

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2009-03876**

**IN THE ESTATE OF  
ANACLETUS LYNCH**

**Also called**

**ANACLETUS SAMUEL LYNCH**

**Late of #1 Haven Park, La Seiva Village, Maracas**

**BETWEEN**

**ALETHEA MC COLLIN**

Claimant

**(One of the Executors of and Beneficiaries  
Under the Will of ANACLETUS LYNCH**

**Dated the 15<sup>th</sup> day of March 2007)**

**By her Duly Appointed Attorney**

**KOFI APPLEWHITE**

**AND**

**PETER LYNCH**

**Also called**

**PETER HAMILTON LYNCH**

Defendant

**BEFORE THE HONOURABLE MADAM JUSTICE JUDITH JONES**

**Appearances:**

Mr. K. Hogan instructed by Ms. K. Hogan for the Claimant.

Mr. C. Blaize instructed by Ms. M. Blaize for the Defendant

## REASONS

The claimant is the daughter and the defendant is the brother of the deceased. At issue are two wills. The first was executed by the deceased on 15<sup>th</sup> March 2007. By that will the claimant and the defendant were appointed the joint executors. The claimant seeks the probate of this will. The second will is dated the 27<sup>th</sup> day of June 2007. By this will the defendant was appointed the sole executor. He now seeks the probate of this will. Except that the will executed on the 15 March 2007 (“the first will”) was not the last will and testament of the deceased the first will has not been challenged by the defendant. This action therefore concerns the validity of the second will (“the disputed will”).

The claimant challenges the disputed will on the grounds that (a) it was not duly executed; (b) the deceased lacked the necessary testamentary capacity;(c)at the time of the execution the deceased did not know and approve of the contents and (d) its execution was obtained by the undue influence of the defendant.

The applicable principles of law are not in dispute. With respect to the burden of proof onus of proving due execution is on the defendant, as the person seeking to propound the will. This onus will be discharged by proof of execution. Once “the will is not irrational or drawn by the person propounding and benefiting under it the onus is discharged, unless and until by cross-examination of the witnesses or by pleading and evidence the issue of testamentary capacity and want of knowledge and approval is raised. The onus on these points is then again on the person propounding.”: **Tristram and Coote’s Probate**

**Practice Twenty-first edition page 649.** The onus of proof with respect to undue influence lies on the claimant.

At the end of the day the claimant submit that on the evidence (a) the circumstances under which the will was prepared is such that ought to excite the suspicion of the court which suspicions they submit have not been dispelled by the defendant; (b) the deceased was not of sound mind, memory and understanding and (c) the will was procured by the defendant exerting undue influence on the deceased. It cannot be disputed that a finding of any one of these three will defeat the defendant's claim to be entitled to have the second will probated.

At the end of the day, it is clear that there is in fact prima facie evidence of the due execution of the will in accordance with the Act. The real question here is whether (i) the testator had the necessary capacity at the time of the making of the will to do so and (ii) there is revealed by the evidence circumstances which serve "to excite my suspicions". In this regard it is not in dispute that (i) the circumstances must be circumstances relevant to and attendant upon the preparation and execution of the will; and (ii) that once these circumstances are shown it is for the person propounding the will, the defendant in this case, to dispel my suspicions.

In this regard the claimant refers to 3 sets of facts: (a) the state of health of the deceased; (b) the fact that the second will was procured by the defendant who stands to receive a

substantial benefit under it; and (c) given the closeness in time, just over three months, the comparison between the contents of the first will and the second will.

On the evidence is not in dispute that during this period, April to July 2007, the deceased's health was getting progressively worse. In or around 1993, the deceased was diagnosed with and treated for lymphoma. The disease went into remission and resurfaced in 2007. In the year 2007 he was under the care of Dr Hess Benjamin for this condition. During the period 16<sup>th</sup> April 2007 to August 2007 the deceased was also under the care of Dr. David Strisiver with respect to further complications.

The only medical evidence is that of Dr Strisiver. I accept his evidence. According to the doctor the deceased was being treated by him for an embolus of the arterial supply to the left lower limb which presented as a progressively worsening pain in his left forefoot and gangrene. In April 2007 the deceased had surgery to remove the embolus. On 9 June 2007 the deceased had another operation which resulted in the amputation of his foot and the distal part of the leg. Thereafter, according to Dr. Strisiver, whereas the recovery time ought to have been between 3 to 4 weeks the deceased's condition worsened progressively. In Dr.Strisiver's opinion he appeared to be depressed that his leg was not getting better. He says that on 4 July, one week after the execution of the second will, he recorded in his notes that the deceased appeared despondent. Eventually the pain had become so intolerable that by the 13<sup>th</sup> July 2007 his leg had to be amputated.

During the period April to June, apart from his medications for the cancer, the deceased was administered Panadine F for pain. Panadine F is, according to Doctor Strisiver, classified as a narcotic analgesic. According to the Doctor during the month of June 2007 the deceased would have been in excruciating pain as his leg was gangrenous. According to him this drug could cause a degree of confusion in patients which is worsened by age and general medical condition. (The evidence is that in June 2007 the deceased was 64 years old.) This, he said, would have severely impaired the deceased's ability to do everyday tasks. He says that even with the Panadine F the deceased would not have been pain-free, according to him, the only thing that would have had that effect would have been morphine.

According to the doctor he was advised that in the month of June 2007 the deceased allegedly made a new will. He says from his observations of the deceased during that time “the deceased was in such pain and such poor state of health and state of mind from the pain and the medication that for him to perform such a task during that period would have required a “Herculean” effort on his part.

There is some conflict between the evidence of Dr. Strisiver and defendant as to the deceased's state of mind around this time. According to Dr Strisiver the deceased was in pain and depressed. According to the defendant, during the period April to July the deceased was not experiencing a lot of pain and was in very good spirits. According to the defendant the deceased would say he was happy. At the end of the day I prefer the evidence of the doctor in this regard. Indeed the evidence of the defendant is that the

reason he took the deceased to Dr. Striviser was because the deceased was experiencing pain.

The issue of testamentary capacity having been raised on the pleadings, the onus of proving that the deceased had the necessary capacity rests on defendant as the propounder of the will. The manner of dealing with such an issue is in one of three ways as stated by Wooding CJ in the case of **Moonan v Moonan (1963) 7 WIR 420 at page 422 I to 423A** either that the court is affirmatively satisfied that testator was sound in mind, memory and understanding, or that the court is satisfied that he was not sound in any of these respects, or that the court is left in doubt, with the result that the issue has to be resolved against the person seeking to propound the will.”

In the instant case while Dr. Striviser does not categorically state that the deceased did not have the capacity at that time to make a will he was of the opinion that, given the state of health of the deceased, the pain that he was in enduring and effect of the painkillers, “to make a will would have required a “Herculean” effort on the part of the deceased”. At best, therefore, I am left in doubt as to the deceased’s testamentary capacity. The burden is on the defendant to satisfy me of the deceased’s testamentary capacity and I am of the opinion that the defendant has not discharged the burden upon him in this regard.

With respect the suspicious circumstances alluded to by the claimants the evidence with respect the procurement of the will comes from the defendant. In his evidence in chief he

states simply that on 27<sup>th</sup> June he took his brother to the lawyer's office. On arrival there was no parking available and he decided to remain in the car. He used his cell phone to call the lawyers office and the secretary, Sharon Legendre (" Legendre") came out to assist the deceased since he was recovering from surgery. With the assistance of Legendre the deceased returned to the car an hour later. He says that the deceased, then told him that he had given instructions to Legendre to prepare a new will which she did and he signed it in her presence and that of Mr. Maynard, a former clerk of the attorney.

The impression given by the defendant in his evidence in chief, therefore, is that he knew nothing of the deceased's intention to make a new will until after the event. Also there is no suggestion that the defendant was aware that the lawyer would not have been present. Under cross-examination, however, the following is revealed. He admits telephoning Legendre. At one point in time in the cross-examination he says he made the arrangements with Legendre and she said to come down. At another time he says that he telephoned Legendre at the request of the deceased who in his presence made the arrangements himself. Further he admits that at the time he knew that the lawyer was ill. According to him in cross-examination, it was only after he read the will that he became aware of Maynard. On June 27 he did not know that Maynard was not an attorney. In fact, he did not know who Maynard was. This conflicts with his evidence in chief that on 27 June while they were both in the car the deceased told him that Maynard, a former clerk of the lawyer, had witnessed him signing the will.

According to Legendre when the defendant called he told her to that the deceased wanted to make some changes. She then spoke to the deceased who said he wanted to change the will and she told him to come to the office. According to Legendre therefore the defendant knew when he called that the deceased wanted to make some changes to this will.

It is clear therefore that even on the evidence led by the defendant there is some conflict with respect his input as regards the procurement of the will. I find that the defendant has not been totally candid respect to this aspect of the case. I am of the view that on the evidence the defendant is not as detached as he would have us believe with the procurement of the new will.

In the instant case the first will was made on 15<sup>th</sup> March 2007. It was prepared by an attorney at law and witnessed by him and his secretary, Sharon Legendre (“ Legendre”). The will is in the usual format. The second will was made on 27<sup>th</sup> June 2007. This will was not made by an attorney, but by Legendre. It too is in the usual format. There are however some noticeable differences between the two wills:

- (i) In the first will the defendant and the claimants are appointed the joint executors. In the second will the defendant is the only executor.
- (ii) While in both wills the deceased makes a declaration as to the property owned by him, in the first will the property declared to be owned by the deceased is far more extensive than in the second will. In particular by the first will the

deceased declares that he is the owner of (a) a four-bedroom house in Arouca;(b) a parcel of land in Sandre Grande;(c) share in the lands in land in Blanchisseuse Road Arima and in Cumana Toco;(c) two houses on lands of Maharaj (d) one house on lands of Lynch and (e) money in three banks. In the second will the deceased declares that he is the owner of the four-bedroom house, two of the chattel houses and money into two bank accounts.

(iii) In the first will the deceased makes dispositions of all the property, both real and personal, declared to be owned by him. This is not the position in the second will.

(iv) While the beneficiaries under both wills are the same the dispositions are not. The specific dispositions under the first will are more than under the second will. In the first will the deceased makes money dispositions amounting to some \$97,500 together with the proceeds of two of his bank accounts and sets aside the proceeds of the third bank account for the payment of his expenses. In the second will the money dispositions amount to \$45,500. While, as in the first will the proceeds of the First Citizens account is to be used for his expenses the proceeds of the two bank accounts specifically disposed of in his first will fall into the residue.

No explanation is given as to the reasons for the changes in the two wills. According to Legendre she asked him why he wanted to make the changes and he said it was a long story. She says she made no enquiry with respect to the story.

Except that the defendant says that is not the last will of the deceaseds' there is no challenge to the first will. Neither is there any evidence that the declaration of the deceased's as to his assets at the time of making the first will is incorrect. It is to be presumed therefore that in March 2007 deceased's asset base was as stated in the first will. This is particularly so since according to the evidence the first will was prepared by the deceased long standing Attorney-at-Law.

Given the fact that a little more than three months expired between the first will and the second will and given the evidence in this case with respect to the deceased's state of health during this period in my opinion while it is possible that the deceased may have dissipated monies standing to his account in the two bank accounts not referred to in the second will it is hardly likely that he would have disposed of the other property referred to therein. Indeed given his state of health had he done so there would have been evidence in this regard in the trial. It is clear therefore that under the second will defendant stood to receive a much larger share of the deceased's estate.

The real question here is, if this was the last will of free and capable testator why would the deceased not declare the full extent of his estate as was done in the first will made by him a few months earlier? No satisfactory answer to this question has been given by the defendant.

Seem to me that given the state of health of the deceased, the opinion of his attending Doctor as to the effect of pain and the medication taken by the deceased on his mental

capacity and the obvious differences between the two wills, I am of the opinion that suspicions with respect to the preparation of the will requiring explanation has been raised. These suspicions have not been dispelled by defendant.

In the circumstances, probate of the will of 27 June 2007 is refused. In the circumstances I order that the will dated 15 March 2007 be admitted to probate.

Dated this 17<sup>th</sup> day of February, 2011.

**Judith Jones**  
**Judge**