REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2007-01564

IN THE MATTER OF THE WILLS AND PROBATE ORDINANCE CHAPTER 8 NUMBER 2 OF THE LAWS OF TRINIDAD AND TOBAGO

AND

IN THE MATTER OF THE REVOCATION OF A GRANT OF PROBATE OF THE WILL OF THE LATE ALBERT ALPHONSO

BETWEEN

ANTHONY ALPHONSO
ARLENE ALLISON BENNET
ALBERT ALPHONSO JR.

CLAIMANT

AND

SHARON RAMKHELAWAN

DEFENDANT

BEFORE THE HON. MADAME JUSTICE JOAN CHARLES

Appearances:

For the Claimants: Mr. G. Mungalsingh, instructed by Mr. P. Maharaj
For the Defendant: Mrs. M. Maharaj-Mohan

Date of Delivery: 7th February, 2013

JUDGMENT

BACKGROUND

[1] The Claimants are all the lawful children of the late Albert Diego Alphonso Sr. ("the Deceased") who died on the 3rd March, 2002. The Defendant was the common law wife of the Deceased and is also the main beneficiary under the Will dated the 7th March, 2001 ("the new Will").

[2] The Claimants instituted this action to set aside the purported new Will of the Deceased. They claim that they are entitled to his estate by virtue of an earlier Will dated the 16th September, 1989 ("the earlier Will").

[3] By Fixed Date Claim Form and Statement of Case filed on the 26th February, 2010, the Claimants are seeking the following reliefs:

i. Revocation of the Grant of Administration with Will annexed of the estate of the Deceased;
ii. A Declaration that the purported Will of the Deceased, dated the 7th March, 2001, is fraudulent and of no effect;
iii. An Injunction restraining the Defendant from evicting and/or compelling the First-named Claimant from vacating the property situated at No. 28 Cedar Drive, Pleasantville;
iv. An Order that the Defendant do account for all the assets of the Deceased collected by her subsequent to the issuance of the Grant of Administration with Will annexed;
v. An Order that the Defendant do return or lodge into Court all monies collected from the CLICO Insurance Policy, in addition to all other monies collected by the Defendant; and,

vi. An account of all rentals collected by the Defendant with respect to the premises situated at No. 28 Cedar Drive, Pleasantville.

PLEADINGS

- **CLAIM**

[4] The First and Third-named Claimants instituted this action as the named executors in the earlier Will. The Second-named Claimant, who resides out of the jurisdiction, appointed the First-named Claimant to be her lawful Attorney and represent her in these legal proceedings by Power of Attorney dated the 13th March, 2002.

[5] The Defendant, who is the purported main beneficiary under the new Will, applied to probate the new Will by Probate Proceedings No. L1618/2005 filed on the 7th July, 2005. However, caveats were lodged by the Claimants on the 10th August, 2005 and were warned on the 12th October, 2005 with an appearance entered on the 17th October, 2005. Nevertheless, the Defendant was granted probate of the new Will on the 24th November, 2005.

[6] The Claimants have claimed that:

i. The new Will of the Deceased was not duly executed in accordance with the provisions of the **WILLS AND PROBATE ACT, CHAP. 9:03**;

ii. The Deceased did not know and approve of the contents thereof; and/or,

iii. The new Will was executed without the Deceased knowing of its contents thereby constituting a fraud.

[7] With respect to the due execution of the new Will, the Claimants contended that:

i. The Deceased did not execute the new Will;

ii. The Deceased did not sign or acknowledge his signature to the new Will in the joint presence of the attesting witnesses;

iii. The alleged witnesses to the new Will did not attest and subscribe the new Will in the presence of the Deceased;

iv. The Deceased never gave any instructions for the preparation of the new Will;

v. The Deceased did not read the new Will himself, nor was it read over to him or properly explained to him;

vi. The Deceased was not aware of the nature and effect of the new Will, nor was he capable of comprehending or appreciating its provisions and effect;

vii. The signature affixed to the new Will was not placed by the Deceased as supported by the Forensic Report of Mr. Glen Parmessar;

viii. The execution of the new Will was therefore obtained through fraud perpetrated by the Defendant.

[8] The Claimants further contended that it was through the dominance of the Defendant over the life and affairs of the Deceased that she encouraged the Deceased to change the named beneficiary of the previous Will and substitute as beneficiary of his personal estate including:

i. his monies at TECU Credit Union;
ii. his Life Insurance Policy at CLICO;
iii. benefits from the Oilfields Workers Trade Union; and,
iv. his monies at Royal Bank, Point-a-Pierre.

[9] In the alternative, the Claimants contended that should the new Will be deemed valid by the Court then the execution of the new Will was procured by the undue influence of the Defendant, her servants and/or agents. They pleaded the following in this regard:

i. The Deceased was an alcoholic and was influenced by the Defendant to make the new Will naming her as the main beneficiary under the said Will;
ii. The Deceased was induced to execute the new Will by undue influence exerted upon him by the Defendant, in whom the Deceased had faith, trust and confidence;
iii. The Defendant exerted such influence over the Deceased that she prevented him from naming his children and grandchildren as beneficiaries under the new Will and/or persons who would be lawfully entitled to his estate;

iv. The Deceased was not a free agent and did not have separate and/or independent legal advice, and/or any consultation with the Claimants and/or his family members;

v. The Deceased did not inform the Claimants and/or any of their family members as to the existence of the new Will. As such the new Will was not the product of the Deceased's own volition but was procured by the importunity of the Defendant.

[10] The First-named Claimant is in occupation of the upstairs portion of the deceased's premises situated at No. 28 Cedar Drive, Pleasantville ("Pleasantville premises"). However, by letter dated the 24th May, 2007, he has been called upon by the Defendant – the alleged main beneficiary to the estate of the Deceased - to vacate the premises.

[11] By letter dated the 28th March, 2002, Messrs. CLICO informed the Claimants that the policy was payable to the named beneficiary – the First-named Defendant. However, by further letter dated the 15th July, 2002, the Claimants were informed by CLICO that the Deceased had changed the beneficiary under the said policy on the 10th November, 1998. The Defendant wrongfully received and cashed the proceeds of the said policy in the sum of twelve thousand dollars ($12,000.00).

- **DEFENCE AND COUNTERCLAIM**

[12] The Defence and Counterclaim was filed on the 8th June, 2007 wherein the Defendant put the Claimants to strict proof of the earlier Will dated the

16th September, 1989. She contended that even if there was another Will in existence the revocation clause in the new Will revoked all former Wills, codicils and/or any testamentary dispositions made prior to the new Will. Accordingly, the new Will is the Last Will and Testament of the Deceased and the only valid Will in existence.

[13] The Defendant contended that the claim has disclosed no reasonable cause of action against her for the following reasons:

i. It is an abuse of the process of the Court to entertain this claim since the Claimants had ample opportunity to challenge the validity of the new Will before the grant was issued to her;
ii. If this action is allowed to proceed it will severely prejudice the Defendant, as she will have to incur the additional expense of defending this claim for the second time;
iii. The length of time that has lapsed in initiating this claim has caused prejudice to the Defendant as portions of the estate have already been devolved and she is now placed in a disadvantageous position by the Claimants; and
iv. At all material times it was within the knowledge of the Claimants that the Defendant was applying for a Grant of Probate of the new Will and took no reasonable steps in prosecuting their claim.

[14] It was also contended by the Defendant that the new Will duly complied with the provisions of the **WILLS AND PROBATE ACT** and was duly executed as:

a. The Deceased executed the new Will in the presence of the witnesses as evidenced by the Affidavit of Execution of Nazim Muradali;
b. The Deceased's signature was witnessed by the two (2) witnesses, who were both over the age of eighteen (18) and were not beneficiaries under the new Will;
c. The Deceased signed his own name on the new Will and his signature was visible to the witnesses who attested to same;
d. Both witnesses were present at the same time and knew or ought to have known that the document the Deceased was executing was his Last Will and Testament; and,
e. The witnesses signed their name and were competent in appreciating the nature of their act.

Further, the Defendant pleaded that the Deceased had the requisite mental capacity when he executed the new Will. He therefore made the new Will by his own free will and volition; he was not influenced by fraud nor was he under duress.

[15] The Defendant averred that the Forensic Report of Glen Parmessar was not conclusive and is not evidence of the alleged fact that it is not the signature of the Deceased on the new Will. Further, she stated that the accounts referred to by the Claimants did not form part of the Deceased's estate as they were held jointly by her. By virtue of the doctrine of *jus accrescendi* the Defendant was therefore entitled to the proceeds of the said accounts.

Alternatively, the Defendant contended that the said accounts named her as beneficiary and upon the death of the Deceased she was entitled to the proceeds thereof.

[16] With regard to the allegations of the First-named Claimant, the Defendant contended that:

i. The First-named Claimant unlawfully broke a lock on the upstairs portion of the house and entered same which was previously unoccupied for three (3) years;
ii. On the same day, the Defendant attended the premises where she met the sister of the First-named Claimant – Tracy Alicia Thorpe – who informed the Defendant that they had legal rights to the property and held up a document, which she stated was the Deed for the property, for the Defendant to see;
iii. Several letters were exchanged between the Defendant and the First-named Claimant regarding the said premises and the Defendant's desire for the First-named Claimant to vacate the said premises. However, to date the First-named Claimant has failed and/or refused to vacate the said premises.

As a result of the foregoing, the Defendant contended that the First-named Claimant's occupation of the said premises is unlawful and he is not entitled to be in possession and/or occupation of the said premises.

[17] Further, the Defendant averred that she moved out of the subject premises in or about August, 2002 and that she rented the said premises. She

contended that she is so entitled to do, and also to collect the proceeds therefrom as the property was bequeathed to her by the new Will for her absolute use and sole benefit.

[18] The Defendant counterclaimed against the First-named Claimant for:

i. An Order that that he deliver vacant possession of the property at No. 28 Cedar Drive, Pleasantville described in Deed No. 20262 of 1977; and
ii. Mense profits at the rate of $700.00 per month from the date of the unlawful occupation, being May 2005 to judgment;

and sought against all the Claimants an injunction restraining them whether by themselves, their servants and/or agents or howsoever otherwise from harassing and/or molesting her.

- **REPLY TO DEFENCE AND COUNTERCLAIM**

[19] The Claimants, by their Reply, pleaded that if the doctrine of *jus accrescendi* applies to the assets of the Deceased, it was only through the undue influence of the Defendant which caused him to make her the beneficiary of such assets.

[20] In answer to the Defendant's counterclaim, the First-named Claimant pleaded that that:

i. The upstairs portion of the said premises were unsecured when the First-named Claimant entered and his occupation therein is lawful;

ii. The Defendant was informed that any rights she purported to have were unlawful by virtue of the invalidity of the new Will;

iii. The Defendant is not entitled to possession of the said premises by virtue of the earlier Will, which is the only valid Will of the Deceased; and,

iv. The claim for *mesne* profit is not lawfully due and payable by the First-named Claimant.

EVIDENCE

- **CLAIMANTS' EVIDENCE**

[21] The evidence relied upon by the Claimants is contained in the Witness Statements of:

i. Anthony Alphonso filed on the 22nd January, 2009; and

ii. Glenn Parmessar filed on the 22nd January, 2009.

ANTHONY ALPHONSO

[22] The First-named Claimant deposed that he is the last of nine (9) children born to the Deceased, who were all aware of the earlier Will made by the Deceased wherein he appointed Arlene Bennett and Albert Alphonso Jr. as the executors. The earlier Will was then given to Arlene Bennett, in whom the Deceased had the most trust and confidence to handle his financial affairs.

[23] He stated that he, along with his step-sister, resided with the Deceased at the Pleasantville premises. They lived in the upstairs portion of the premises, whilst the downstairs portion was usually rented out; rental income was used by the Deceased to maintain the household.

[24] The First-named Claimant testified that the Defendant came onto the premises as a tenant with her daughter on the 17th November, 1995. They lived in the downstairs apartment until the 28th October, 1997 when she left as the First-named Claimant and the Defendant were prone to having disagreements. The First-named Claimant was about twenty (20) years of age at that time.

[25] On the 25th September, 1998, the Defendant and her daughter returned to the premises and resumed living downstairs as tenants. It was around this time, the First-named Claimant stated, that the relationship between the Defendant and the Deceased began which eventually led to a common law relationship between the two.

[26] Sometime in 1999, the First-named Claimant, who was often away from the home because of work commitments, returned home and found that the Deceased had moved downstairs into the Defendant's apartment and the upstairs apartment was rented. Thereafter, the First-named Claimant went to live in Gasprillo with his in-laws.

[27] He met the Deceased the Friday before he died at the Pointe-a-Pierre branch of the Royal Bank where the latter came to withdraw his pension. They chatted cordially before parting ways.

[28] The First-named Claimant stated that none of the children of the Deceased were informed after his passing about the existence of the new Will. Further, two weeks after the death of the Deceased, the Defendant and Joseph Mohammed, one of the attesting witnesses to the new Will, placed tenants in the downstairs apartment and took all the possessions from the apartment with them. Meanwhile, the children of the Deceased were the ones that bore the financial burden of the Deceased's funeral expenses.

[29] He deposed that he only became aware of the new Will when both he and the Defendant claimed the Deceased's life insurance policy at CLICO . He then obtained a copy of the new Will. Upon reading the new Will and seeing the purported signature of the Deceased, the First-named Claimant became suspicious of the said signature as it did not resemble the Deceased's signature. After informing the other Claimants about his suspicions, they obtained the services of Glen Parmessar to examine the new Will. Upon receipt of Mr. Parmessar's Report casting doubt on the authenticity of the signature of the Deceased affixed to thereto, they formed the view that the new Will was fraudulent.

[30] The Claimants caused a caveat to be lodged when the Defendant applied to probate the Deceased's estate. However, due to a lapse in the renewal of the caveat, the grant was obtained by the Defendant. Thereafter, the First-named Claimant caused an investigation to be conducted by the Police who interviewed the attesting witnesses to the new Will in addition to the Defendant. The attesting witness Joseph Mohammed has since died.

[31] The First-named Claimant maintained that the purported new Will of the Deceased is a forgery and/or was made and executed by the undue influence of the Defendant on the Deceased. He further testified that the Deceased was an alcoholic and the Defendant would often time encourage him to drink frequently and as such the Deceased was probably intoxicated when he made and/or executed the new Will.

GLEN PARMESSAR

[32] Glen Parmessar testified that he is an expert in the field of Forensic Document Examination with over twenty (20) years' experience. He was retained by the First-named Claimant in June 2005 to carry out a forensic examination of the signature of the Deceased contained in the new Will (Q1).

[33] He requested documents that contained the signature of the Deceased in order to effectively carry out the examination; microscopic examinations were carried out on the new Will in addition to the specimen signatures provided[1]. The Report was completed on the 4th May, 2006 and he concluded that "*it is probably that the two questioned signatures "A. Alphonso" and "Albert Alphonso" on exhibit Q1 was not executed by the K1-kK4 specimen writer*".

[1] Will date the 16th September, 1989 (K1); Copy of a job repair agreement dated the 2nd April, 1997 (K2); Copy of an IOU dated the 18th August, 1997 (K3); Copy of a receipt dated the 30th August, 1997 and Letter dated the 16th August, 1995 (K4)

[34] At a Case Management Conference on the 4th January, 2008, Jamadar J. (as he then was) ordered that the parties submit more recent documents[2] to Mr. Parmessar bearing the signature of the Deceased for examination. A supplemental Forensic Report was prepared, date the 10th November, 2008, which concluded that it was highly probable that the question handwriting on Q1 was not executed by K1-K4 and S1-S4.

[35] Under cross-examination, he admitted that the number of specimen signature provided were less than that normally required to establish a clear finding. Additionally, the issue of the age of the Deceased and how that fact may have affected his handwriting was not addressed in the Reports.

- **DEFENDANT'S EVIDENCE**

[36] The evidence relied upon by the Defendant is contained in the Witness Statements of:

i. Sharon Ramkhelawan filed on the 30th July, 2009; and
ii. Nazim Muradali filed on the 30th July, 2009.

SHARON RAMKHELAWAN

[37] The Defendant deposed that she was the common law wife of the Deceased. They lived together from about August, 1993 until the 3rd

[2] Royal Bank Consumer Loan Statement dated the 5th August, 1999 (S1); Royal Bank Consumer Loan Statement dated the 17th December, 1998 (S2); Royal Bank Consumer Loan Statement dated the 10th April, 2000 (S3); Driving permit application dated the year 2001 (S4)

March, 2002 when he died. She was introduced to the Deceased by a mutual friend in or about October, 1991, at which time she resided at her father's home with her infant daughter.

[38] During the period October, 1991 to August, 1993, the Deceased would visit the Defendant often at her home; sometimes the First-named Claimant accompanied him on those visits. Their relationship blossomed and in or about August, 1993, the Deceased invited the Defendant to move in with him at his home in Pleasantville in the downstairs apartment. She obliged and by the end of August, 1993, she had moved into the Deceased's downstairs apartment with her daughter. The Defendant stated that the Deceased and the First-named Claimant shared all meals downstairs with her and her daughter, and she would look after and care for the Deceased. The Deceased soon started staying downstairs in her apartment although most of his possessions were stored in the upstairs apartment.

[39] During this time, she deposed that the First-named Claimant was attending Pleasantville Senior Comprehensive School and upon the completion of his secondary education, he became rebellious and would often time return home showing behavioural patterns as if under the influence of 'drugs'. She stated that the Deceased was very worried about the First-named Claimant and sought to enrol him in higher education so as to curb his behaviour.

[40] As a result, in September 1996 the Deceased, accompanied by the Defendant, enrolled the First-named Claimant in Servol Limited, Forres Park, Claxton Bay to pursue a course in auto mechanics. However, this did

not assist the First-named Claimant's behaviour which only became increasingly violent towards the Deceased and the Defendant's daughter; he professed that he was unhappy about the relationship shared by the Defendant and the Deceased.

[41] This escalated in November 1998, when the First-named Claimant threatened to kill the Defendant and her daughter. The Deceased attempted to calm the First-named Claimant; however the latter physically attacked him with a baseball bat and pushed him down a flight of stairs causing the Deceased to suffer a sprained ankle. Consequently, the Deceased told the First-named Claimant to leave the home which he did.

[42] In or about December, 1998, the Deceased moved his possessions from the upstairs apartment into the Defendant's downstairs apartment. The Deceased then commenced renting the upstairs apartment in January 1999 to Eurban Maloney and Elizabeth Maloney.

[43] The Defendant deposed that on the 7th March, 2001, the Deceased personally showed his Last Will and Testament to her; explaining that he wanted to ensure that after he died the Defendant and her daughter would always have a home and be taken care of, as his wife and children had forsaken him.

[44] When the Deceased fell ill, the Defendant tried to contact the First-named Claimant but was unsuccessful. She stated that it was Joseph Mohammed who assisted her in taking the Deceased to the hospital where he later died. None of the Deceased's children visited him while he was in the

hospital. The funeral service for the Deceased was held on the 8th March, 2002.

[45] She stated that afterwards the First-named Claimant would frequently come into the neighbourhood and threaten her, in an effort to cause her to vacate the premises in Pleasantville. She therefore caused her then Attorney-at-Law to write the Claimant on the 12th March, 2002 demanding that he stop harassing and threatening her. As a result of the threats, the Defendant left the premises at Pleasantville sometime in April, 2002 and moved back to her former residence in Marabella.

[46] The Defendant because fearful for her safety and that of her daughter because of the following:

i. The First-named Claimant was arrested for shoplifting on the 26th October, 2002. This incident was reported in the Newsday of the 30th October, 2002;
ii. On the 14th February, 2003, she received a phone call stating that her daughter had been taken during school hours. The Defendant made a report at the Marabella Police Station regarding this incident; and,
iii. On the 25th May, 2005, the First-named Claimant threatened to burn down the Pleasantville premises and to shoot her and her daughter. A report was again made at the Marabella Police Station.

[47] In June, 2005, the Defendant began the proceedings for obtaining probate of the Deceased's estate and in November, 2006, she was advised that probate had been granted and that she should collect a copy of the grant from her Attorney's office.

[48] Under cross examination, the Defendant conceded that she erroneously stated n her Witness Statement that she first learnt of the contents of the new Will when the Deceased showed her same in their apartment. Instead, she admitted that she present in Nazim Muradali's office when the Deceased was executing the new Will.

[49] Further, under cross-examination, the Defendant stated that she brought the Deceased to Mr. Muradali's office she was outside when the instructions were being given to Nazim Muradali. She then returned to the inside of the office whilst the new Will was being read over to the Deceased. However, this contradicts Nazim Muradali's evidence stated in his Witness Statement that the Deceased attended his office with Joseph Mohammed.

NAZIM MURADALI

[50] Nazim Muradali deposed that he is a Justice of the Peace for sixteen (16) years, during which time he prepared numerous Wills. He stated that he has been friends with the Deceased for over fifteen (15) years, as they both shared Joseph Mohammed as mutual friend.

[51] Mr. Muradali stated that as a result of their friendship, the Deceased would often time confide in him. He stated that the Deceased expressed sadness at the fact that his family had deserted him as none of them came to visit him whilst he was in the Pointe-a-Pierre Hospital during his final days. Nazim Muradali stated that it was the Defendant who would take care of him while he was in the hospital, and who took care of all of his business.

[52] He deposed that his usual procedure when preparing a Will is to take notes of the person's wishes in a diary; these notes would then be used to draft the Will. When the Will is completed, he would read over the Will to the testator in the presence of the witnesses. He stated that the foregoing procedure was adopted when he drafted the new Will of the Deceased. The new Will was read over to the Deceased in the presence of Joseph Mohammed and the Defendant.

[53] He stated that the Deceased seemed to have understood the contents of the Will and the effect of same. He further stated that the Deceased appeared to be normal, cohesive and in full command of his mental faculties as required to execute the new Will.

[54] Nazim Muradali deposed that on the 7th March, 2001, the Deceased came to his office and stated that he wanted a Will prepared on his behalf devolving essentially his entire estate to his common law wife – the Defendant. He prepared a will as instructed by the deceased. He was present with Joseph Mohammed to witness the Deceased sign and publish

his Last Will and Testament – the new Will. Thereafter, he and Joseph Mohammed signed the said Will in the presence of each other.

[55] He stated that the reason for two signatures on the new Will is that he noticed that the Deceased signed his name as "A.D. Alphonso" and at other times "Albert Alphonso". It is for this reason that he made the Deceased sign twice.

[56] Under cross examination, Nazim Muradali stated that he did not know of the existence of the earlier Will and as such he did not discuss the effect of the new Will. He further stated that in his view there was no need for the appointment of an executor as there was a sole beneficiary in the new Will.

[57] When cross-examined on the procedure he adopted, he stated that the understood and appreciated the need to take the instructions of the Deceased in private but conceded that Joseph Mohammed was present during the entire process. Also, he understood the need for reading over the Will to the Deceased in the presence of the witnesses yet nevertheless the Defendant was present when it was being read over to the Deceased.

ANALYSIS

[58] The essence of the claim by the Claimants is that the new Will was obtained through fraud, *i.e.* the signature of the Deceased thereon is a falsification or, in the alternative, that the Defendant exerted undue influence on the Deceased, so as to become the sole beneficiary of his estate.

[59] I will deal firstly with the issue of preparation and due execution of the new Will. In **Shrimattee Gobin Persad v Harrilal Gobin**[3] Stollmeyer J. (as he then was) on the issue of due execution opined:

> "*It is for the party propounding a will to prove the execution, but that onus is a shifting one. A duly executed will which is regular and usual in form, rational on its face, not drawn by the person propounding it and benefiting under it, carries two presumptions: first that it is of a person of competent understanding; and second, that it was executed according to the law with the testator knowing and approving of its contents. This last requirement is essential because ultimately a court must be satisfied that the will being propounded reflects the testamentary intentions of the testator...*
> *[If] the issue of lack of knowledge and approval is raised ... then the onus reverts back to the party propounding the will to put forward affirmative evidence of due execution. In other words, the presumption is rebuttable...*
>
> *It is important to note that ... suspicious circumstances which might place a propounding party in a position where it is required to demonstrate the righteousness of the transaction ... does not carry a connotation of morality; or a requirement that the morality or propriety of the contents of the document be proved ... The question is really simply whether the Court is satisfied that the contents do truly represent the testator's intentions. Further, it is the events surrounding the preparation and execution of a will which are to be considered and generally not subsequent events.*

[3] HCA No. 816/1996

Hassanali J. in **Samuel Sylvestre Smith v Pearl John**[4] also addressed the circumstances surrounding the preparation and execution of a Will and opined:

> *"Where there exists circumstances attendant upon or relevant to the preparation and execution of a Will which excite the suspicion of the court, it must be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does not express the true Will of the deceased.*
>
> *It is for those who propound a Will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only when this is done that the onus is thrown on those who oppose the Will to prove fraud or undue influence or whatever else they may rely on to displace the case made for proving the Will."*

Further, Peter Gibson LJ in **Fuller v Strum**[5] explored the issue of due execution and the circumstances surrounding same. He opined:

> *"In the ordinary probate case knowledge and approval are established by the propounder of the Will proving testamentary capacity of the deceased and due execution of the Will, from which the court will infer that knowledge and approval. But in a case where the circumstances are such as to arouse the suspicion of the court the propounder must prove affirmatively that knowledge and approval, so as to satisfy the court that the Will represents*

[4] HCA No. 11/1972, p. 4
[5] [2001] EWCA 1879

the wishes of the deceased. All relevant circumstances will be scrutinised by the court which will be 'vigilant and jealous' in examining the evidence in support of the Will ... Suspicion may be aroused in varying degrees, depending on the circumstances, and what is needed to dispel the suspicion will vary accordingly."

[60] I have carefully reviewed the evidence before me on the issue of due execution and there were circumstances which aroused my suspicion which were not dispelled by the Defendant, namely that:

i. There were two (2) signatures on the new Will and from a natural observation of same, they differ from each other. There was no proper explanation, to my mind, given by Muradali as to why he allegedly caused the Deceased to sign twice. His explanation to the Court was that he had seen documents where the Deceased signed his name "A. Alphonso" and "Albert Alphonso". However, none of these documents were submitted into evidence;

ii. There should have been two (2) spaces on the new Will for the Deceased to affix his signatures if, as Muradali – the drafter of the new Will - contended was done so as to dispel any doubt that it was indeed the Deceased who that signed the new Will. However, an observation of the new Will shows that there is one "proper" space for the Deceased's signature, then the second signature is awkwardly affixed between two (2) paragraphs of text on the new Will;

iii. In Muradali's Affidavit in support of the Letters of Administration dated the 5th July, 2005 and filed on the 13th July, 2005, at paragraphs 3 and 6, he repeatedly stated that the "signature", singular not plural, of the Deceased is true and proper. Surely, if he both drafted the new Will and was present during its execution he must have known that there were two (2) signatures present and deposed to same.

[61] Of greater significance, to my mind, was the evidence of the handwriting expert Glen Parmessar who stated that it was "highly probable" that the signature on the new Will was not that of the Deceased. Mr. Parmessar examined eight (8) documents with the Deceased's signature before he came to his final conclusion that it was "highly probable" that the signature on the new Will was not that of the Deceased; he however conceded under cross-examination that the ideal number of specimens is usually ten (10). He asserted, though, that an accurate assessment can be furnished with less. He further stated under cross-examination that in some instances more than ten (10) specimens are examined yet no conclusive finding can be achieved.

[62] Parmessar firstly examined four (4) documents supplied by the Claimant upon the latter's request. He reached the conclusion on this initial examination that it was "probable" that the signatures on the new Will were not that of the Deceased. Subsequently, by Order of Mr. Justice Jamadar (as he then was), Parmessar examined another four (4) documents which were closer in time to the death of the Deceased. Mr. Parmessar was

then able to determine that it was "highly probable" that the signatures on the new Will were not that of the Deceased.

[63] Parmessar defined "Probable/Not Probable" at Paragraph 25 of his Witness Statement as:

> *"It is probable that the material was written/was not written by the specimen writer. More of the identifiable features found in examinations support the finding expressed than those which do not. There is a moderate level of evidence but the evidence found does not reach the highly probable level."*

"Highly probable/ highly probable not" was also defined at Paragraph 25 of this Witness Statement as:

> *"It is highly probable that the questioned material was written/was not written by the specimen writer. This evidence falls short of the conclusive level. However, it is still very strong and persuasive and remains within the virtually certain category. Sometimes the term very strong may be used."*

[64] On this point, I am guided by the *dicta* of Rahim J. in **Lenny Mastay v Egbert Ross *et al***[6], where he dealt with the impact of evidence of a handwriting expert. He opined:

[6] CV2008-02106, p. 10

"The evidence that the signature is that of the First Defendant carries much weight in this court when considered in the round together with all the other evidence in the case. It is certainly to be preferred to the evidence that the Memorandum had been signed by the First-Defendant's son …

[The expert's] findings went beyond that of mere possibility that it was signed by the First Defendant. His findings ventured into the realm of likelihood. Essentially the expert was in fact testifying that while he could not say as a matter of certainty that the signature belonged to the First Defendant without more samples from the appropriate time period, it was likely that the signature was that of the First Defendant having regard to the similarities between the original signature and the specimens provided."

[65] Based on the foregoing, I am of the view that the new Will was not executed by the Deceased. Having reached this conclusion, there is no need for me to discuss the remaining issues of undue influence and testamentary capacity.

CONCLUSION

[67] In the circumstances, I make the following orders:

i. Judgment for the Claimants against the Defendant;
ii. The Grant of Probate granted to the Defendant on the 24th November, 2006 is hereby set aside;
iii. The new Will of the Deceased dated the 7th March, 2001 is fraudulent and of no effect, and is hereby set aside;

iv. The renewal of the lease o the premises situate at No. 28 Cedar Drive, Pleasantville obtained by the Defendant is hereby set aside;

v. The Defendant is to account for all household equipment, appliances and personal effects of the Deceased in the dwelling house situate at No. 28 Cedar Drive, Pleasantville;

vi. The Defendant is to account for the vehicle, Registration No. HAG 7750, and/or the proceeds of the sale of same;

vii. The Defendant is to account for the CLICO Policy No. 0146015 valued in the sum of eleven thousand, eight hundred and seventy-nine dollars and eighty-nine cents ($11,879.89);

viii. The Defendant is to account for the rent received for the upstairs apartment situate at No. 28 Cedar Drive, Pleasantville for the period August, 2002 to May 2005 at $700.00 per month thereby totalling twenty-three thousand, one hundred dollars ($23,100.00);

ix. The Defendant is to account for the rent received for the downstairs apartment situate at No. 28 Cedar Drive, Pleasantville for the period August, 2002 to May 2005 at $500.00 per month thereby totalling sixteen thousand, five hundred dollars ($16,600.00); and,

x. The Defendant to pay the Claimants' costs in this action to be assessed in default of agreement by the Registrar.

JOAN CHARLES

JUDGE