REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2017-2557

IN THE MATTER OF
THE WILLS AND PROBATE ORDINANCE CH. 8 NO.2

AND

IN THE MATTER OF
THE ESTATE OF THOMAS SIMON, DECEASED

BETWEEN

MICHAEL WILLIAMS

Claimant

AND

PATRICIA PATRICE

Defendant

Before The Hon. Madam Justice C. Gobin

Date of Delivery: March 12, 2019

Appearances:
Ms. Keisha Peters for the Claimant
Mr. M. O'neil for the Defendant

REASONS

Background

1. By this action the Claimant Michael Williams, sought probate of the alleged will dated 28th October 2014 of his father Thomas Simon. Mr. Simon died of complications of uncontrolled diabetes on 2nd June 2015 at the age of 83. The Defendant, Patricia Patrice is a daughter and one of several children of the Deceased entitled to a share in his estate on an intestacy.

2. By her Defence and Counterclaim raised issues of testamentary capacity, and want of knowledge and approval of the contents of the will. The Defendant sought a declaration that Mr. Simon died intestate.

3. The Defendant failed to comply with the directions for the filing of Witness Statements and managed not to file the appropriate application to avoid the consequences of her failure to do so on two occasions. In the circumstances, the Defendant had no positive case with evidence to put forward in the proceedings. The law is well established however that the burden of proof lies on the Claimant in this matter. Even in the absence of a positive case for the defence the Claimant had to address certain issues raised on the pleadings. The Amended Defence and Counterclaim as well as the Medical Report dated 10th June 2014 which was attached to the Claimant's own Witness Statement, and the evidence of Dr. Vin Sen Chiang raised issues of mental capacity as well as want of knowledge and approval of the contents of the will. In the circumstances, the Claimant could not establish the will by simply proving due execution. These matters having been raised the onus shifted once more to the Claimant as the propounder of the will.

4. The broad principle is that it is essential to the validity of a will that the testator should know and approve of its contents. In determining whether the Claimant has discharged the burden of proof I have had to consider whether any suspicion attaches to the document which is said to be the will.

5. The will was prepared by attorney at law, Mr. Ramesh Persad Maharaj at his office at No.116 Frederick Street, Port of Spain. Mr. Persad Maharaj is an attorney of many years' experience. He disclosed that not only did he share a professional relationship with the deceased, they were

business partners and friends. Mr. Persad Maharaj is also the attorney on record on the application for the grant of probate as well as the attorney at law on record in these proceedings.

6. Counsel for the Defendant cross-examined the attorney on these various relationships and roles, suggesting that they may well having given rise to a conflict of interest. The fact that the attorney and Mr. Simon were friends as well as in a professional relationship, even business partners was not in my view enough to raise any suggestion of conflict on suspicion. On the face of the document, Mr. Persad Maharaj did not take any benefit from the will.

7. But further cross examination both of the attorney and the Claimant raised an issue which gave rise to a suspicion which I regret to say was not dispelled at the end of the day and this among other things has left me in doubt that this was indeed the true last will of the testator.

8. Mr. Simon became Mr. Persad Maharaj's client in 1972 on thereabouts. They had only one business transaction. They purchased a piece of land jointly in 1980. In his Witness Statement, Mr. Persad Maharaj gave no further information about this land transaction. The evidence established that Mr. Persad Maharaj was not the testator's only attorney. The Claimant's Bundle of documents disclosed no recent transactions other than a power of attorney which was prepared and allegedly executed on the same date of the will. The other legal documents disclosed were prepared by other attorneys. Some dated as recently as 2013/2014.

9. On the date of the alleged execution, Mr. Simon turned up at the attorney's office with the Claimant Michael and Michael's daughter, Keisha William at about 2:00 p.m. According to the attorney, he saw Mr. Simon in private and took written instructions for the will. He said that Mr. Simon did not look 100% physically fit, he had a walking stick, but was alert and coherent. The attorney's

Witness Statement does not make it clear that when he took the written instructions that Michael and Keisha were not present (paragraph 6 – Witness Statement of Ramesh Persad Maharaj). He does say specifically (paragraph 8) that Michael, Keisha and Ms. Mc Clean, one of his employees remained in the waiting room while the will was being prepared and signed.

10. Mr. Ramesh Persad Maharaj and Ms. Lai Ying Chiang, his Clerk witnessed the execution of the will. Ms. Chin read aloud the contents of the will in their presence and it was executed by Mr. Simon. Ms. Chin who remains in the attorney's employ even until today. No witness statement was produced on her behalf. In the circumstances of the document itself not indicating that Mr. Simon read it on had it read over to him this omission assumed some significance.

11. The written instructions which were produced in Mr. Persad Maharaj's hand and signed by Mr. Simon were admitted into evidence. The instructions contained few details of any bequests. They indicated an address which is not known to be the testator's address. The instructions read as follows: -

> "Tuesday 28/10/14
>
> I Thomas Simon of 10 Coronation Street, St. James do hereby instruct Mr. Ramesh Persad Maharaj my attorney of several years to prepare my last Will and testament in a following terms: -
>
> I appoint Michael Williams as sole executor. I appoint Michael to look after Kerwin. I give my granddaughter Keisha Lot.6 Roxborough Street. I give Kevin Simon my son, Lot 10 Roxborough Street. All my property I give devise and bequeath to Michael Williams. All my other property I sign to Michael Williams including my Morvant Building Construction Company.
>
> Dated 28/10/14."

12. The will was typed immediately afterward. A comparison of the terms of the will and the instructions raised questions in my mind. Significantly the will contained a statement as to why the testator made no provisions for his wife and remaining children. It stated he had been separated from his wife and children except Michael Williams and Kerwin Simon, for more than 34 years. The inclusion of this clause which did not appear in the written instructions was significant in my assessment. The documentary evidence which clearly establish the continued involvement of the testator's wife Sukhmati and other children of the deceased as directors and shareholders of his companies which continued in operation even up to the time of his death. The inconsistency in the statement which appeared on the will with the reality of their continued involvement in his business raised further questions as to whether Mr. Simon appreciated that he was leaving almost the entirety of an estate valued 9 million dollars to one child to the exclusion of others who were objects of his family affection.

13. On a balance of probabilities I do not accept the evidence of the attorney further instructions which were given orally in this regard. Specific instructions to omit to provide for other members of the family and the reasons for disinheriting them would have been sufficiently important to be specifically included in the written instructions which the attorney took care to have the testator sign. Michael himself gave no evidence of any strain in the relationship between his father and Sukhmati and his other siblings. The absence of such evidence went to the issue of testamentary capacity. Could it be said confidentially that Mr. Simon understood the claims of his family to his bounty? I think not.

14. The will included by name, several companies which had not been identified in the written instructions. The documents disclosed in the Claimant's bundles indicate that Mr. Persad Maharaj was not the attorney who was acting for the companies. Indeed other than the power of attorney which was also allegedly executed on the date of the execution of the will, 28/10/14, there was no evidence of any other professional meeting between Mr. Persad Maharaj and Mr. Simon. Mr. Williams stated that the testator returned to Mr. Persad Maharaj two days after the execution of the will in connection with the sale of another parcel of land, but the attorney gave no evidence of this in his witness statement. That parcel of land or the transaction has not been identified.

15. Further the will itself made no specific mention of what turned out to be a property of significant value – which was identified by Mr. Persad Maharaj and included in his inventory. It is property described at item (i): -

> (i) One half share of all and singular that piece or parcel of land situate in the ward of Cunupia in the island of Trinidad comprising 10 acres, 2 rods and 29 perches and bounded on the north by lands of Jacelon, on the south partly by the Cunupia River partly by Chin Chin Road.

16. While Mr. Persad Maharaj did not say this in his evidence in chief, it turns out that he himself was the owner of the other half share of this parcel of land. This by itself given the various roles Mr. Persad Maharaj played, may only have required an increased level of scrutiny, but the attorney's evidence as to the status of this parcel of land became more relevant to the circumstances of the preparation on execution of the will.

17. First it seems odd that given that Mr. Persad Maharaj was aware of the property and owned a half share in it, that it was not specifically mentioned, but was merely included in the residuary estate.

Then under cross examination when he was asked about it Mr. Persad Maharaj said that the property had been mortgaged to the First Citizen Bank which had sold the entire thing some time a long time before. The attorney went on to state that Mr. Maharaj believed that one half of the property still belonged to him. The Claimant too indicated that his search revealed that that property had been sold by First Citizen Bank but that Mr. Maharaj's halfshare "was still available." He added that he was informed (by the attorney) that after this case (the instant proceedings) we (I understood this to mean he and the attorney) can take any steps in relation to it.

18. The inconsistency in the statement that the jointly owned property had been sold by the mortgage prior to the making of the will and the inclusion in the estate was not satisfactorily explained especially since the attorney ought to have had it in his contemplation if he was preparing Mr. Simon's will. What emerged was that there was some expectation that following a grant of probate in these proceedings steps would be taken to recover some part of it. These steps would have benefitted.

19. There may have been nothing wrong or suspicious about this had there been full disclosure by the attorney and had the particulars or even the intention been alluded to by the testator in his written instructions. This evidence raised a suspicion as to whether there was an undisclosed benefit to the attorney who prepared the will. Michael's evidence that after this case was finished he and the attorney would take steps in relation to that property raised a suspicion that the will may have been prepared with that in mind. That could quite simply have been stated if Mr. Simon could have taken steps during his lifetime against the bank then surely both he and the attorney would have explored their options during his lifetime. That would be if he even had such within his contemplation. Michael's evidence on the particular transaction is based on what he was told by

the attorney who included it in the inventory. He confirmed that after the outcome of this case, they intend to take steps.

20. Michael evidence of what transpired on the day that he went to Mr. Persad Maharaj's office raised some doubts as to credibility of his account. First, he says he did not know the attorney the purpose of the visit. His daughter Keisha Williams accompanied them. Keisha who was the Company Secretary had taken along the seal of Morvant Building Construction Company. Michael was one of two directors of the company. The other was Mr. Simon, the testator. I find it hard to believe in those circumstances that Michael was unaware of the business that Mr. Simon went to transact, even as it related to the power of attorney in his favour. Why would Mr. Simon prepare it and not tell him about it. Why would his daughter who had prepared by taking the seal along for the visit not mention it? These questions though they arise in relation to the power of attorney which the testator allegedly prepared on the same day, raise general suspicious about the circumstances surrounding the preparation and execution of the will. Michael was attempting to distance himself from knowledge of the preparation of the will but the evidence that he knew nothing did not see credible, and the attempt raises a more significant question of, why.

21. What compounded the suspicion is that according to Michael he returned to the attorney's officer a couple of days later in relation to a parcel of land that was being sold. The attorney provided no evidence of this transaction. He said in the attorney's presence Mr. Simon indicated he had appointed him executor of his will. He said there and then he "was informed that property would also be given to him on condition that he took care of his mentally challenged brother Kerwin Simon," He said he agreed to the condition and they continued their consultation. According to him it is only at that point that his father told him he had given him a power of attorney to act on

behalf of the company. Mr. Persad Maharaj claimed not to have heard this exchange at all. By the time this conversation would have taken place if it did, the will would already been executed. The Claimant's agreement to the condition was therefore meaningless.

22. The will does in fact appoint Michael to look after and to care for Kerwin. Far from imposing the obligation as a condition, it gives the entirety of the estate absolutely to Michael save and except for two specific request to Keisha–Michael's daughter and the testator's son Kerwin. This apparent inconsistency has raised a further question in my mind as to whether the testator did in fact understood and approve the contents of the will and whether what he signed indeed reflected his intentions.

23. And most significantly, the issue of the testator's mental capacity was raised in the pleadings as well as on the evidence in support of the claim. Michael said his father was of sound memory mind and understanding up to the day he died. He made independent financial and business decisions to the end. This raises a question as to why then would he execute a power of attorney in Michael's favour at all and only in relation to a company of which Michael was already a director.

24. But Michael introduced evidence that his father had an assessment conducted by his personal doctor, Dr. Vin Sen Chiang on 10th June 2014 and it was found he was fully "compos mentis". The doctor gave evidence consistent with his report. It turned out that Michael himself had taken his father to the doctor's office on that day. The doctor, not Michael, indicated that he believed that relatives had been saying he was going senile. There was no evidence of which of his relatives had been saying this. I considered it extremely unusual for someone to attend a doctor's office for such a report – especially if the patient is independent and conducting his business, financial and

personal affairs as he usually does. This visit was not in preparation for an imminent transaction. The will was allegedly executed several months after the June visit, in October of that year.

25. But the doctor's general conclusions in the report and the materials on which he based them were not forth coming. There was no evidence of the particular test which the doctor applied – nor were the testator's scores produced. The doctor was allowed to refer to his notes. These disclosed that he had not seem Mr. Simon for three years prior to that visit. He had never made a diagnosis of and was unaware of Mr. Simon's diabetic condition (from which he eventually died). Neither side sought permission to admit the doctor's notes in evidence.

26. In the circumstances and in the absence of the relevant material I am not inclined to attach much weight to the report. The testator had not been a regular visitor to Dr. Chiang. For his diabetic condition he visited the Health Centre for treatment. A report from providers who saw the testator more frequently may have been of more assistance to the claimant's case. The Doctor's office was on Frederick Street as was Mr. Persad Maharaj's. Given that there had been some question of senility in June which had caused the visit to Dr. Chiang, and that the Doctor had specifically indicated his findings "at that time", it would have prudent and practical for the Claimant to have the testator assessed more contemporaneously to the date of the execution of the will.

27. The doctor is a general practitioner and while it is not impossible for a general practitioner to make an assessment where he is applying tests and making a conclusion as to the mental capacity of a patient on the basis of scores, I would first want to know that the tests are accepted for current standard in Trinidad and Tobago, and I would have to see the scores. There was no evidence in the report of any verbal discourse which would indicate alertness to his circumstances of the testator at the time of his assessment. The details of the methodology have not been provided. In

the circumstances, of my findings above I am not satisfied that the will dated 8th October 2014 was the true last will of Mr. Thomas Simon.

28. Probate of the will dated 8th October 2014 is refused. The Court declares that Mr. Thomas Simon who died 2nd June 2015 died intestate. The Claimant's case is dismissed. In the circumstances, of the repeated failure of the Defendant to comply with the directions of the Court I am not inclined to make an order for full trial costs – the Claimant will pay the Defendant's costs in the sum of $5,000.00.

Carol Gobin
Judge