who has seen and heard the witnesses not only during examination-in-chief but also under cross-examination. This Court is guided by the principles set out in the oft-cited case of ***Watt (or Thomas) v Thomas*** [1947] 1 All ER 582, the headnote of which reads:

> "Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the

> witnesses could not be sufficient to explain or justify the judge's conclusion.
> The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

16. Mr. Kirk Anderson for the respondent referred to and relied on the judgment of Lord Thankerton, particularly where he said:

> "It may be well to quote the passage from the opinion of Lord Shaw in ***Clarke v Edinburgh & District Tramways Co.*** [1919] S.C.(H.L.) 35, 37 which was quoted with approval by Lord Sankey, L.C., in ***Powell v. Streatham Manor Nursing Home*** [1935] A.C. 250. Lord Shaw said:
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> 'In my opinion, the duty of an appellate court in those circumstances is for each judge to put it to himself, as I now do in this case, the question, Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment'.
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> Lord Shaw had already pointed out that these privileges involved more than questions of credibility. He said (ibid., 36):
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> '...witnesses without any conscious bias towards a conclusion may have in their

> demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced on the printed page'." (p. 587 E – G)

17. Mr. Codlin for the appellant recognized the importance of ***Watt v Thomas*** as he commenced his submissions by using language which clearly came from the headnote. He stated that the learned trial judge "was clearly wrong, and there were objective facts that falsify what she has done". The objective facts to which he referred were supposedly contained in the evidence of the medical doctors. In written submissions on behalf of the appellant, it was contended that Dr. Royer's evidence was clear and unequivocal that the deceased was not in a mental state to make a will for at least four to five years prior to the examination by Dr. Royer. This contention however ignores the fact that Dr. Royer's examination was deficient in relation to the methodology of testing. Added to this, the learned judge was therefore correct in finding that Dr. Royer's evidence was unable to assist her as to the mental competence of the deceased at the time of the making of the will.

18. In the light of the learned judge's clear assessment and findings, and following the principles set out in ***Watt v Thomas***, I see no basis for interfering with the judge's decision. I find no fault in her reasoning on this score. Supplemental grounds 6, 8, and 14 claim that the judge erred in relying on the evidence of Dr. Margaret Green. However, this is a misconception as there does

not appear to be any mention of Dr. Green in the reasons for judgment. In fact, at page 29 of the "Supplemental Judge's Bundle" containing the notes of evidence taken at the trial, there is the following note: "Claimant states that she will not be calling Dr. Green as a witness, as, her evidence will not be probative".

19. **Grounds dealing with the judge's failure to accept certain witness statements**

- "The Learned Judge erred in refusing to accept the evidence of Level Constantine Ricketts when the testimony was one of evidential valve (sic) in determining the issue of testamentary capacity."

- "The Learned Judge erred in not giving due weight to the evidence contained in the Witness Statements and in the witness (sic) of Gwendolyn Gaynair when these witness (sic) had filed Witness Statements and given evidence that would have greatly assisted the Court."

- "The Learned Judge erred in failing to accept the evidence of Dr. Aggrey, (sic) an independent court appointed doctor, someone well learned and competent in psychiatric illness and assessing the mental capacity of persons being a Psychiatrist, when there was no reason to doubt the veracity of his testimony."

20. The supplemental judge's bundle referred to earlier shows at pages 50 and 51 the reasons for the exclusion of the statements of Miss Gaynair and Mrs. Ricketts. In each case the learned judge noted that satisfactory proof of the witness' inability to attend the hearing was not forthcoming. Nothing has been advanced before us to show that the learned judge was incorrect in ruling as she did. The Civil Procedure Rules make it clear that as a general rule any fact that

needs to be proved by the evidence of witnesses is to be proved at trial by their oral evidence given in public. Under the new Rules, there is a requirement to file and serve witness statements which stand as examination-in-chief, and on which the witness may be cross-examined. Rule 29.8 (4) reads thus:

> "Where a party –
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> (a) has served a witness summary; and
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> (b) does not intend to call that witness at the trial, that party must give notice to that effect to all other parties not less than 28 days before the trial."

In the instant case, it was on the fourth day of the trial, virtually at the end of the case for the defence that the judge was being asked to accept the statements in the absence of the witnesses. The learned judge was quite right to have refused to countenance non-compliance with the Rules, without there being satisfactory explanation.

21. In respect of the non-acceptance of the witness statement of Dr. Aggrey Irons, the record of appeal does not reveal the reason for such exclusion if, indeed, there was a ruling by the learned judge in this regard. There is also no mention of it in the judgment of Her Ladyship. It may be noted however that on November 20, 2003, Mrs. Justice Norma McIntosh ordered at the pre-trial review that Dr. Irons was a witness whose statement was to be relied on as evidence-in-chief and he was to attend at the trial for the purpose of cross-examination only. The record does not disclose that Dr. Irons attended and was denied the

opportunity to be cross-examined. The order also listed the names of witnesses who could not attend at the trial, but whose evidence would still be considered. Dr. Irons' name does not appear on that list. It seems therefore that the grounds of appeal on this point are misconceived. In any event, it cannot be ignored that Dr. Irons was appointed medical examiner in respect of the deceased by court order on September 4, 1989, that is, nearly three years after the making of the will in dispute. His opinion as to her mental state would therefore bear the handicap of being nearly three years after the event.

22. **The grounds dealing with senility**

In addition to the first ground listed in paragraph 14 above, the following grounds were filed in respect of the claim that the deceased was senile.

- "The Learned Judge erred in not giving any or any sufficient weight to any of the following matters:

  (f) That the testatrix failed to make provision for her only grandchild, whom she did not accuse of being abusive to her, points to her senility."

- "The Learned Judge failed to accept for consideration the report of Dr. Royer, as to the mental capacity of the testatrix when there was no reason to doubt the veracity of the said report and fail (sic) to consider the report in its entirety."

- "The learned trial judge erred when she failed to conclude that Dr. Royer's evidence has supported the case for the Appellant."

- "The learned trial judge erred when she stated that Dr. Royer used the wrong test. She was wrong not to have given any weight to Dr. Royer's several observations in regard to the senility of Mrs. Jensen—

> see page 52 of evidence notes and medical report of Dr. John Royer which he read into the records."

23. So far as the testatrix's failure to make provision for her grandchild is concerned, the appellant is clearly speculating in his claim that that is a sign of senility. He advanced no credible scientific data to prove his claim. The learned judge, in my view, was not entitled or required to theorise in this regard. It is surely part of life's story that very dear and beloved kith and kin are from time to time deliberately overlooked by perfectly sane testators. Legacies are not necessarily determined by familial ties.

24. The other grounds are in respect of Dr. Royer's evidence and the treatment thereof by the learned judge. His evidence has already been recounted at paragraph 10 above, and there followed comments in respect of the judge's findings (paras. 11 & 17). It bears repetition that Dr. Royer said, in reference to testing for dementia, "none of these tests were done in that group of tests because she would not be able to understand, perform and execute those tests". In addition, Dr. Royer's examination was conducted three years after the making of the will.

Conclusion

25. In view of the appellant's failure to show any error on the part of the learned trial judge in respect of her reasoning and findings, there is no basis to disturb the judgment. Accordingly, I would dismiss this appeal and award costs to the respondent.

HARRISON, J.A.

I agree entirely with the reasoning and conclusions arrived at by Panton, P. I have nothing to add.

DUKHARAN, J.A.

I agree.

ORDER

PANTON, P.

The appeal is dismissed. Costs are awarded to the respondent to be agreed or taxed.