

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2013-02366

**IN THE ESTATE OF ERIC ELDRIDGE KIRTON
also called ERIC KIRTON, DECEASED and**

**IN THE MATTER OF THE WILLS PROBATE ACT CH. 9:03
AND
IN THE MATTER OF AN APPLICATION
TO PROPOUND A WILL IN SOLEMN FORM**

BETWEEN

**WINSTON PADMORE
(Legal Personal Representative of the Estate of Eric Eldridge Kirton)
Claimant**

AND

**ELIZABETH KIRTON-CRANE
Defendant**

Before the Hon. Madam Justice C. Gobin

Appearances:

Mr. M. Morgan instructed by Ms. K. Persad for the Claimant

Ms. J. Koorn instructed by Mr. C.A. Serrano for the Defendant

JUDGMENT

Background/The Parties

1. Mr. Eric Eldridge Kirton, an attorney-at-law died on the 13th October 2008 at the age of 98. He became a lawyer in his later years. Before that he was a Master at Queen's Royal College. He was revered as a gentleman and a scholar by his former students and by those with whom he interacted and socialised until the time of his death. He was a member of a lodge and attended its meetings. There too, he was held in high esteem. Among Mr. Kirton's oldest friends, was the

claimant, Mr. Winston Padmore. He was a former student of Mr. Kirton's in the 1950's.

2. Mr. Kirton was married for some time in the 1960's but the marriage did not last. It was dissolved in 1975. The marriage produced one child Elizabeth, (Beth) who is the defendant in these proceedings. Beth was about 9 years old at the time of the divorce. Beth added the name Crane (which is the surname of her mother's second husband) to hers before she attained the age of 18 through a legal process in the United States. She has kept it. She is not married and has no children. Beth's mother, the former Mrs. Kirton is about 74 years old, is in reasonable health and they remain close. Indeed because of certain health challenges which Beth now faces, her mother looks after her when she needs care.

Two Wills

3. In these contentious probate proceedings the parties seek probate of two competing documents. The claimant, Mr. Padmore, seeks probate of a will (the Padmore will) which is the first in time. It is in conventional form and was executed on the 8th March 2008.

4. The second (the Holder will) is a document which was produced by Yvette Holder. Her grandparents and Mr. Kirton's parents were old family friends. She referred to him as ("uncle Eric") and remained close to the Kirton family, including Beth. The second document is typed on Mr. Kirton's letterhead. On a generous

interpretation, it attempts to revoke any earlier will and to give Mr. Kirton's property at Broome Street (his home) to Beth. It also declares that Beth is his daughter.

5. Unlike the Padmore will, this document is not in standard form but since it purports to make a devise to Beth and since the defendant claims it was duly executed as required by law, I am prepared to treat it as an alleged will or testamentary document.

6. I shall consider first the Padmore will and indicate my findings on it. I shall then consider the Holder will. In the event that I find them to both be valid, I shall proceed to consider the effect of the terms of the Holder will on the Padmore will, that is whether it entirely revokes it or not.

The Padmore Will

7. This will was executed at Mr. Kirton's home on the 8th March, 2008. It was prepared by Senior Counsel Mr. Stanley Marcus, who had known the elderly gentleman both as a colleague in the legal profession, and a fellow member of their organisation. It was prepared on the basis of a draft will which Mr. Marcus claimed was submitted to him at a meeting which had been sought by Mr. Kirton. Counsel spoke with the testator, took his instructions, made some notes and some days later, attended Mr. Kirton's home at Broome Street, where arrangements had been made for its execution. Before it was executed, he read the will to Mr. Kirton

in the presence of Mr. Padmore and two attesting witnesses, Mr. Basil Ince and Mr. Selby Brown. Mr. Kirton approved it and it was executed.

Due Execution not an issue

8. It is convenient to note here, that the defendant concedes that this will was duly executed. The defendant's challenge to this will on the pleadings was made on grounds of undue influence, want of knowledge and approval and a reference to capacity through lapses of memory and understanding. For obvious reasons, this last plea was not pressed by the defendant. She is herself seeking probate of the will which was allegedly executed more than three months later, and closer to the time of Mr. Kirton's death.

Undue Influence

9. The undue influence plea was somewhat vague and thin. As I understand it, on the pleadings, Mr. Padmore was supposed to have gone searching through Mr. Kirton's private papers, he came across a very old letter which had been written by Beth's mother to her. It was written after her parents' separation and at a time when Beth was a child living in Trinidad with her father, while her mother lived in the United States. Her mother made certain suggestions in the letter to Beth as to how she should behave in order to have him allow her to return to the US. Among them was that she should tell Mr. Kirton he was not her father.

10. The defendant alleged that having come across the letter, Mr. Padmore gave it to the testator, who became upset and confused by the contents. He began to complain to people that Beth was not his child. The pleadings went on to state that Mr. Padmore seized upon Mr. Kirton's confusion and distress over the discovery so many years later of this letter. He, along with other members of family (who remained unidentified) manipulated the testator to disinherit his daughter. It was alleged that Mr. Kirton relied heavily on Mr. Padmore, whom he trusted and that Mr. Padmore disliked the defendant. On the basis of these allegations I was asked to find that the will was the product, not of Mr. Kirton's volition, but of Mr. Padmore's.

11. In a significant departure from the pleading as to Mr. Padmore's involvement in the discovery of the letter, Yvette Holder's evidence for the defence was that Mr. Kirton told her he discovered the letter himself while he was cleaning out his library and organising his books. It is not very clearly stated, but it seems Mr. Kirton had read it some time before but when he came across it the second time and it would have to be in 2008, he began to make the utterances as to Beth's paternity.

12. The case on the pleading was weak and quite frankly, it appeared somewhat far fetched especially since Mr. Padmore had no interest in the matter and I have found that he had had only limited interaction with the defendant throughout his

relationship with Mr. Kirton. He recognised her as Mr. Kirton's daughter. He had no other particular feelings towards her and certainly no ill feelings.

13. At the trial, no evidence of undue influence was lead. This plea ought never to have been put forward and it appears to have been advanced only to make veiled charges of impropriety on the part of Mr. Padmore, which I have found to be completely unsubstantiated and unjustifiable. In my assessment Mr. Padmore's conduct in all aspects of this matter has been irreproachable. The relationship which he shared with Mr. Kirton until the latter's demise was close but it was at all times defined by appropriate levels of gentility and decorum. I can well understand that Mr. Padmore has felt insulted by the allegations made against him in this case.

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The Padmore Will/Testamentary capacity

14. While the burden of proof on this issue was at all times on the claimant, the effect of the defendant's pleading as to alleged memory lapses and lapses of understanding in a sense heightened the burden. I noted before that the defendant could not be seen to press this issue. Not surprisingly therefore, no evidence was adduced by the defence to support the plea that at the date of the execution of the Padmore will Mr. Kirton suffered from such. He was, it is true, in his late 90's and physically frail in body as was to be expected.

15. The evidence that emerged appeared to support the claimant's case. In April 2008 Beth received copies of two deeds of severance that Mr. Kirton had made. She raised no issue as to his mental capacity then. The first time that the defendant mentioned any concern about her father's state of mind, was in an email in which she reported that he seemed to be a "little confused about his health among other things". This conversation with her father took place after the Padmore will was executed.

16. I find it significant that Beth, who spoke to him several times a month never observed any confusion prior to that time. Even in her conversation with her father following the receipt of the deeds of severance, she appeared to have raised no issue with him as to his intentions or his understanding of these transactions. She gave no indication that he appeared to be confused about those. When she asked what they were about, he was very clear in his suggestion that she should call Mr. Padmore, who by then had been appointed executor of the will and would have been aware of the contents.

17. The case ultimately turned on the credibility of witnesses. The evidence of Mr. Marcus, Mr. Padmore and Mr. Browne which I accepted, established that his long years notwithstanding, Mr. Kirton remained lucid, sharp in his thinking, competent to speak and discuss issues at least up to the date of the execution of the Padmore will. His last presentation to the lodge was in October, 2007 on the occasion of his birthday, and this was five months before he made the will. Mr.

Browne was able to recall the conversation he had with Mr. Kirton on the morning of the execution of the will at this home regarding George Padmore. The testator's ability to recollect was manifest. He was also mobile and well enough to meet his visitors as he did, and to entertain them with conversation and to offer a drink.

18. I accept the evidence of Mr. Marcus as to the circumstances under which he received instructions for the preparation of the will from Mr. Kirton himself. It was an obviously convenient way for a lawyer to give them. I consider it significant that at the same time that he gave instructions for the will, Mr. Kirton gave instructions for the severing of the joint tenancy of the Broome Street property as well as a property in Tobago he held jointly with the defendant. It confirms that he understood what he was doing and what he needed to do to avoid the legal effect of survivorship.

19. I find that he gave specific reasons for his decision to leave nothing for the defendant. He did not wish his half share and any part of his estate to fall into the hands of the defendant's mother. He indicated this very clearly to Mr. Marcus and his instructions and the terms of the will and the deeds of severance together achieved this primary objective. It is significant that the defendant has not seriously challenged his competence to make the deeds, when Mr. Kirton gave instructions for their preparation at the same time he gave them for the will.

20. I have noted before the defendant has no children and she is not married. She and her mother remain close. I have formed the impression that the divorce of Beth's parents was acrimonious and that unfortunate fighting over her custody and her affections in the early days made things worse. It is evident from the letter that her mother wrote to Beth that the former Mrs. Kirton, in those early days had little respect for Mr. Kirton and it seems his extended family. Some of the unsavory language used to describe them would undoubtedly have caused Mr. Kirton much embarrassment and distress, given the high esteem in which he was held in the community.

21. It is perhaps not surprising in those circumstances that the testator took and maintained the unforgiving position that he did regarding Beth's mother. It is unlikely, given what can be gleaned from the tone of it, that the letter is the only one or the only communication in which such allegations were made. While Beth says in later years her parents spoke civilly to each other, I believe Mr. Kirton never quite forgave her mother. As well, the adoption of the second husband's name must have caused Beth's father some hurt and this was confirmed by Yvette Holder.

22. But I reject the claim that Mr. Kirton was misled or had any doubts as to Beth's paternity. The tenor of her mother's letter is clear. Its purpose is obviously to encourage Beth to misbehave in order to get her father to send her back to her mother. I am not convinced that this letter was reread by Mr. Kirton in 2008, or

that it led to any confusion in his mind. Had that been the case he would have indicated the position to Mr. Marcus. His reason for “disinheriting” Beth had to do with her mother. I find too that Mr. Padmore never saw this letter prior to Mr. Kirton’s death.

23. The circumstances as to how the letter resurfaced so many years later remain hazy. Having regard to the contents, I believe Beth would have taken it back to the USA when she returned to her mother. It hardly seems likely that Mr. Kirton would have kept a copy it. But this letter has assumed a central part of the defendant’s case. It was held out as the reason for Mr. Kirton’s alleged “irrational actions” in making the will in the way that he did. In the light of my other findings as to Mr. Kirton’s state of mind, I reject this. This whole business of the letter seemed a bit contrived.

24. I returned to the circumstances of the preparation of the Padmore will. I find that Mr. Marcus made notes during his meeting with Mr. Kirton and within a number of days, attended his home where by pre-arrangement Mr. Padmore and the witnesses, who were members of the society of which Mr. Kirton had been a respected member, were in attendance. I accept Mr. Marcus’ evidence that he read the will aloud to Mr. Kirton in the presence of the witnesses and Mr. Padmore, and that Mr. Kirton confirmed that it accorded with his instructions. He acknowledged and approved its contents.

25. I found the cross-examination of the claimant's witnesses to be generally uneventful. I attached little significance to the omission of specific instructions regarding the residuary clause and Mr. Marcus' drafting one in the way that he did and for the beneficiaries. I accept he did this because he was very clear in his understanding from the testator's instructions that everything was to be left to the same beneficiaries a niece, Ms. Juliet Brooks and a nephew, Mr. Kirton.

26. I reject the suggestion that was made in the defendant's closing submission that Ms. Brooks gave instructions for any part of the will. This is completely at odds with the defendant's case that it was Mr. Padmore who did so, and indeed it was never part of the case that Ms. Juliet Brooks had anything to do with the preparation of the Padmore will. It is another aspect of this defendant's case, a belated attempt in closing submissions to make unfounded accusations, that I consider to be unfortunate and unwarranted.

27. I find that Mr. Kirton did indeed die testate, and that the will of 8th March 2008 was properly executed and that he did have the requisite testamentary capacity. Although she remained the half share owner of two pieces of real estate by virtue of inter vivos gifts made by her father, the defendant, Mr. Kirton's only child receives nothing under this will. She is understandably disappointed and entitled to question the fairness of it. But from the evidence it is clear to me that it was her father's express intention that his estate did not pass to her, to avoid any possibility of her mother ever having any control over it. This may seem harsh and

terribly unfair. But testamentary freedom allows this kind of disposition so long as the testator had the requisite capacity and I have found Mr. Kirton did.

The Holder Will

28. But this is not the end of the matter. I must go on to consider the Holder will, the contents of which I set out.

30th June, 2008

I, Eric Kirton, make this will this day, 30th June in the year 2008 and I wish to confirm that this document is my true will stating that I bought the property at 2 Broome Street, St. Clair from Phillip and Wilson Thomson and that any other document does not state my truth and my belief that this my last will and testament in which I give of my own free will and accord said property to Elizabeth Kirton-Crane who I swear now and at all times is my daughter.

*Signed
Eric Kirton*

The defendant sought probate of this will in her counterclaim filed on the 8th October 2013.

29. In response, in the defence to counterclaim filed on the 4th November 2013 the claimant put the defendant to strict proof that the Holder will was the testator's last will. Even in the absence of any challenge on specific grounds, this pleading was sufficient to cast the burden of proof on the defendant of due execution as well as testamentary capacity. (*Barry v Butlin 1838 II Moore 480*) Having considered the statements contained in the counterclaim as well as the

evidence that was led for the defence I find that the defendant failed to discharge the burden.

30. The Holder will is dated the 30th June 2008. The facts which were alleged in the Defendant's counterclaim regarding the testator's behaviour between the 15th June, 2008 clearly raised an issue as to his mental capacity.

31. They were as follows:

- (1) *On 15th June, 2008 the deceased was discovered sitting at his desk attempting to write on a sheet of paper on which his name and address was printed all the while mumbling that he had done something foolish. A copy of the said sheet of paper is hereto annexed marked "EC1".*
- (2) *On or about the 26th June 2008 when asked why he had severed the joint tenancy with the defendant, the deceased denied so doing. The deceased also stated that he had not made a will and asked for paper and a pen. Upon it being given to him the deceased then spoke aloud as if dictating to himself that he, Eric Kirton, declares that Beth (the Defendant), is his daughter.*
- (3) *His handwriting on the paper was mostly indecipherable. The deceased was then invited to dictate what he wanted to write which would be typed and returned to him. This he did and he signed that document in the presence of two (2) persons, Yvette Holder and G.A. Mentor, on 30th June, 2008. From the wording thereof the deceased it appears that the deceased intended it to be a testamentary document. A copy of the said document is hereto annexed and marked "EC2".*

32. The annexure EC1 which the defendant produced, on the face of it leads to one conclusion only, that at the time of writing, the writer was not capable of understanding what he was doing. The document is indecipherable and makes no sense. It reflects a level of obvious mental confusion on the part of the writer.

33. The evidence of Mrs. Holder established that that was not the only occasion on which Mr. Kirton attempted to write a document that was indecipherable. Less than two weeks later, she observed him attempting to do so again on the 26th June 2008. Significantly this is the day on which she says he dictated what he wanted on the Holder will. She did not produce what he attempted to write then, but she again described it as indecipherable.

34. From the statements of the defendant's witness, I have concluded on the 26th June 2008, Mr. Kirton's mental capacity was significantly diminished. Here was a scholar and academic who simply could not put his thoughts down on paper in a coherent manner. In those circumstances the evidence of Mrs. Holder that she invited him to dictate what he wanted and she took his instructions for the preparation of the Holder will aroused my suspicions. They were compounded by Mrs. Holder's failure to produce the instructions that were allegedly dictated, which she said she recorded and which the testator signed. She eventually produced a typewritten document dated 30th June 2008 on Mr. Kirton's letterhead, the "Holder Will".

35. How Mr. Kirton moved from being unable to put his thoughts down on paper, to providing coherent and comprehensible instructions, has not been established by credible evidence medical or otherwise. In the absence of such I therefore reject the defendant's case on the issue. My suspicions have not been dispelled.

36. Further, I am not persuaded that Mr. Kirton, a scholar and an attorney of many years experience would dictate his instructions (if there were such at all), to someone who was not an attorney. His niece worked at a law firm and he had at least one relative in the legal profession. Instructing attorney in this matter Mr. Serrano was someone with whom he had worked professionally, and presumably someone who could have been reached if Mr. Kirton needed him. Indeed Mrs. Holder was able to recall that a few weeks before he died, and from my understanding, after the Holder will had been prepared, the testator said he had been trying to contact Mr. Serrano. As to why she did not simply assist him to do so, or why she did not consult Mr. Serrano on the will she had prepared, was not explained. This account also begs the question as to Mr. Kirton's ability even to make a telephone call himself and to communicate at that date.

37. Further suspicion attaches to the Holder will itself. The form of it and the language, even the grammar causes me to question whether it could have been made by Mr. Kirton. The declaration that Beth is his daughter in a document of its nature is to my mind, odd. The affirmation of the relationship seemed to be a

matter which Ms. Holder believed to be of importance. That it appears in a document prepared by her, only increased suspicion.

38. The manner in which the Holder will surfaced and the timing of it has also compounded my suspicions as to the genuineness of the document. The fact that the defendant said she was not aware of it even after her father's funeral raised further questions, moreso when Yvette Holder said she sent her a copy soon after the alleged execution. It is inconceivable that the defendant would not have raised the existence of this will with Mr. Padmore or her attorneys following the funeral, if she had known of it, as she ought to have done by Mrs. Holder's account.

39. Again, on the issue of his capacity, the defendant herself introduced evidence of Mr. Kirton having suffered a series of mini strokes. She became aware of this only in May 2008 through emails from her cousin, Juliet, and she visited her father in June 2008. She discussed the results of scans which had been done in April 2008 and her concerns with him.

40. My own concerns over it have been compounded by the evidence of Mr. Padmore which I accept, that he detected a change in the testator's physical and mental capacity around the middle of the year, after the first will was executed. A special bed was required to keep him enclosed because he became very restless. Mr. Padmore went on to say that just past the middle of the year, the testator began spending more and more time in bed. He eventually became bedridden. At that

time his mind began to waver a lot. His mental state deteriorated until he could no longer recollect and he stopped talking. Mr. Padmore continued to visit Mr. Kirton at least once per week. I accept his assessment of Mr. Kirton's condition and find that in the months following the execution of the first will there was a rapid decline in Mr. Kirton's physical and mental health.

41. The defendant herself gave evidence of her visit in early June 2008. She bought him items such as adult pampers, a hospital bed, a commode and a wheelchair. This evidence supports my finding of Mr. Kirton's physical decline. The defendant introduced evidence of mini strokes but failed to provide any evidence as to their effect if any on his mental capacity. This is another reason for my finding that the burden of proof of establishing testamentary capacity in relation to the Holder will has not been discharged.

42. During the course of the trial several witnesses were asked to compare the signature of Mr. Kirton on the Padmore will as well as the deeds of severance, with the indecipherable writing and the purported signature on the second will. I consider that this exercise was of little assistance at the end of the day. From my own observations, the writing on the June documents is obviously different and appears to be far more unsteady. But even if the Holder will was actually executed by Mr. Kirton, and I do not believe that it was, I find that he lacked testamentary capacity to make a valid will from at least 15th June 2008, by which date this

former academic and scholar was no longer capable of putting his thoughts down on paper.

43. On the issue of due execution, it is convenient to state here that I reject the evidence of Yvette Holder. My assessment of her overall credibility has not been favourable. The failure to produce the second attesting witness in the circumstances of this case has added to my suspicion as to its preparation and execution. In the course of the proceedings, explanations as to the unavailability of Mrs. Mentor were inconsistent. It turned out in the end that she was always living in and employed in Trinidad as a teacher.

Disposition

44. There shall be judgment for the claimant. The counterclaim is dismissed with costs to be paid by the defendant on the prescribed scale. The Court declares that Mr. Eric Eldridge Kirton who died on the 13th October 2008 died testate. The Court pronounces against the force and validity of the alleged will dated the 30th June 2008. The Court pronounces for the force and validity of the will dated 8th March 2008.

Dated this 21st day of November 2014

CAROL GOBIN

JUDGE