

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2017-03033

IN THE ESTATE OF OWEN BLANCHE, DECEASED

AND

IN THE MATTER OF THE WILLS AND PROBATE ACT CH. 9:03

AND

IN THE MATTER OF AN APPLICATION
TO PROPOUND A WILL IN SOLEMN FORM

BETWEEN

ESTHER CHARLES

(Sole Executrix of the Estate of Owen Blanche, deceased)

Claimant

AND

EUTRICE BLANCHE

Defendant

Before The Hon. Madam Justice C. Gobin

Date of Delivery: January 07, 2020

Appearances:

Ms. Marcia Murray for the Claimant

Ms. Natasha Samuel for the Defendant

JUDGMENT

The Proceedings

1. In these contentious probate proceedings, I have to decide which of two (2) competing Wills propounded by the Claimant and the Defendant respectively is the true last Will of Mr. Owen Blanche (the testator). The Claimant's is the earlier Will dated 12/01/1979, which was made over twenty years before his death. The Defendant's is dated the 02/04/2001. That date is significant. It is the date on which the testator died allegedly at 3:00pm. The history of the relationship between each party and the testator, was not seriously disputed.

The Parties

2. The Claimant, Esther Charles, entered into a cohabitational relationship with Mr. Owen Blanche in or about 1975. Mr Blanche was at that time lawfully married to Eutrice Blanche the Defendant. The cohabitational relationship produced three children all of whom are now adults. The marriage entered into in 16/04/1960, produced four children including Allan Blanche who died on 29/12/2016.

3. The marriage between Mr. Blanche and the Defendant was not a happy one. In her amended Defence and Counterclaim (paragraph 7(a) on 23/04/2018 she stated that:

“from the very inception of her marriage she was the victim of constant physical, mental and financial abuse along with infidelity and as a consequence was oftentimes forced to flee from the matrimonial home for short periods of time”.

Mrs. Blanche accepted (on the pleadings F(c)) that Mr. Blanche and Ms. Charles did indeed commence an extra marital cohabitational relationship but she claims that the relationship ended in the mid 1990’s when he entered into another relationship with one Gracelyn-Ann Bernard.

4. Mrs. Blanche filed proceedings for the dissolution of the marriage (MCA No.220 of 1980) in which she named Ms. Charles as a co-respondent. The decree of the divorce was made final on the 25/4/1985. Mrs. Blanche’s claims for distribution of property were settled by consent, with the wife taking property situate at Lots No (6) and (7) Siewdass Street, El Socorro and No. 38 Sixth Street, Barataria. Mr. Blanche remained with Lot No. 5 Siewdass Street, Barataria, No. 12 Gloster Lodge Road, Belmont and No. 117 10th Street, Barataria.

Mr. Blanche’s state of health prior to the 29/03/2001

5. Mr. Blanche died at aged 67 at the Port-of-Spain General Hospital on 02/04/2001. He had been admitted to the hospital mere days prior to his passing. The cause of death which is recorded on the death certificate is “cerebro vascular accident Diabetes and Hypertension” which is commonly understood to be a stroke. The evidence established that the last one was the fourth stroke that Mr. Blanche had suffered. Ms. Charles claimed that the third which he had in 1999 had left him severely debilitated and in need of day to day assistance for his personal care including provision of meals etc. Ms. Charles who accepted he (Mr. Blanche) was in fact having a relationship at the time with Ms.

Bernard said his paramour brought him back to her (Ms. Charles's) home after that event indicating, she could not look after him. Ms. Charles said after six (6) months Mr. Blanche returned to his property at 117 10th Street, Barataria but that she had to provide daily care for him at a cost of about \$200.00 per day.

6. I did not consider Mr. Blanche's physical state after 1999 to be very much in dispute. In the original defence filed on 08/12/2017, previous attorney pleaded (at Paragraph 9)

"By the early 2000 the testator's health began failing and it was the Defendant along with the party's son Allan Blanche who took on the role of caregiver with the responsibility for his day to day care including but not limited to meals, laundry, grooming and doctor visits".

While the issue as to who took care of him remained joined, it was accepted that he was not able to physically take care of himself. This suggests to me at aged 65 this gentleman who had previously been a successful and active businessman had been left significantly physically incapacitated. The Defendant in her evidence claimed that she and Allan started assisting him in 1999.

Mr. Blanche's state of health on admission to hospital

7. On 29/03/2001, five (5) days prior to April 02/2001, Mr. Blanche was admitted to hospital. He died on the 02/04/2001 at 3:00pm according to the defence of Mrs. Blanche. Mrs. Blanche claims he was taken to the hospital by the ambulance because he complained of feeling unwell. She claims he was lucid and conscious until his death. This claim was supported by a witness, a friend of the deceased Mr. Andy Joseph who visited him a few times including on the last day of his life.
8. On the other hand Mrs. Charles claimed that for the last days since he was hospitalised until his death he was unconscious and unable to communicate. She said she was not allowed to visit him. Allan had security guards preventing her from getting close to him. From a distance she could see he was not moving. In a pre-action letter written on her behalf, the Claimant alleged that she and her children found him to be incapacitated when they attended his bedside on the date of his admission on 29/03/2001. She claimed that from the following day to the end, she was prevented from visiting him. I have found no material inconsistency in the claimant's evidence on this aspect of the matter. Her evidence as to her observations on the first day of his admission has not been seriously undermined.

I have assessed the credibility of the parties and their claims, I found the evidence of the Claimant as to his condition to be preferred.

The Wills

9. On the 11th June, 2003 the Claimant filed an application for a Grant of Probate. The Defendant made no immediate attempt to establish the later will. Instead she together with Allan proceeded to file a series of caveats listed on the following dates:-

- 1) 23/06/2003
- 2) 17/12/2003
- 3) 13/08/2004
- 4) 03/11/2016
- 5) 05/05/2017

None of the caveats referred to a specific Will on the date of it, under which the Caveators claimed to be entitled "on testacy". This was in my view unusual and raised an obvious question as to whether there was a Will in fact.

10. It is convenient to set out the terms of the two (2) Wills.

"Ms. Charles Will"

"This is the last will and testament of Owen Blanche of 6 Siewdass Street, El Socorro, San Juan, Trinidad, Proprietor.

I hereby revoke all former wills and testamentary dispositions heretofore made by me and declare this to be my last will and testament.

I nominate and appoint my friend ESTHER CHARLES (nee Poban) of 127 Tenth Street, Barataria, Trinidad, to be sole executrix of this my last will.

I declare that my wife Eutrice Blanche has for the past twelve years been leaving my home and returning without my consent. Since October 1978 she left my home without my consent or authority and has not yet returned.

I give devise and bequeath all my estate real and personal whatsoever and whosoever including my freehold property situate at No. 117 Tenth Street, Barataria, Trinidad, unto the said ESTHER CHARLES (nee Poban) absolutely.

IN WITNESS WHEREOF I have hereunto subscribed my name to this my last will and testament this 12th day of January in the year One Thousand Nine Hundred and Seventy-Nine".

11. “Mrs. Blanche’s Will”

“THIS IS THE LAST WILL AND TESTAMENT of me OWEN JOHN BLANCHE of #117, 10th Street, Barataria, in the island of Trinidad.

I hereby revoke all former wills, codicils and Testamentary instruments or disposition heretofore made by me and declare this to be my Last Will and Testament which I make this 02nd day of April, in the Year of Our Lord Two Thousand and One.

I hereby appoint EUTRICE BLANCHE of #6, Sieudass Street, El Socorro Road, San Juan, in the island of Trinidad, to be the Executrix and Trustee of this my Last Will and Testament and direct that she shall pay all my just debts, funeral and testamentary expenses as soon as possible after my death.

I declare that I am seised and possessed of:

i. House and land situate at #117, 10th Street, Barataria, in the island of Trinidad.

I GIVE DEVISE AND BEQUEATH to EUTRICE BALNCHE and ALLAN BLANCHE my house and land situate at #117, 10th Street, Barataria, in the Island of Trinidad, for their absolute use and benefit in equal shares.

All of my real and personal property whatever and wheresoever situate which is not here or by any other will and codicil hereto otherwise specifically disposed of, I give devise and bequeath to EUTRICE BLANCHE and ALLAN BLANCHE for their absolute use and benefit in equal shares.

IN WITNESS WHEREOF I the aforesaid testator OWEN JOHN BLANCHE have hereunto affixed my name to this my Last Will and Testament this 02nd day of April, in the Year of Our Lord Two Thousand and One”.

12. The earlier Will was prepared by Attorney-at-Law Mr. Charles Maing. The affidavit of due execution which was filed in the claimant’s non-contentious application **L1402/2003** established due execution. These proceedings were referred to at the trial. The search in the Depository of Wills established that the earlier Will was deposited on the 12/01/1979 the very day on which it was made. It remained there until Mr. Blanche’s death. In the circumstances the Clamant sought to establish that Mr. Blanche never sought to revoke it and it remained effectual.
13. The Defendant did not challenge the execution of the earlier Will. She claimed essentially that the later Will revoked it and that in any case the transfer of the property identified as 117, Barataria from the testator to Gracelyn-Ann Bernard subsequent to the date of the earlier evinced an intention to revoke it.

14. **The issues for the court's determination were:-**

- 1) Whether the Testator had testamentary capacity on 02/04/2001 to execute the later Will.
- 2) Whether he knew and approved the contents of the Will.
- 3) Whether there were suspicious circumstances surrounding the preparation and execution of the later Will and if yes, whether the Defendant had through evidence dispelled such suspicion.
- 4) Whether the earlier Will was revoked by the deceased having sold the subject property 117, Tenth Street, Barataria (Defendant SOI 06/06/2019).

Issue 4

15. The last issue (No.4) can be disposed of summarily. The evidence established that Mr. Blanche conveyed this property to Mrs. Charles, had her execute a power of attorney in his favour to deal with it, using the power without her consent or knowledge, he transferred it to Gracelyn-Ann Bernard in May 1996 and she subsequently reconveyed it to him in February, 1998. The reason for the series of transactions is immaterial in my view. The property formed part of Mr. Blanche's estate at his death. Indeed in the later Will there is a specific provision relating to it. This revocation argument is also weak in my view because the earlier Will also contained a residuary clause in the Claimant's favour. Even if Mr. Blanche had not managed to regain possession of No. 117 10th Street, Barataria, the Claimant would still be entitled to the remainder of his estate, real and personal under the terms of the earlier Will.

16. On the remaining issues, I have considered the well-established relevant law and the evidence and find that Probate of the Will dated 02/04/2001 must be refused. In the circumstances, I must declare that Mr. Blanche died testate and pronounce the force and validity of the Will executed on 12/01/1979.

My reasons for rejecting the validity of the later Will are as follows:

17. Insofar as I have had to resolve issues on the credibility of the witnesses, I shall indicate here that I prefer the evidence of the Claimant.

18. This alleged Will was a classic “death bed” Will executed mere hours before the testator’s passing. In the circumstances of this case I consider the absence of the medical evidence as to the Testator’s capacity to be extremely significant. He had suffered a fourth stroke. The third had left him incapable of looking after his personal needs since 1999 about two years before his death. Both sides agreed he had to be looked after. The Claimant’s evidence that it was her brother Carlton discovered the testator unconscious on 29th March and that it was he who called the ambulance which transported him to the hospital was not refuted. The defendant has proffered no other explanation as to how he was admitted to the hospital other than to allege in the pleadings he complained of feeling unwell and was taken there.

19. The Defendant and her witness, Mr. Andy Joseph, claimed that the Testator remained conscious and lucid on the 02nd April up to the time of the execution of the Will. Both the Defendant and Mr. Joseph said he was talking as he would normally though Mr. Joseph said he spoke very softly. This was the sum of their evidence of capacity. The witness who took execution, law clerk Mrs. Britto George, could only rely on her identification of her signature on the reverse side of the photocopy of the Will and her insistence that she would have, in accordance with her the usual practice ensured the testator understood it when she read it. She was adamant and would not have allowed an unconscious man to affix his mark.

20. I did not in the circumstance of this case consider this to be sufficient. The Testator allegedly affixed a thumbprint. There has been no explanation as to why in 2001 a gentleman who was a businessman and who executed a deed with a signature in 1998 was incapable of writing it three years later. This raises unanswered questions about his capacity. It is well established that burden of proof of capacity is on the party seeking to propound the Will. In the circumstances of the execution of a death bed Will, evidence of the party who is indeed a beneficiary as well as an executrix and a family friend whose independence is questionable in my view, was simply not sufficient to discharge the burden.

21. While it is not essential that medical evidence is produced to answer every case in which capacity is raised, in the circumstances of this case, it would have been easily available at the time of execution. The absence of hospital records relating to the patient’s history between 29/03/2001 and his death

on 02/04/2001 do not assist the Defendant. While they may not have been available at the time of the trial, it is hard to imagine that given the fact that the Testator died within hours of alleged execution, that efforts would not have been made to have the records preserved immediately, or at least to have requests made for them at that time of the filing of the first caveat. I am left to draw the inference that the medical records would not have supported the Defendant's case on capacity. The failure of the alleged witness to the death bed Will, Head Nurse Marcelline Sutherland, to appear as a witness at the trial has only compounded the Defendant's difficulties.

22. Ms. Britto-George's evidence was that she was able to recall nothing of the transaction beyond identifying her signature and to give evidence of what she would have done in accordance with her training and practice. Her signature appears on the backside of the photocopy of the Will. Given her inability to recall (understandably after 18 years or so) and the unavailability of any other contemporaneous note of what transpired on that day even for her, the records of her employer an attorney at law, it cannot be said that Ms. Britto-George has properly identified even the terms of the Will. Her evidence makes no connection between what appears in one side of the page and the other. Had she been able to produce evidence of even instructions for the preparation of the Will, some kind of consistency may have been established. But there was none.

23. This leads to the issue of want of knowledge and approval. This is a curious case in which although Ms. Britto-George was employed by and left the office of an attorney to attend the hospital to take execution of the Will, there is no evidence of the Testator having given instructions for the preparation of the Will. Mr. Joseph said he heard Mr. Blanche say to Allan that he wanted to make a Will. This suggests he made none. Allan left and returned with a lady who came with a file and a Will which was already prepared for execution. There is no evidence that prior to 02/04/2001 this Testator had given instructions to the attorney. Ms. Britto-George had not taken instructions, nor had she typed the document.

24. What is clear is that Allan, who with his mother Mrs. Blanche were the only two beneficiaries of the Testator's bounty under the terms of the death bed Will, was instrumental in the making of the Will. The Defendant's case was that it was Allan that the Testator asked to contact the lawyer to "finalize

his Will". Andy Joseph said he was asked to get the lawyer "to make the Will". It was Allan who went to the lawyer. There is no evidence that Mr. Blanche had a professional relationship with the attorney. The Defendant had said that Ms. Beckles had done work for her previously. It was Allan who returned with a young lady, Ms. Britto-George with a prepared Will. It was Allan who made the request to the alleged witness, the Head Nurse, to attest to the signing. It was Allan who allegedly kept the Will and who misplaced it, seems sometime in 2016. It was Allan to whom Mrs. Blanche claims she passed all the responsibility regarding probate and legal matters arising out of the later Will.

25. The amended Defence and Counterclaim filed 21/02/2019 stated this – Paragraph 8(viii)

"The Testator's son was instrumental in ensuring that his father's wishes were fulfilled in relation to the execution of the Will and the Defendant took a backseat".

If more was indeed to establish that Allan was instrumental, in her evidence Paragraphs 18 of her witness statement, the Defendant said –

"My son was instrumental in ensuring that his father's wishes were fulfilled in relation to the execution of the Will and I took a backseat".

I have formed the view that by the pleadings and this evidence, the defendant was attempting to distance herself from the preparation and execution of the Will by placing Allan in the middle of it. But I was not impressed.

26. This is a classic case for the application of the rule that "a person who is instrumental in preparing a Will under which he is a beneficiary has to satisfy the court on the balance of probabilities that the Testator knew and approved the contents". Indeed, on my assessment of the Defendant, I believe that she was as much involved as was Allan in the preparation of the Will, though it was Allan who did the footwork. I was not impressed by Mrs. Blanche's attempts to put physical distance between herself and the Testator. I have found her to be a somewhat cunning lady whose aim in all of this was to get her hands on every bit of property that the Testator had left, so many years after their divorce and the settlement of her claims in the matrimonial proceedings.

27. I reject her evidence of her taking care of the deceased after 1999 and of performing his household chores. I prefer the evidence of the Claimant as to the relationship between Allan and his mother and the deceased. In particular, the Defendant's conduct in changing the locks to 117 10th Street, Baratavia upon the Testator's death on the basis of a Will and in respect of which she produced on a copy some sixteen years later has not impressed me. The fact that she continuously filed caveats without identifying the date of an alleged Will raised questions in my mind as to whether the Will even existed. She also managed to buy the freehold in the Gloster Road property (the only other real estate left by the deceased) under the feet of the Claimant. Her explanation as to her inaction because she left everything in Allan's hands too did not impress. I have not assessed this Defendant to be a helpless lady who left business dealings to her son, and the explanation as to the failure to locate the original Will too, raised more questions in my mind.

28. There are several circumstances surrounding the preparation and execution of this Will which have excited the suspicion of the court and the suspicion has not been dispelled.

I enumerate them once more.

- 1) This was a death bed Will – the Testator died within hours of alleged signing it.
- 2) He was in hospital and there is no medical evidence to establish he was conscious or capable of making the Will.
- 3) He was clearly seriously ill – he had suffered a fourth stroke, and the third had left him incapacitated.
- 4) There is no evidence of him having given instructions for the preparation of the Will. There is no evidence as to how the Will came into existence.
- 5) I have found his son Allan, one of the main beneficiaries as well as the Defendant were instrumental in having it prepared.
- 6) The Will referred to the Testator as Owen John Blanche. The Testator did not usually use his middle name. It was a name which the Defendant would have known him to have as a middle name.
- 7) The Testator alleged used a thumbprint – there is no explanation as to why he was incapable of signing his name. He executed a deed in 1998 in his usual signature.

- 8) The alleged will does not indicate it was read over to the Testator. The execution clause states “Acknowledged by the above named Owen John Blanche, the Testator who has hereunto affixed his mark as and for his last Will and Testament in the presence of us both at the same time who at his request and in his presence and in the presence of each other have hereunto subscribed our names as witnesses”. This suggests that the person who prepared the Will was aware that the Testator could not read it himself – nor as it turned out could not sign his name.
- 9) There is no credible reason for Owen, wanting on his death bed, to make any further provisions for the Defendant after their divorce and a settlement that she consented to. There is no reason why of his seven adult children he would chose to benefit Allan over and above the others.
- 10) There is no credible reason for the change in the terms of his previous Will regarding the property at No. 117 10th Street, Barataria. The evidence established that even after he had managed to have ownership of it returned to him, he took no step to retrieve the Will he had lodged so many years before.

29. The Defendant has failed to remove the suspicion, and the conscience of the court is not satisfied that the later Will is indeed the true last Will of the Testator. The Defendant has failed to prove that the Testator had knowledge of and approved the contents of the alleged Will.

30. There is an aspect of the alleged execution to which I must return. Ms. Britto left the chambers of attorney at law who had previously acted for the Defendant. She said she took the execution of the Will and signed as an attesting witness along with someone whose name appeared on the Document. The signature is not entirely legible. Ms. Britto did not take the full name or indeed any proof of identification as one would expect she would have done. In 2004 she signed a statutory declaration. The formatting and the obvious deletions on the document at every point at which reference is made to the name of the alleged witness have raised even more doubt as to who, if anyone indeed, allegedly witnessed the Will.

31. Had there been proper execution, one would have expected that upon her return to her office the witness would have made some contemporaneous note of what she had done, including the name of the witness for the attorney's records. The absence of any contemporaneous note or report of what transpired at the hospital and the obvious uncertainty even as to the name of the witness in the document prepared in 2004 heightened the suspicion of the court.

32. **Disposition**

- (1) The court declares that Mr. Owen Blanche who died 02/04/2001 died Testate.
- (2) Probate of the Will dated 02/04/2001 is refused.
- (3) The court declares that the Will dated 12/01/1979 is the last Will of Owen Blanche.
- (4) Probate of the Will dated 12/01/1979 is granted in solemn form.
- (5) The Defendant is to pay the costs of the claim and the counterclaim.

Order

33. Following the pronouncement of the order the parties entered the following order by consent:

1. The Defendant to grant vacant possession of the property at #117 10th Street, Barataria to the Claimant on or before 28/02/2020.
2. The Defendant to pay costs in the sum of \$28,000.00 on the claim and counterclaim.
3. The Defendant to pay the sum of \$50,000.00 to the Claimant for the chattel house at #12 Gloster Road, Belmont.

**Carol Gobin
Judge**