

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2009-00618**

**BETWEEN**

**ELGEEN ROBERTS-MITCHELL**

**Claimant**

**AND**

**LINCOLN RICHARDSON**

**Defendant**

**Before the Honorable Mr. Justice V. Kokaram**

**Appearances:**

**Ms Earla Nyack for the Claimant**

**Ms J Koorn instructed by C Serrano for the Defendant**

**JUDGMENT**

1. The rule of law to be applied in this claim of contested wills is well settled. The *onus probandi* in every case lie on the party who propounds the will. If no evidence is given by the party on whom the burden is cast the issue must be found against him. The onus is generally discharged by the party propounding the will by proof of capacity and the fact of execution from which the knowledge and assent to the contents of the instrument are assumed.

2. The Claimant, the wife of the deceased, is seeking to pronounce for the force and validity of the last will and testament of the deceased, Valentine Mitchell, dated 7<sup>th</sup> April 2006. The Defendant in his Counterclaim asks the Court to pronounce against the force and validity of the said will and to pronounce in solemn form the will of the deceased dated 14<sup>th</sup> March 2006.
  
3. From the elementary application of the rule of law stated above, the Defendant's counterclaim fails outright. There is no evidence before this Court of the due execution of the will dated 14<sup>th</sup> March 2006. The said will which forms part of an agreed bundle, appears on its face to have been witnessed by Hyacinth Hospedales and Carlyle Serrano, the instructing attorney at law for the Defendant. Neither of these persons gave evidence in this matter. The sole witness for the Defendant, Cleopatra Yvonne Hosten in her witness statement dated and filed 22<sup>nd</sup> February 2010 spoke to signing twice in early 2006 as a witness on a document, in the bedroom of the deceased. She went there on the invitation of the Claimant and signed in the presence of the deceased, a lawyer and a doctor. In the agreed bundle of documents her name appears as a witness on the deceased's Power of Attorney and his will both dated 26<sup>th</sup> January 2006. There is absolutely no evidence nor reference to a will made by the deceased on 14<sup>th</sup> March 2006. There is no evidence from the Claimant nor her witnesses acknowledging the existence of a will dated 14<sup>th</sup> March 2006. Further by letter dated 22<sup>nd</sup> September 2006 Mr. Serrano writes on behalf of the daughter of the deceased whom he described as the proposed administrator of the deceased. If Mr. Serrano did in fact prepare and execute the will on March 2006 why does he act for an "administrator" instead of the Defendant as "executor?" There is simply no satisfactory answer in this case to be found in the evidence for the Defendant. The Defendant's counterclaim to pronounce on the force and validity of a will dated 14<sup>th</sup> March 2006 is therefore unsustainable and is dismissed.
  
4. The real issue in this claim therefore is whether, in light of the oral and documentary evidence, the Court can pronounce on the force and validity of the deceased's will dated 7<sup>th</sup> April 2006. I answer this issue in the affirmative:

- (a) There is uncontroverted evidence of the Claimant, Mr. Krishna Doonath the attorney preparing the will and his secretary Nicole Richards Husbands, both of whom witnessed the will, of the due execution of the will.
  - (b) The Claimant's witnesses have proved conclusively in my view the capacity of the deceased in executing the will.
  - (c) There are no circumstances to excite the Court's suspicions. The fact that the Claimant provided solely for his wife, who looked after his needs in his ailing years, to the exclusion of his two children is in the circumstances of this case neither abnormal nor suspicious.
  - (d) The documentary evidence including the contemporaneous instructions taken by Mr. Doonath, the copy of the will on his file, the continuous changes in the gifts in the deceased's will over the years are all consistent with the Claimant's claim.
  - (e) Having regard to the pleadings and the evidence, the validity of the will dated 7<sup>th</sup> April 2006 is highly probable.
5. In or around October 2007, after the death of the deceased on 17<sup>th</sup> September 2006 the Claimant filed an application for probate of the estate of the deceased. The Claimant was appointed the executor of the estate of the deceased and is also the sole beneficiary. The Defendant, who is a friend of the deceased and purported executor of the April 2006 will, filed a caveat.
6. In his defence filed herein the Defendant contends as follows:
- That the deceased did not know nor approve of the contents of the said will. He never gave any instructions for the preparation of the will to Mr. Doonath

- If he did give those instructions he did not do so of his own free will. He was (a) carrying out the instructions of the Claimant and (b) acting under undue influence of the Claimant. The plea of undue influence was both presumed: where she took advantage of his illness and his physical disability and weak and emotional state to assume domination over him; as well as actual influence: where it is alleged she coerced, bullied, threatened the Claimant.
- Further the will was procured by fraud.

7. The Defendant produced no evidence at this trial to sustain any of these allegations. The evidence of the only witness for the Defendant, Ms Hosten falls woefully short of the type of evidence required to prove under influence. I studied her under the brief cross examination, brief as her evidence in chief was irrelevant to disputing the Claimant's claim of due execution of a will made on April 2006. She appeared to be confused and unreliable. It was revealed to the Court that she was, without the knowledge of the party's representatives or the Court, sitting throughout the evidence of Mr. Doonath and Ms Hosten. The Claimant's attorney made no objection and cross examined the witness. Ms Hosten in her cross examination identified Mr Doonath as the attorney before whom she signed as a witness to the power of attorney in January 2006. How she can say this when it was accepted by the parties that the attorney who prepared those documents was one Mr Krishna Sukdeo simply reinforced my view of her unreliability.

8. Without any positive evidence being adduced by the Defendant of fraud or undue influence the Defendant's cross examination was focused to putting the Claimant to proof of the allegation of due execution of the will made on April 2008. The Claimant convincingly in my view crossed the bar.

(a) The Claimant gave evidence as to her relationship with the deceased and his execution of two wills on in March 1998 and in April 2006. The deceased

although bedridden was at the material time mentally alert and he was well aware of the nature and extent of his estate and how he wanted to dispose of it.

- (b) The relationship between himself and his daughter was not of the best while the Claimant saw to her husband's every need. Even though a power of attorney was made in her name by the deceased she did not as the Claimant's attorney described "clean out the deceased". She gave the impression of a wife dutiful to the needs of her husband and unconcerned about the execution of the will.
- (c) Margaret Poteon, was employed by the Claimant and deceased as a nurse to look after the deceased who suffered from HTLV 1. Her testimony of the active mind of the deceased was unshaken. Even though his health deteriorated he still maintained strength in his hands.
- (d) Mr Doonath gave a vivid picture of the execution of the will by the deceased. The deceased was driven to Mr Doonath's office in Arima. Both himself and his secretary attended to the deceased to take his instructions. He was asked to return the next day to execute the will. The deceased did so while sitting in the car in the office car park in the presence of the two attesting witnesses who signed in the deceased presence. The Claimant stood away off from the transaction. Ms Hosten corroborated this account. The only possible inconsistency is the Claimant in her evidence in chief stating that they came back on another day to make changes to the will. In cross examination the Claimant confessed that it may be an error. I am satisfied having viewed her demeanour in cross examination that she was a straightforward speaking woman and that her error can be reconciled by the fact that it is all agreed by the witnesses that the deceased and the Claimant did come to the office on two occasions. The first to take instructions and the next day to execute. The Claimant not being a party to the transaction possibly speculated as to the reason for the second visit of the deceased.

9. I have reviewed the authorities submitted to me by the Defendant **Rattan Singh v Amirchand** [1948] AC 161 **Mitchel v Augustus Thomas** 29 WIR 59. **Moonan v Moonan** 7 WIR 421 on the circumstances surrounding the execution of a will which may excite the suspicion of the Court. That enquiry is fact specific. On the facts in this case I see no basis to be suspicious of the execution of the will dated 7<sup>th</sup> April 2006. It was in my view the free and voluntary expression of the wishes of the testator.
10. Even if I examine the relationship of the deceased and the Claimant, I do not find that the devise given to the Claimant by the deceased was of such a nature that it cannot be reasonably accounted for on the ground of the ordinary motives on which ordinary men act. See **Re Craig** [1970] 2 AER 390. Critically one must take into account in this case the confidence reposed in the Claimant by appointing her the attorney for the deceased. Yet the Claimant executed those duties responsibly for the benefit of the deceased and not selfishly when she had the opportunity to deal with the assets of the deceased as she so desired.
11. I therefore order as follows:
- (a) The Court pronounces in solemn form for the validity of the last will and testament of Valentine Mitchell (“deceased”) dated 7<sup>th</sup> April 2006.
  - (b) The Court orders that
    - (i) the caveat dated 10<sup>th</sup> December 2008 and filed by the Defendant in the estate of the deceased be removed
    - (ii) The Claimant, Elgeen Roberts-Mitchell, sole executrix of the said last will be granted probate of the said will

(iii) The Court declares that the purported last will of the deceased dated 14<sup>th</sup> March 2006 was revoked by the said will dated 7<sup>th</sup> April 2006 and is therefore of no effect.

(c) The Counterclaim stands dismissed and the Defendant do pay to the Claimant prescribed costs in the sum of \$14,000.00.

Dated this 30<sup>th</sup> day of July 2010.

.....  
Vasheist Kokaram

Judge