THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2012-00066

IN THE MATTER OF THE WILLS AND PROBATE ORDINANCE CH 8:02

AND

IN THE MATTER OF THE SUCCESSION ACT CH.9:02 (PART VIII)

AND

IN THE MATTER OF THE DISTRIBUTION OF ESTATES ACT NO. 28 OF 2000

BETWEEN

LECHELL SAMUELS

Claimant

AND

THEODORE TOUSSAINT
(The named Executor of the alleged Last Will and Testament Of the late BONAVENTURE THEO TOUSSAINT)

Defendant

Before The Hon. Madam Justice C. Gobin
Appearances:

Mr. G. Mungalsingh for the Claimant
Mr. K. Mc Quilkin instructed by Mr. A. Moore for the Defendant

JUDGMENT (DRAFT)

The following is a draft of my reasons for my decision in the matter. In the event of an appeal I shall expand upon what follows and add to it and make any necessary changes as to form.

1. In this action the Court was called upon to pronounce for the force and validity of a will dated 14th August 2009 or alternatively for a will in almost the exact terms dated 7th August 2009, allegedly executed by Mr. Bonaventure Toussaint who died on September 21st 2009.

2. The pleadings as well as the evidence raised issues of testamentary capacity by reason of the unsoundmess of mind through Mr. Toussaint's sickness, as well as want of knowledge and approval of contents of the wills.

3. As I understand the law in these circumstances, it fell to the propounder of the will, (the defendant in this case) to prove that Mr. Toussaint's illness notwithstanding, (and in this case it is not in dispute he was gravely indeed terminally ill and in counsel's words "near death"), the testator was of sufficiently sound memory and understanding to recall the extent of his estate and all those persons who would have claims to his bounty, in other words that he had testamentary capacity.

4. On August 7th 2009 the date of the first will, the Testator was hospitalised. He had been diagnosed with thoracic cancer a few months earlier in April, but according to his wife, the claimant, he had been ravaged by the disease and his health had declined rapidly until his demise on September 24th 2009. In the statement of case, the claimant relied on the medical report of Dr. Steve Medford which indicated the deceased's diagnosis to support the claim of lack of capacity at that stage. The defendant did not dispute the report but responded that the mere diagnosis more than one month before the

execution of the will dated 7th August 2009 did not support the claim that his illness had ravaged the testator physically and mentally so as to render him lacking in testamentary capacity. In respect of the later will, the defendant relied on the due execution and attestation by the defendant Theodore Toussaint and his wife Marlene Toussaint.

5. Several factors had put the mental soundness of the testator in issue. These included, the pleadings, the acceptance that the deceased was critically ill and being treated for cancer In fact, the attorney who prepared the will confirmed under cross-examination that the testator was at the time of her visit "near death". When she met with him at hospital he had a tube in his throat which restricted his communication. She said though that this did not inhibit their discussion, which he managed through a loud whisper. Indeed the deceased passed away less than eight weeks later.

6. Further, even when she returned to have the will executed on 7th August 2009, she sought to have his attending physicians witness the will after Dr. Armoogum "questioned" him. She obviously took this precaution because she considered it necessary, another indication that capacity was an issue.

7. When the attorney met him for the first time, the testator handed her two pieces of paper which she relied upon as reflecting his initial instructions. Both notes are unsigned, one is dated August 7th 2009. While it has not been disputed that the patient may have written the notes, no one has given evidence as to when the defendant wrote them. The note which was dated August 7th 2009 reflected a time 5:00 hours. That put the writing at

two hours before Ms. Bazzey first met the testator. There is no recording of the time or date on the second sheet. In other words it does not say that it was recorded after the one saying 5:00 a.m. on the same day nearer to the time of her visit.

8. The second note headed "In the unlikely event" contains jottings which in my assessment are not particularly clear and coherent. For example, the note says "once mom is alive Beverly Toussaint (who was not the mother), Isac will give you all pa……". The sentence makes no sense, the last word is unfinished. Then this important and more coherent sentence appears. "My blood pressure was very high this a.m. which is not good. Sorry this might be a bad time for this. I want to get with you Isac today when you get back to me with drafts". Then the jottings continue, disconnected, and in terms that cannot be regarded as specific or comprehensible instructions.

9. If this second piece of writings of the deceased was recorded after 5:00a.m. and there is nothing which can provide assistance on the precise timing, the Testator may well have been even worse off at the time of Ms. Bazzey's visit than when he wrote the first note at 5:00a.m. In other words testamentary capacity, if he had it at the start at all may have been reduced. What is reflected on these two notes produced by the defendant indicates that even the testator was not sure he was in a fit state of mind to give instructions at that time.

10. The attorney said she had taken the precaution of speaking to Dr. Armoogum, who told her that he was the one who had been treating Mr. Toussaint for some 10 days prior to her visit and that given the state of the deceased's condition, he was the one who had advised the deceased to put his affairs in order. There is no evidence from Dr. Armoogam of this. What is significant, is that according to the attorney, this conversation took place when Ms. Bazzey already had the prepared will ready for execution and after the instructions had allegedly been taken some hours earlier. Ms. Bazzey went on to say Dr. Armoogum "questioned the deceased in my presence and in the presence of Dr. Beharry and two trainee nurses".

11. No note of the questions and answers is produced either by the medical staff or by the attorney. One does not know whether these were questions relating to his name, address, his age, his occupation, why he was in hospital or whether they were in relation to whether he knew the attorney, what was her business there, whether he knew what he was about to sign, if he understood what he was about to do and whether he felt well enough to do it, whether he could recall the extent of his estate. Indeed when one compares his handwritten notes to the inventory on the probate application it is clear that when he wrote the alleged instructions shortly before Ms. Bazzey's visit, he did not recall the extent of his estate. In those circumstances, even if Dr. Armoogum asked questions and then proceeded to witness the purport execution will, it would make no difference to my findings.

12. At the trial, the defendant failed to call either doctor. The task of producing a doctor who allegedly witnessed the first will was undertaken by the claimant who had Dr. Beharry attend in answer to a witness summons. This doctor gave evidence consistent with a witness summary which had been filed and which would have been seen well before the trial date by the defence. Of particular importance is that the doctor said he saw the attorney very early on the morning of August 7th 2009 at approximately 7:00 a.m. The doctor was not cross-examined by the defendant. This evidence which was unchallenged was inconsistent with the attorney's account of what had transpired. In the absence of cross-examination, no issue was made of it. I do not think that the Court could in those circumstances simply ignore the inconsistency or put it to poor recollection on the doctor's part. This was never suggested by the defendant.

13. The failure of the Defence to challenge Dr. Beharry's evidence had a more direct impact on the issue of whether the deceased knew and approved the contents of the will and if he had indeed signed it. If as Dr. Beharry said, it was signed at 7:00 a.m. when the attorney visited, then the Court can reasonably infer that if counsel received instructions for the preparation, whether of a draft or indeed a will, those instructions were not received by Ms. Bazzy on the morning of 7th August 2009 and that when she attended the deceased that morning at 7:00 a.m. she already had prepared a complete will for execution. There is no other explanation on the defendant's case or in the absence of cross-examination of Dr. Beharry.

14. This raises suspicions as to what the Testator meant when his note said that Isac (the Defendant) would give what Ms. Bazzey understood to be "particulars". Did he mean that Isac would relay something to the attorney and did that include details of his assets as well as his wishes? It is not that I believe that there could have been justifiable objection if the defendant had indeed at the testator's request, and in the presence of the attorney, assisted the testator by reminding him perhaps of matters they may have discussed and if the attorney in such circumstances had taken precautions to satisfy herself that the instructions were indeed those of the testator and no one else. That would have been a different matter.

15. Here however, there is a gap. One minute the testator was unable to even write a proper sentence, then a few hours later a very detailed document which bore little resemblance to what he had written was presented for signing. In the absence of proper written instructions and evidence to fill that gap, I am not persuaded that what was presented for execution reflected the intention of the testation as expressed on August 7th 2009 in those notes, if his intention could be discerned at all.

16. To return to the evidence of the doctor, Dr. Beharry said he and Dr. Armoogum saw the deceased sign and "then we both signed a document". He was not privy to the contents of the document. All signatures on the will dated 7th August 2009 appear on the second side of the page. Dr. Beharry was not called upon by the defendant to identify the document or his signature on it, nor was he cross-examined to confirm that he and Dr. Armoogum signed in each other's presence. This could have easily been established by

better evidence than the attorney's. The failure to have Dr. Beharry identify his signature on the will of 7th August 2009 especially in the light of the serious discrepancy as to the time of the alleged execution of it and the absence of cross-examination led me to find that the will was not duly executed.

17. What is highly significant too and especially since all the signatures were on the overleaf is that there is no evidence either in chief or under cross-examination that the will was read by the testator or that it was read to him prior to his signing. Given that the will of August 7th 2009 was only formally re-executed to correct the defendant's name on August 14th 2009 it was extremely important that the defendant established that the first will was the product of the testator's free will and that it was properly executed. In the circumstances the failure to call the doctors and to take advantage of the presence of Dr. Beharry is unexplained and has adversely affected the defendant's case.

18. As to the will of 14th August 2009, the exercise in producing this will was considered by Ms. Bazzey to be simply a re-execution of the earlier will. In the circumstances, even if I were prepared to consider the earlier will as reflecting instructions for the second will, my finding as to the lack of want of knowledge and approval and the testator's capacity would attach to both documents.

19. In the case of the second will, the reason for the preparation of it as opposed to the preparation of a codicil or advice to the defendant to swear an affidavit at the appropriate time simply to correct his name, has not been properly explained. Under cross-

examination the defendant confirmed that he is the person who called Ms Bazzey and that he in effect gave instructions for the corrections to the will. At that stage, the attorney it seems, suggested that the defendant and his wife Mrs. Marlene Toussaint should be witnesses to the execution of the new will.

20. The defendant then, was the one who gave the instructions for the preparation of the second will. Indeed it is clear that the testator never did, nor did he instruct Ms. Bazzey to revoke the will he had allegedly prepared earlier. On this occasion, 14th August 2009, the attorney said that the deceased "reviewed" the will. Evidence was led from the defendant which appeared to confirm that the deceased read and appeared to understand the contents of the later will. But this is not the end of the matter. The presumption as to knowledge and approval of the contents by a testator who has read over a will did not apply on the facts as I have found them. This was not in my view a capable testator. The defendant failed to prove that he was other than incapable.

21. In relation to the will of August 14th 2009, the claimant specifically set up his lack of capacity through the testator's illness. The claimant relied on the ongoing effects of his illness and continued and what appeared to be a rapid decline in his health. In particular she relied on the fact that on the same day as part of his treatment he had a full body scan which required the flooding of his body two days prior to it with radioactive iodine.

22. The defendant's response to this was important. The defendant specifically pleaded that this procedure did not affect the mental capacity of the patient and put the claimant to proof of same. This part of the pleading with the greatest respect to the pleader betrays a misapprehension as to who had onus of proof. The burden was at all times with the defendant to produce evidence on this issue to support its pleading.

23. I find it established on the evidence that the deceased in fact had a full body scan on the day in question and that as the defendant was aware, the procedure required him to be pumped two days before. In the defence it was specifically pleaded at para. 30 that radioactive iodine does not affect the mental capacity of persons treated with same. No evidence was however led in support of the statement or to assist the Court on how or whether this procedure would have affected the testator, mentally or physically. No advantage was taken of Dr. Beharry's presence to elicit evidence that might have assisted in this regard.

24. The Court was therefore left with medical evidence contained in the several reports which it accepted and to which much weight was attached, of a patient who was being treated for a terminal illness. I accept from the evidence of his wife, the claimant, that this had a devastating effect on him physically, as well as one would expect mentally. According to her evidence in addition to his breathing tube which was in place when Ms. Bazzey saw the testator in hospital by 11th August 2009 and after the first will was allegedly executed, by the time of the execution of the second will he had a feeding tube inserted to get food into his stomach. Surely this was evidence of further and I dare

say rapid decline. He had been on palliative care and on pain medication and valium to allow him to sleep.

25. In the circumstances, even if the deceased did read over the will, I am not satisfied that his medical condition on the 14th August, 2009 permitted the soundness of memory and understanding of the effects of the will, moreso against my reservations as to how the first document came into being. I am still not convinced he gave instructions which could have resulted in what was produced the first time for mere "formal" re-execution the second time.

26. Further on the issue of want of knowledge and approval, I considered whether there were circumstances surrounding the preparation and execution of both wills or either of them which should excite the suspicion of the Court, in which case the onus fell on the defendant to dispel the suspicion to satisfy me that either will expressed the mind of the testator.

27. The circumstances in which the Court's suspicion should be aroused are not limited to cases where a person who prepares the will takes a benefit under it. So the mere fact that in this case the executor does not appear to benefit from the will does not exclude the arousal of the court's suspicion. The law is as stated in the judgment of Davy LJ in (**Tyrell v Painton**) –

> ***"Whenever a will is prepared in the circumstances which raise a well grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless the suspicion is removed".***

Since both willls are almost identical in terms and given the reason, according to the defendant's case, for the preparation and execution of the later will, I have scrutinized the circumstances in relation to the production of the will of August 7th 2009. Several observations I have made in the preceding paragraphs which apply to the issue of want of knowledge and approval as well as incapacity by reason of illness point to what I consider to be suspicious circumstances, some of which when taken individually would not have significantly affected my eventual findings but which when viewed as a whole, are cause for concern that the deceased may not have had knowledge of and or approved the contents of either will.

28. I wish to make it absolutely clear that my opinion and conclusions ought not to be taken to reflect adversely on the conduct or integrity of attorney-at-law, Ms. Bazzey, who was involved in the preparation of the will. My findings are but comments on what I consider to have been the weaknesses in the defendant's case and indications of why and how the evidence failed to meet what I understand to be the standard of proof that was required to dispel suspicion.

29. This all started with instructions to the attorney from the employees of the testator. There is no evidence as to who made this request that the attorney was to "assist the testator with the preparation of his will". In the circumstances of this case this assumes greater significance because it turns out the Testator seemed to believe, from his notes, that he would be giving instructions for the preparation of a draft document which

he thought he would have an opportunity to discuss some time later that day, with the attorney and Isac (the Defendant). I have already indicated questions as to precisely what was the defendant's role in the preparation of the will which was produced for execution by the testator. As I have said before it is not that it was necessarily objectionable that the Testator might have wanted to discuss his draft will with a trusted relative. What fuels the suspicion is the defendant's attempt to distance himself from the preparation of the will of 7th August 2009. It is compounded when one compares the testator's handwritten "instructions" to what was eventually produced for his execution; more questions are raised which remained unanswered.

30. According to the defendant's case Ms. Bazzey was visiting the deceased at 7:00a.m. She spent two hours with him taking instructions. She failed, notwithstanding what was clearly reflected in his own handwriting and the reservations expressed about his fitness to give instructions, to seek medical advice at that critical time when she was allegedly taking instructions as to whether he was well enough to do so. Indeed she sought to have Dr. Armoogum "question him" at the time of execution some time later.

31. She sought to say that the testator "clarified" the written instructions which, as they appear in his hand can only be described as sketchy at best and incoherent at worst. This 'clarification" resulted in a two hour discussion, during which time she made some personal notes. During that time she was able to observe him speak on his phone and walk to the nurses station to chat with the nurses. (Why this would happen while an attorney is carrying out an important function is not explained). Most significantly, she

failed to produce any notes of the testator's "clarification of his instructions" and purported to give evidence of her recollection of what she was told by the testator. The Court is not inclined to place much reliance on counsel's memory in circumstances such as these.

32. The absence of written instructions in the circumstances of this case is highly unsatisfactory and unexplained. The production of the notes taken by Ms. Bazzey and a proper record would have gone a long way to dispel some of the suspicion. Ms. Bazzey already had two pieces of paper, she could very easily have made notes on those sheets of the specific devises which eventually appeared on the wills, or of all the further instructions given during the two hour long conference, and could have had the testator at least sign them if indeed they were intended to be instructions for his last will. For some reason Ms. Bazzey saw it fit to reproduce a typed versions of the sketchy and uncomprehensible notes made in the testator's hand, but she never produced any version of her alleged note, either in her handwriting or in typewriting.

33. In the absence of the attorney's note it is impossible to simply follow how the testator's notes evolved into the will of August 7, 2009. For example, on the basis of the following instructions as they appear on one of the notes it seems Clause 8 of the will left the entire policy to Angela. The note read :-

> ***"Policy about 400.00***
>
> ***The property located @ #549 Onyx Circular Edingburgh 500 is covered by Insurance under Maritime General. Value of insurance will cover loan ($100,000.00) from***

Excess funds to be given to Angela Toussaint to acquire car or fix leg whichever is more needful".

I am in doubt as to whether what the will did was what the testator intended.

34. Certainly it seems to me that what he may equally have intended was that after the satisfaction of the outstanding loan, from some portion of the excess $100,000.00, was to be given to Angela either for the purchase of a car to use towards her leg. It may be also that $100,000.00 was what he thought would be applied to the loan, and that some unspecified sum was to be left for Angela out of the balance to do what she need. It is simply not clear, a proper note of the alleged clarification would have provided assistance. In the absence of the attorney's notes, I am not convinced as to how what was written in the testator's hand translated to what appeared in the will. One jotting. "$170,000 use for Chaguanas property" has not found its way into either will and its absence has not been explained.

35. Very many of the provisions including the bequest to Nicoli are not reflected on either paper writing. The testator's instructions made no reference to a valuable Clico Life Policy in the sum of $800,000.00. This asset actually accounted for approximately one third of the value of his entire estate. His failure to recall this particular asset in his instructions, as well as absence of written instructions, regarding such an important one as the residuary clause too, has left me in doubt as to whether the will reflected the wishes of the testator or whether indeed he appreciated the extent of his estate.

36. I accept the submissions of Counsel for the claimant regarding the uncertainty as to what were the intentions of the testator regarding the cohabitational home (property left to Bernadette), the testator's, recollection and understanding of the ownership of it, and of the introduction of a clause giving the claimant a mere license to occupy it for a period of six months after his death, especially in the light of Ms. Bazzey's evidence that he did not wish to leave his common-law wife homeless.

37. That the land on which the home was built was originally leased to Bernadette by the HDC is not in dispute. But there had been a proper and legal transfer of Bernadette's interest to him and the deceased had taken a loan to build the house which he was paying and which he understood his insurance policy would cover on his death. In the circumstances his belief or understanding that the property would "revert" to Bernadette is not as rational as it may have seemed. There appeared to be no accounting for his own expenditure and financial contribution which had resulted in the complete erection of a house on the parcel of land. Had there been written instructions of the clarification Ms. Bazzey received, some suspicion may have been dispelled. It is clear from the cross-examination that counsel herself did not fully appreciate the position regarding the ownership of the property.

38. The defendant has submitted that on the face of it, the will is not irrational and indeed it clearly demonstrates by its various provisions that the testator was sufficiently cognisant of the claims to his bounty by all his family members including even the claimant and her son. I am unable to agree with this submission. Generosity to one's

adult siblings and an elderly mother are entirely understandable, but in the absence of an explanation or specific instructions, the disparity in the provisions or the effect of these bequests on the future and well-being including the basic needs of his wife and child raised questions.

39. Here was a man who had a wife and a young dependent son, though not his biological child whom he treated as his own. The defendant himself attested to the closeness of the relationship between the testator and Nicolli in an affidavit of 17th November 2009 following his death. The testator was responsible for all of Nicolli's needs including all financial provision and shelter. The defendant described it as a healthy "father and son relationship".

40. In the circumstances, the provision for Nicolli when looked at along with the bequest to his mother (the claimant) cannot be described as rational. In the case of the claimant, her evidence established a close and loving husband and wife relationship with the usual and expected challenges couples experience from time to time. On my assessment her evidence established her to be a wife committed to her husband's care and well being, who was devoted to him to his last days.

41. The claimant was not cross-examined on her evidence in this regard. She relied on all her affidavits filed in the connected proceedings. The defendant did not. The defendant did not raise any issue in respect of her behaviour or any reason why the testator her common-law husband of 13 years would seek to reduce her fair share in his

estate. Her cross-examination was limited to establishing her absence on both occasions when the wills were allegedly executed. What was left to her in the circumstances of their relationship has not been explained. It was little or nothing outside of what appears to have been a trust of 40% of his pension fund. The Testator could not have thought that that would be sufficient even to house her and a minor child far less to provide for their financial needs in the circumstances of their relationship and their financial dependence on him. This is against the background of what his estate comprised and when compared with the other bequests to persons who were not established on evidence to be dependent on him at all. Because of the testator's state of health and the suspicious circumstances I have outlined, I am not satisfied that what was signed indeed reflected the wishes of the testator.

42. There are other reasons for my finding that the defendant has not discharged the burden of proof. I find it significant that the defendant did not attempt to call either attesting witness to the will of August 7th 2009 especially in the circumstances of the later will being almost identical in terms. On August 7th 2009 Ms. Bazzey had thought it fit to have doctors at the hospital speak to the testator and to witness the first will, presumably to confirm his competence healthwise, to execute his will. One week later, after yet another procedure, the insertion of the feeding tube, no care was taken to ascertain his medical fitness and as to how his further decline affected his testamentary capacity. The burden was on the defendant to prove that it did not, but in the circumstances I find that more was required than the assessment of the attorney and the observations of the defendant and his wife.

43. As to the point made by Counsel for the claimant as to the handwriting of the attesting witness to the second will, I find on the authorities that even initials made by attesting witnesses would be sufficient if their intention was to witness the execution of the will, however I am not impressed that the witnesses, having been confronted with their names in block letters as opposed to signatures when clearly they understand the difference, insisted that what appeared were their signatures.

44. Some further doubt is thrown on the credibility of the attesting witnesses. The defendant said that the testator requested that both should witness his will at Ms. Bazzey's office, but Ms. Bazzey herself said something different. Ms. Bazzey also said that the wife remained in the car until she told the husband that two witnesses were required. If that is the reason Mrs. Toussaint had gone to Ms. Bazzey's office, it is highly unlikely that she would have remained in the car. These inconsistencies did not assist in dispelling the suspicion of the Court.

45. I find that the defendant failed to discharge the burden of proof that the testator had testamentary capacity on August 14th 2009 and on August 7th 2009or that his illness did not affect his soundness of mine, memory and understanding on both those dates so as to render both wills invalid.

46. The Court pronounces against the force and validity of the will dated August 14th 2009 and the will dated August 7th 2009 and declares that the deceased Bonaventure Toussaint who died on September 21st 2009 died intestate.

Dated this 24th day of January 2013

CAROL GOBIN
JUDGE