THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2011-04815

BETWEEN

TRUDY LISA COX

Claimant

AND

MARK COX

First Defendant

AND

JOANNE PHILBERT

Second Defendant

AND

CIAN BROWN

Third Defendant

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES:

Mr. Emerson John Charles for the Claimant

Mr. Dexter Bailey for the Defendants

JUDGMENT

BACKGROUND

1. The Deceased, a cancer patient, died on 20th September 2010 at the age of 71.

2. On 09th September 2010, he had signed a will, (the said will).

3. The deceased was admitted to a private hospital on the 10th day of September, 2010.

4. Instructions for the alleged Will were communicated by the Claimant, (who is the main beneficiary thereunder), and submitted to an Attorney-at-Law (the attorney), who drafted it. The said will was not executed in the presence of any attorney at law.

5. The defendants contest the validity of the said will. The claimant seeks probate of the will in solemn form.

ISSUES

6. The following issues arise:-

   a. Whether the said will was duly executed in a manner which satisfies the formal requirements of the Wills and Probate Act, Chapter 9:03;

   b. Whether the execution of the said will was the act of a competent testator, (with testamentary capacity, and with his knowledge and approval),

   c. Whether the circumstances and facts surrounding the preparation and execution of the said will give rise to a well-grounded suspicion that the said will does not express the will of the deceased

   d. Whether the execution of the said will was the product of the **undue influence** of the Claimant; and

   e. Whether the Third Defendant is the daughter of the Deceased.

CONCLUSION

7. a. The said will was duly executed in accordance with the requisite formalities.

b. The deceased was able to execute a will, he knew that what he had executed was a will, and the execution of the will was the act of a competent testator. There is no evidence of unsoundness of mind, or mental illness in the deceased.

c. The burden of proving that the deceased knew and approved of its full contents and effects has not been discharged.

d. The circumstances and facts surrounding the preparation and execution of the said will give rise to a well-grounded suspicion that the said will does not express the will of the deceased. The circumstances of suspicion surrounding the execution of this will have not been dispelled.

e. The execution of the said will was the product of the presumed **undue influence** of the Claimant, which presumption has not been rebutted.

f. The said will is invalid and ought not to be admitted to probate.

g. Third Defendant, acknowledged by the deceased for most of his life, but who disavowed paternity before his death, is, on a balance of probabilities, the daughter of the Deceased.

DISPOSITION AND ORDERS

8. i. The claimant's claim is dismissed.

ii. A declaration is granted that the purported will of the deceased dated September 9th 2010 is null and void.

iii. A declaration is granted that the defendants, including the third named defendant, are entitled to apply for a grant of letters of administration.

iv. A declaration is granted that the deceased is the father of the third named defendant.

v. Liberty to Apply.

vi. The claimant is to pay to the Defendants costs in the sum of $14,000.00.

ANALYSIS AND REASONING

THE EVIDENCE

ANTHONY CELESTINE

9. Anthony Celestine was asked by Colin Cox, a son of the deceased, and the brother of the claimant, to witness the execution of a Will by the deceased. He was taken to the home of the deceased by Colin Cox on the 8th day of September, 2010. Mr. Celestine was introduced to the deceased and then he went back outside. The Will was not executed. Mr. Celestine remained outside.

10. This evidence was **contradicted** by Mr. Colin Cox who indicated that the two witnesses, he, his sister, and the deceased, all convened in his living room for signing, when the deceased allegedly read the Will to himself, and detected an error. This is of fundamental importance. Mr. Colin Cox's **evidence is** that on the 8th day of September, 2010 **Mr. Celestine was present when the deceased was allegedly reading the Will** and pointed out an error in the Will to the claimant. The pointing out of that error is relied upon to show an alert state of mind of the deceased.

11. I accept the evidence of Mr Celestine that he stayed at the front with Colin and did not observe this. I therefore find that that did not happen, as I prefer his evidence to that of Colin, (who is the full brother of the claimant), and the claimant herself, (the main beneficiary under the said will). Mr Celestine was not in the living room as suggested. He could not, and did not, observe the deceased reading over the will on September 8th, when he allegedly detected the error, and there is therefore no evidence on which I can rely, that the deceased did in fact read the will, detect an error, and therefore declined, for that reason, to execute it on that day. The suggestion of such mental acuity on the part of the deceased on the day before he executed his will, that he was able to detect, and did detect, an arithmetical error in the percentages there stated, must therefore be considered without this evidence.

TRUDY COX

12. The Claimant is the major beneficiary under the said Will. She is the person responsible for taking the deceased's alleged instructions. Her evidence is as follows:-

He knew that his ideas were evolving and he desired to give me the flexibility to put them into effect as per his communication – paragraph 10 of her witness statement

I recorded some of those discussions because I wanted to ensure that ***his desires*** *were properly saved for future action by myself* ***when the time came****. (*Paragraph 11 of her witness statement)

13. At paragraph 13 - 14 of the Claimant's witness statement she indicated the alleged "guidelines" given by the deceased for the preparation of his Will.

In our discussions, he ***mentioned*** *that-*

a. *With respect to apportioning the shares i.e. the income and the distribution of the income, the income and the splitting up of the income which will have to go in different areas,* ***that I would have to have autonomy*** *in* ***dealing with the apportioning*** *with different interest groups i.e. beneficiaries and family members and mothers.*
b. *He detailed the below* ***specifics*** *as a* ***guideline*** *that included but is (sic) not limited to the following disbursements -*
    i. *That* ***the share*** *of the income for Joanne and her sister Nicole should not be equal to the rest but* ***be reduced/cut in half;***
    ii. *The proportion of the estate income after all bank loans are paid off* ***should resemble a proportion such as*** *20% Colin Cox, 20% Trudy Cox; 20% Mark Togie Cox; 20% split between Philberts (Joanne, Nicole and mother); 20% to Carol, Keith and Maureen.*
    iii. *He* ***mentioned*** *the inclusion of the 'mothers' as recipients of some benefits of some benefits* ***of some sort*** *but* ***did not define this****.*

14. It is for these reasons that the division contained in paragraph 8 (b) is worded as it is. ***The Deceased indicated his general intention****; did not wish to state specifically in the will* ***exactly how the net income*** *or, in the event of the final distribution after dissolution of the business,* ***how the distribution ought to be****. However****, he felt*** *that* ***I should be given broad powers t****o carry out* ***his wishes consistent with the sentiments that he had indicated****. In any event, the Deceased approved of the actual wording and the contents of the will.*

14. From this very fuzzy sketch of what the deceased had allegedly indicated it appears clearly that the deceased himself had not determined what his intentions actually were. How then could the claimant carry out his wishes consistent with the sentiments that he had indicated? (Further the generalised nature of these alleged instructions/wishes is strange in itself. It is common ground that the deceased was a strong willed individual who had clear ideas).

15. The Claimant transmitted the instructions to the Attorney-at-Law to prepare the Will. There was no opportunity provided for verification by the Attorney-at-Law that the instructions he received were those of the deceased. The Claimant was able to take the deceased to a coffee shop at a shopping mall but did not see it fit to take the deceased to the office of the Attorney-at-Law. Though the instructions came from the Claimant, the Attorney-at-Law did not meet the deceased himself to confirm not only the instructions, but also that the deceased possessed testamentary capacity, and appreciated the legal effect of what he was doing. The Attorney-at-Law was never provided with that opportunity.

16. At **paragraph 19** of the Claimant's witness statement filed on the 5th day of June, 2012 the Claimant indicated that,

"*He admitted in a conversation with me in August, 2010 that his circle of friends had become* ***very slim to non-existent*** *and that he had chosen to live a very independent mode of life".*

17. Further on the 7th day of September, 2010 the day before the first attempt was made to execute the alleged Will, the deceased was acting strangely. At paragraph 23 of the Claimant's witness statement she states:-

"*On the 7th day of September, 2010, he received a call from one of his sisters whom I believe was Maureen.* ***He refused to disclose his location and was aggressive and cursed at her on the phone****. He explained to me that she was at his house waiting with Togie (the first defendant) and Cian to see him. They had given no notice.* ***He angrily requested that they leave****. At the time that he received the call, we were in the vicinity of Trincity Mall on the way* ***to have coffee at Rituals****. He did not want to return home to meet them there. When we eventually left the mall for me to drop him off,* ***he crouched down in the passenger seat and made me drive past his house at least twice so that he could ensure that they were not still waiting for him****. He was* ***adamant about avoiding them****. I played no part in my father's reaction and did as he requested of me. I respected his wishes*".

18. This evidence of strange behavior should have placed the claimant on alert and should have prompted her to take the deceased to get medical attention, or at least to have his testamentary capacity verified before he executed an important document like his Will.

CAROL CEDENO

19. At Paragraph 13-24 of her witness statement she testifies as to the state of the deceased on the 10th day of September, 2010, the date after the deceased executed the alleged Will. In particular she stated at paragraph 22 of her witness statement –

> "*I observed that he was quite frail, had lost a considerable amount of weight since my last visit and that his skin was extremely dry …. He was quite pale, appeared lethargic and he was also suffering from severe shortage of breath and kept gasping for breath in between his words."*

He was unable to come to the door to let them in.

MAUREEN HOSPEDALES

20. She gave evidence of having a close relationship with the deceased but was shocked and hurt by his behavior on the 7th day of September, 2010. This witness visited the deceased on the 6th day of September, 2010 and at paragraph 22 of her witness statement she stated that

"On the 6th day of September, 2010, I visited Kenrick at his new home and found him looking frail. He was also not able to move around as quickly as on the last occasion when I had last seen him."

21. The next day the deceased's attitude towards his sister changed. At paragraph 25 of her witness statement she stated:

"Although Kenrick has always been cordial and respectful of me and has always confided in me as to his whereabouts, he did not appear to be himself on that day and was very abrupt and rude to me in our telephone conversation. He quarreled with me as to why I had not called him before I had come as he was not home. I found Kenrick's behavior to be strange as this was the first time that I have ever had such a cold reception from him when visiting his home."

22. He contacted her by telephone and apologized to her the following day. By the 10th day of September, 2010 this witness found the deceased "*alone and appeared to be in an even worse state than the last time I had seen him on the 6th day of September, 2010."* She observed the deceased had great difficulty breathing and his skin appeared to be dry.

CIAN BROWN

23. The deceased treated this Defendant as his daughter until approximately two (2) months before he died. Even the Claimant accepts that the deceased assisted Cian in her educational expenses.

24. The Claimant admitted that the Defendant visited the deceased when he was admitted to Medical Associates in St. Joseph. This was after the execution of the alleged Will. It was never contended that the deceased refused to entertain this Defendant or was cold towards her. The deceased's pride in the accomplishments of this Defendant is corroborated by all the witnesses for the Defendants and the Defendants themselves .His acceptance of her as his daughter for most of his life is also undisputed.

JOANNE PHILBERT

25. The Third Defendant stated at paragraph 32 of her witness statement -

"*My father often expressed to me how proud he was of his daughter Cian and of her academic success."*

At paragraph 33 she stated,

"*I do not recall my father ever stating to me that Cian was not his daughter.* ***He has always treated her as his daughter*** *and I have always observed a close relationship between the two. My father always brought her up in our conversations and always spoke highly of her to me."*

PATRICIA BROWN

26. She is the mother of the Third Defendant. At paragraph 27 of her witness statement she states -

"*On the 9th day of September, 2010, I tried calling Kenrick again on his phone and he answered. However, he suddenly made the accusation that Cian was not his child and insisted that he wanted a DNA test done."*

At paragraph 28 she states further

"*I was very surprised given that Cian was twenty-three and a half years old and Kenrick had never once during that time raised any issue or concern about Cian's paternity. I denied the allegation and was very upset and shocked at what had transpired as I have never been unfaithful to Kenrick. As far as I had observed, he had also always treated Cian as his daughter. I was baffled as to where these unfounded allegations had emerged and what or who could have led Kenrick to believe such a thing."*

LAW

27. In **Marilyn Lucky v Mauren Elizabeth Thomas-Vailloo, H.C.A. No. Cv. 1936 of 1996** at page 16 of the judgment of the Honourable Stollmeyer J, (as he then was), he set out relevant principles as follows:-

*1. The **onus of proving a will as having been executed** as required by law is on the **party propounding** it;* (See also Civ. App. No. 102 of 2003 **Lalla v Lalla** per the Honourable Mendonca JA at para 53)

2. There is presumption of due execution if the will is, ex facie, duly executed;

3. The force of the presumption varies depending upon the circumstances,

The presumption might be very strong if the document is entirely regular in form, but where it is irregular or unusual in form, the maxim omnia praesemuntur rite esse acta cannot apply with the same force, as for example, would be the case where the attestation clause is incomplete;

*4. The party seeking to propound a will must establish a prima facie case by proving **due execution**;*

*5. If a will is not irregular or irrational, or **not drawn by a person propounding the will and benefitting under it**, then this onus will have been discharged.*

*6. If by either by the cross examination of witnesses , or the pleadings and the evidence , the issues of either **testamentary capacity** or **want of knowledge and approval** are raised, then **the onus on these issues shifts again to the party propounding the will**;*

*7. Even if the party propounding the will leads evidence as to due execution, **there is still the question of whether the vigilance and suspicions of the court are aroused**. If so, then the **burden once again reverts to the party seeking to propound.***

EXECUTION OF WILL

28. The will was signed by the Deceased at his residence at #1 Khan's Drive, Cane Farm Road, Tacarigua, in the presence of two witnesses namely, Kitran Charles and Anthony Celestine, and also in the presence of the Claimant and her brother Colin. After the Deceased had signed the will, Kitran Charles and Anthony Celestine then signed the will in the presence of each other and also in the presence of the Deceased. Throughout, both the Claimant and her brother Colin were present.

29. It was submitted that the evidence of both Colin Cox and the witness Anthony Celestine support that of the Claimant so that there is no doubt as to the **satisfaction** of the **formal requirements** of the statute.

30. I find that the burden of proof was on the claimant to establish due execution of the will, as she was in effect the person responsible for the drawing of the will, she was the person propounding the will, and she was the person primarily benefitting under it. I find, on a balance of probabilities, that the deceased did sign the will in the presence of two witnesses, both present at the same time, and that the will was duly executed.

KNOWLEDGE AND APPROVAL OF CONTENTS

TESTAMENTARY CAPACITY, WANT OF KNOWLEDGE AND APPROVAL

31. Cockburn CJ in **Banks v Goodfellow (1870) LR 5 QB** at 256 stated:

> *"It is essential that a testator shall understand* ***the nature of the act and its effects****; shall understand the* ***extent of the property of which he is disposing;*** *shall be able* ***to comprehend and appreciate the claims to which he ought to give effect*** *and with a view to the latter object, that* ***no disorder of the mind*** *shall* ***poison his affections****, pervert his sense of right or prevent the exercise of his natural faculties – that no insane* ***delusion*** *shall* ***influence his will*** *in disposing of his property and bring about a disposition of it which, if the mind had been sound would not have been made."*

32. In **Doreen Fernandes v Monica Ramjohn Nadeau, Ian Ramjohn, Marilyn Ramjohn et al CV. 2006-00305**, the Honourable Mr. Justice Stollmeyer, (as he then was), stated (at page 15) (emphasis added**)**:

> "*The requirements for* ***testamentary capacity*** *and for* ***knowledge and approval*** *are separate. …****Testamentary capacity,*** *which the Claimant must show in this case,* ***requires the capacity to understand*** *(in the sense of the* ***ability to do so****) certain important matters relating to a will namely:* ***the nature of the act and its effects****, and* ***the extent of the property being disposed of****. The testator must also be able to* ***comprehend and appreciate the claims to which he might give effect…"***

"*If there is evidence of actual understanding then that proves the requisite capacity*". (***Hoff v. Atherton*** [2004] EWCA Civ 1554 paragraph 33, referring to ***Banks v. Goodfellow*** (1870) LR 5QB 549 at 565.)

33. **Knowledge and approval** requires **proof of actual knowledge and approval of the contents of the will**. According to the Honourable Justice Stollmeyer (citing **Hoff v. Atherton)**, this is a further and a separate test. (Page 16 ibid)

> *"Further, it may well be* [per Chadwick JA at paragraph 64 of Hoff v Atherton] *that where there is evidence of a failing mind - - and, a fortiori* ***where evidence of a failing mind is coupled with the facts that the beneficiary has been concerned in the instructions for the will*** *--* *the* ***court will require more than proof that the testator knew the contents of the document which he signed****. If the court is to be satisfied that a testator did* ***know and approve the contents of his will*** *- - that is to say, that he did* ***understand what he was doing and its effect - - it may require evidence that 1. the effect of the document was explained, 2. that the testator did know the extent of his property and 3. that he did comprehend and appreciate the claims on his bounty to which he ought to give effect****. But that is not because the court has doubts as to the testator's capacity to make a will. It is because the court accepts that the testator was* ***able*** *to understand what he was doing and its effect at the time he signed the document, but needs to be satisfied that he did, in fact, know and approve the contents - - in the wider sense to which I have referred".*

34. He must therefore-

a. Have the capacity to understand, and

b. Actually understand:-

i. The **nature of the act and its effects,**

ii. The **extent of the property** of which he is disposing,

iii. The claims to which he **ought** to give effect, and

35. He must not be **suffering** from any **disorder of the mind** which causes him to make a disposition which differs from that which he would otherwise have made if his mind has been sound. It may require **evidence** that **the effect of the document was explained**. There is no such evidence here.

BURDEN OF PROOF

36. In **Re Thompson's Estate (Deceased); Thompson and another v Thompson and another** Girvan J stated that *"the **legal burden** of proving that a testator was of sound mind is **on the person propounding the will**. The evidential burden may shift in the course of the case. If a will is rational on its face there **is a presumption that the testator had testamentary capacity**. This can be rebutted by evidence to the contrary. **If there is evidence of prior mental illness or unsoundness of mind, there is a presumption that this state was continuing when the will was executed**...."*

DEGREE OF UNDERSTANDING REQUIRED

37. In the case of **Simpson and Others v Simpson and Another [1992] 1FLR 601 at 613** Morritt J makes reference to the test as laid down Beaney v Beaney [1978] 1 WLR 770 to be applied, namely:

> *'The **degree or extent of understanding required** in respect of any instrument is **relative** to the particular transaction which it is to effect. **In the case of a will the degree required is always high.** In the case of a contract a deed made for consideration or a gift inter vivos, whether by deed or otherwise, the degree required varies with the circumstances of the transaction. Thus at one extreme, if the subject matter and value of the gift are trivial in relation to the donor's other assets a low degree of understanding will suffice. But at the other extreme, **if its effect is to dispose of the donor's only asset of value and thus, for practical purposes, to pre-empt the devolution of his estate under his will or on his intestacy then the degree of understanding required is as high as that required for a will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of.'***

38. It was submitted that all the evidence shows that the deceased had knowledge of the contents of the will. Though the will dealt with the property at Don Miguel Road – the main asset-, it was not restricted to that property. Further, none of the five children, whom the deceased then acknowledged as his, was left out. Accordingly it was submitted that the deceased did understand-

i. The nature of the act of signing the will and its effects,

ii. The extent of the property of which he was disposing, and

iii. The claims to which he **ought** to give effect.

39. The deceased appeared, from the evidence of the independent witness to its execution, to understand that he was signing a will. It clearly referred to the major part of his property. The will itself referred to his children, save for Cian, whom he appeared to have disowned as his daughter at that point.

40. It was submitted that he was not be suffering from any disorder of the mind which caused him to make a disposition which differed from that which he would otherwise have made if his mind has been sound. There is little evidence of a disorder of mind. There is evidence of unusual behaviour - suddenly and for no apparent reason disavowing paternity of Cian, as well as avoidance of members of his family generally, and specifically on the day when his sister tried to visit him on September 7th 2010.

41. However he was able to call the next day and apologise, he was able to have conversations with his sisters when he was taken to Medical Associates, he was able to inform them that the claimant needed to be called to make the financial arrangements as she had his bank books, and he was able to converse with family members, including Cian, when they all visited him there. Further no one has testified that after he left the nursing home he appeared to be of anything other than sound mind.

42. On a balance of probabilities, I find that he had the **capacity** to understand that he had made a will. However there is no evidence that the **effect** of the will was explained to him, and in particular that, by the terms of the will, the claimant could have adjusted, to an extraordinary extent, the percentages distributable, and quantum of any distribution, if any.

43. If the court is to find that the deceased was in fact able to appreciate the contents of the will and the **effects** thereof, it would require more than proof of the simple fact that the deceased was capable of signing a will and was of sound mind. It would require evidence that the deceased appreciated the extremely wide discretion being given to the claimant, with power to potentially veto a disposition to any one of the named beneficiaries.

44. The disposition to the claimant of 10 % percent of the monthly gross rental receipts is categorical and fixed. The dispositions to the other beneficiaries are not so fixed, and the disposition to any can be negated at the discretion of the claimant. Such unusual terms in a will entirely in favour of the claimant, giving her carte blanche over the deceased's estate, require evidence that the effect of the will was explained to the deceased , and that, with the benefit of such explanation of its full ramifications, he knew and approved of the contents of the will. Even if there is no compelling evidence of a failing mind, I find that evidence of such an explanation is necessary, as in this case there is evidence of illness, frailty, and episodes of unusual behaviour by the deceased around the time of execution of the will.

45. In the absence of evidence that the effect of the will was explained to the deceased, I find that it has not been proved that the deceased possessed the requisite high degree of understanding of the effects of this will, or knew and approved of the full contents and effect of the said will.

AROUSING THE VIGILANCE AND SUSPICIONS OF THE COURT

46. That is not the end of the matter.

Even if the party propounding the will leads evidence as to due execution, there is still the question of whether the vigilance and suspicions of the court are aroused. If so, then ***the burden once again reverts*** *to the party seeking to propound.*

47. In **Lalla v. Lalla Civ App No. 102 of 2003** the Honourable Mendonca JA held (at paragraph 59) that:

> *"Where there are* ***circumstances which excite the suspicion of the Court****, the Court* ***ought not to pronounce*** *in favour of the Will* ***unless the suspicion is removed*** *so that the Court is* ***satisfied*** *that the Will propounded does* ***express the true Will of the deceased*** (see Barry v Butlin 2 Moo P. C. 480)."

48. In **Lalla v. Lalla** it was further explained that the circumstances, which have been held to excite suspicion, include the **intrinsic terms** and the **circumstances of the preparation and execution of the Will** and regard must be had to the **circumstances** primarily **existing at the time** when the Will was executed, although subsequent events could be relevant. (At paragraph 60)

49. Notwithstanding the formal validity of the will, the question therefore remains **whether there was anything surrounding the preparation and execution of the will which would excite the suspicion of the court**. If that is the case, there would be a **burden placed on the claimant** to remove that suspicion and satisfy the court.

50. The claimant's attorney at law accepted that there were a number of factors that would seem at first glance to require explanation. Among those were -

a. Although the deceased was apparently close to his sisters Carol Cedeno and Maureen Hospedales, he had kept virtually secret from them the fact of his intentions to make , and of his actually making, a will;

b. Two days before the execution of the will, when his sister Maureen was coming unannounced to visit him, he refused to disclose his location and was aggressive and cursed her on the phone.

c. The only person who had received and taken instructions with respect to the preparation of the will was the claimant;

d. Under the will, the claimant was given almost unfettered liberty in the administration and distribution of the estate of the deceased;

e. Although the **deceased was suffering from cancer** during the period of preparation and execution of the will, **there was no medical examination** to actually prove that he was in a **fit condition** to prepare a will;

f. To these must be added that the deceased, shortly before his death, disavowed the paternity of Cian – whom he had previously been close to, and whose education he had supported.

KEEPING INTENTIONS OF MAKING A WILL SECRET

51. Although the claimant includes this in the list of matters which might excite a court's suspicion in relation to a will, this does not excite the court's suspicions. It is not that unusual to keep such matters to oneself.

CURSING HIS SISTER MAUREEN

52. It was submitted that there was nothing unusual when the Deceased "refused to disclose his location and was aggressive and cursed at her (Maureen) on the phone" as the evidence was that

a. The deceased was a person with very strong opinions and was strong-willed;

b. The deceased could easily be annoyed;

c. The deceased was prone to using obscene language ,

d. Without exception, they had all heard him using obscene language in their presence; and

e. Most of them had also heard him use obscene language in the presence of other family members.

53. I do not agree. The claimant has stated that it was strange that the deceased would curse his sister, and I find that it was unusual for him to curse his sisters. It is a matter of suspicion, especially when it is combined with his behavior after he returned home that same day, as described by the claimant herself. (At paragraph 23 of her witness statement she stated that he crouched down in the passenger seat and made her drive past his house at least twice to make sure that she was not there waiting).

CLAIMANT ONLY PERSON RECEIVING AND TAKING INSTRUCTIONS WITH RESPECT TO WILL

54. While keeping the will secret is not suspicious in itself, what is suspicious is the gap between the person giving instructions – the deceased – and the attorney drawing up the will. In this case I do not find any wrongdoing on the part of the attorney- that gap could easily have been bridged by the deceased executing the will in the presence of the attorney, who would then have had the opportunity to ascertain (a) whether the instructions communicated to him, or translated by him into the wording of the will, actually represented the testator's wishes, and (b) whether the testator was free from the undue influence of others, and (c) of sound mind and possessing testamentary capacity.

55. What is lacking is the explanation for why the deceased did not attend for execution before the attorney, or any attorney, or request the attendance upon him of an attorney. This I find is suspicious, and the suspicion can only be dispelled by my accepting evidence that the deceased was sufficiently of sound mind, sufficiently free from undue influence, and possessing sufficient testamentary capacity, that he would have refused to execute the will if it did not represent his wishes.

56. There is some such evidence. The claimant claims that the deceased detected an error in the will and did not sign it the first time they went to witness the execution. But I have found that I cannot accept that evidence in light of Mr Celestine's independent evidence that he was outside, and did not observe this alleged detection by the deceased of the error.

57. What is particularly troubling is the evidence of the claimant, that, in effect she interpreted his wishes, which had not yet crystallized, and that the deceased left it to her to make the decisions as to who would benefit "when the time comes."

58. The will therefore represented her interpretation of the deceased's intentions, communicated by her to the attorney, recorded in a will, and presumably verified by the testator when he executed it. In fact the will left a significant discretion in the claimant as to the distribution of the estate, and, in light of the considerable discretion given to her to determine the eventual legacies and their distribution, would in fact represent her wishes " when the time comes" for distributions thereunder.

59. In the Privy Council case of **Battan Singh and Ors v Amirchand and Others** [1948] AC 161. At page 169 Lord Normand stated

> "Their Lordships are further of opinion that the principle enunciated in **Parker v. Felgate (I)** should be applied with the greatest caution and reserve when the testator does not himself give instructions to the solicitor who draws the will, **but to a lay intermediary who repeats them to the solicitor. The opportunities for error in transmission and of misunderstanding and of deception in such a situation are obvious, and the court ought to be strictly satisfied that there is no ground for suspicion**, and **that the instructions given to the intermediary were unambiguous and clearly understood**, **faithfully reported by him and rightly apprehended by the solicitor, before making any presumption in favour of validity.**

(In **Battan Singh** itself, unlike the instant case, although the instructions were communicated by an intermediary to a solicitor, who then drafted the will, that will was then actually executed by the testator **before a solicitor**, who **read it over to him)**.

CONTENTS OF WILL

60. Apart from the specific gifts contained in paragraph 3 of the will, the claimant has been given almost unfettered liberty in the administration and distribution of the estate. The estate comprises mainly a warehouse that is rented. There is also an outstanding loan due to Scotiabank.

61. It was submitted that it should not be surprising that the claimant would be given as much latitude as possible in the management of the business, in view of her education. (She possesses a degree in Human Resource management). However the latitude, conferred by the terms of the will, is not just with respect to the running of the business, but with respect to the distribution of the assets of the estate.

62. The will itself confers an unusual degree of discretion in the claimant, as well as benefitting her significantly. Under the will the claimant is given a monthly salary of 10% of the gross rent receipts from the warehouse.

63. She is not to dispose of the warehouse for 5 years if it can possibly be helped, and she is to try to pay off the mortgage to the bank as early as possible from the **net** rental income.

64. She is to **retain** whatever proportion of the income of the business in the business **as she sees fit**, and from the remainder of the net income, distribute 99% of the income **in whatever proportions she thinks fit**, to herself, Colin, Mark, Joanne and Nicole. This suggests that she continues to be executor of the estate of the deceased and in effective control of the business, and the warehouse, indefinitely, with distribution of whatever share of the income she chooses, to whomever she chooses. She, rather than the deceased, effectively decides the beneficiaries, and their entitlement, if any.

65. If the business is to be sold, she is to distribute the net proceeds in the proportion 25 % to herself, and 75 % to be divided equally among 4 children Colin, Mark, Nicole and Joanne, (excluding Cian), though she is at liberty to vary these percentages as she sees fit. She can therefore increase her percentage and reduce the percentages to the other beneficiaries to whatever extent she chooses, as under paragraph 8 of the will, she is to be the "sole judge" of whatever proportions are deemed fit.

66. In fact based on the extremely wide discretions in the will purportedly granted to her by the deceased, she can decide to retain all the income in the business, and leave none available to distribute to other family members/beneficiaries. She can also decide simply to exclude any or all such family members/beneficiaries from any distribution.

67. In the alternative scenario where the warehouse/ business is sold, she can decide to exclude any or all named beneficiaries by reducing their percentages to zero, and increasing her own, as she is the sole judge.

68. The result of this will is to entrust all discretion in the claimant, not only in the running of the warehouse, (which might be understandable), but with respect to

i. who would ultimately be the beneficiaries,

ii. whether there would be any distributions to be made to them at all, and,

iii. if so ,the amounts thereof.

69. It is difficult to envisage anything which would arouse a court's suspicions more than this. Even if it were not the product of instructions being relayed by the claimant to the attorney, without face to face interaction between the deceased and the drafting attorney, the terms of this will **demand** a satisfactory explanation, and evidence that the deceased appreciated the ramifications of it, including evidence that it was properly explained to him.

70. The explanation suggested is that the claimant had business experience and training, and that by reason of this, and her extensive conversations with the deceased, he trusted her to understand and give effect to his wishes, which were to ensure the preservation of his main asset, the warehouse, and to make provision for most of his children. The claimant also testified that he wanted provision made for the mothers of his children, and that his ideas had not yet fully crystallized.

71. This raises the question, if the deceased had not fully decided on the disposition of his assets, how could the claimant claim to know what his wishes would be? The will could only be the product of the deceased's will, reflective of his intentions, if his intentions were to leave it all up to the claimant to distribute his estate.

72. The will as drafted reflects the wishes of someone who did not know his own mind, and was prepared to abdicate, to one of his daughters, his discretion to dispose of his assets that he had spent his lifetime acquiring. This is completely at odds with the picture of the testator portrayed by all the witnesses, of a strong willed, dominant figure, who had strong ideas of what he wanted, not only for himself, but for his children.

73. The claimant claimed to have recordings of the discussions that she had with the deceased. These were never produced or disclosed. In fact, this is another matter which raises suspicion.

DISAVOWING PATERNITY OF CIAN

74. To disavow paternity of Cian, suddenly sever ties with her, and apparently disown her for no apparent reason must be a matter which arouses suspicion, and requires explanation. This uncharacteristic change in behaviour is also a matter which arouses suspicion as to the deceased's state of mental health, as there is no evidence of anything new or obvious that arose in that time period to explain that change of attitude.

75. The fact that the deceased did not sign the birth certificate of Cian is nothing new. He recognized her as his daughter and supported her at university, decades later. Not one of the witnesses on either side disputed that for most of the deceased's life, up to just before his death, he recognized Cian as his daughter. In fact she visited him at the nursing home, after the will was executed, and he had no objection to her presence. However**,** while there is evidence of episodes of unusual and uncharacteristic behaviour. I am unable, on the totality of the evidence, to infer unsoundness of mind, or mental illness.

ABSENCE OF MEDICAL EXAMINATION OR LEGAL ADVICE

76. In the case of **Marilyn Lucky v. Maureen Elizabeth Thomas-Vaillo H.C.A. No. CV 1396 of 1996 delivered July 9th 2001** per the Honourable Justice Stollmeyer (at page 15) stressed the need for the presence of a medical practitioner when an elderly or infirm testator makes a will.

77. "*Where a testator is elderly and infirm his will* ***should be witnessed*** *and approved* ***by a medical practitioner*** *who satisfies himself as to the* ***capacity and understanding of the testator*** *and who records his examination and findings –* ***Re Simpson, Schaniel v Simpson 1977 121 Sol Jo 224****"* relied on in **Marilyn Lucky v. Maureen Elizabeth Thomas-Vaillo H.C.A. No. CV 1396 of 1996 delivered July 9th 2001** (at page 15).

78. As stated by the Honourable Stollmeyer J supra "*the onus of proving that a will has been executed with the testator's knowledge and approval lies on the party propounding it*". See also Civ App. No. 102 of 2003 **Lalla v Lalla** per the Honourable Mendonca JA at para 53.

79. Although the evidence showed that the deceased had been suffering from cancer, the Claimant accepted that **he had not been medically examined prior** to his **making** or **signing** the will. It was submitted however, that on the totality of the evidence, it was sufficiently established that the deceased did understand what he was doing, and further, that there was no evidence of any mental illness or unsoundness of mind in the deceased.

MENTAL AND PHYSICAL CONDITION OF DECEASED

80. It was submitted that the evidence demonstrates that the day following the execution of the will, even hours after they had found the deceased in the very weak state as they claimed, and with nothing to eat, he was still coherent, he was still able to remember the Claimant's cell phone number, was still able to remember that she had his bank book, was still able to recognize that she was in a position to get the money needed to pay Medical Associates, he was not babbling, and what he said made sense to them. This is accepted. I am unable to find on the evidence that there is any evidence of unsoundness of mind, or mental illness. I have found that the deceased was able to execute a will and that he knew that what he had executed was a will.

81. However these are all circumstances which excite the suspicion of the Court. The circumstances of suspicion surrounding the execution of this will have not been dispelled. The Court cannot therefore be satisfied that the Will propounded does express the true Will of the deceased. In such circumstances the Court will not pronounce in favour of the Will, and the will ought not to be admitted to probate.

UNDUE INFLUENCE

82. The law on undue influence has been clarified in recent decisions and is set out and summarized in **Snell's Equity 31st edition** as follows. The principles are set out at some length hereunder – (any emphasis mine)

THE DOCTRINE OF UNDUE INFLUENCE - LAW

83. In **Royal Bank of Scotland v Etridge (No.2)** [2001] UKHL 44, [2001] 4 All ER 449 Lord Nicholls at paragraphs 6-7 page 457 stated-

> *"Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused. In everyday life people constantly seek to influence the decisions*

of others. They seek to persuade those with whom they are dealing to enter into transactions, whether great or small. The law has set limits ***to the means*** *properly employable for this purpose.*

The law will investigate the manner in which the intention to enter into the transaction was secured…If the intention was produced by an ***unacceptable means****, the law will not permit the transaction to stand. The means used is regarded as an exercise* ***of improper or 'undue' influence, and hence unacceptable****,* ***whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will****. It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion."*

84. The current state of the law is summarised in **Snell's Equity 31st Edition.**

But in Royal Bank of Scotland plc v Etridge (No. 2) *the Court of Appeal and the House of Lords have now confirmed that the basis of the doctrine is not absence of consent but* **proof of wrongdoing**. *Despite this clarification of the principles, however, the scope of undue influence still remains uncertain. The Court of Appeal has recently confirmed that* **the presumption of undue influence can still arise even where the "wrongdoer" is able to satisfy the court affirmatively that his conduct was unimpeachable and that there was nothing sinister in it.**

At page 712 "it is brought into play whenever **one party has acted unconscionably in exploiting the power to direct the conduct of another which is derived from the relationship between them;** *and Etridge [6]-[7]: "The law will investigate the manner in which the intention to enter into the transaction was secured…***If the intention was secured by unacceptable means, the law will not permit the transaction to stand***"*

Paragraph 8-09 page 204-205

"The doctrine of undue influence enables C to obtain relief **where he or she has been induced by the influence of D** *to enter into or participate in a transaction in*

circumstances where the court considers that **the influence was exerted improperly or unfairly….** *The kind of conduct which will attract the Court's intervention may involve threats or other overt acts of coercion. But* **the Court may also intervene where D has exercised no overt pressure on C because he or she has such a power of influence that this is unnecessary***…. cases where the doctrine operates are conventionally divided into two classes. The first class consists of cases of* **actual undue influence***. The second class consists of cases of* **presumed undue influence**. **The legal burden of proving undue influence remains on C throughout but if C establishes the existence of a relationship of influence and the nature of the transaction is so suspicious that it calls for an explanation, this satisfies the evidential burden of proving undue influence and the burden moves to D to provide a satisfactory explanation for the transaction.** ***In the absence of a satisfactory explanation the inference of undue influence can be drawn and the legal burden of proof will be satisfied even if there is no direct evidence of undue influence****… Further, where the relationship between the parties falls into one of a number of recognised categories* ***of*** *parent and child****,*** *guardian and ward, trustee and beneficiary, solicitor and client or medical or spiritual adviser and patient or follower a relationship of influence* ***is presumed****. This is an irrebuttable legal presumption (as opposed to an evidential one)* ***although in order to establish undue influence it remains necessary in all cases for C to establish that the transaction called for an explanation on the basis that it was "immoderate or irrational" or cannot "be reasonably accounted for on the grounds of friendship, relationship, charity, or other motives on which ordinary men act".***

Paragraph 8-12

"Equity identified broadly two forms of unacceptable conduct. The first ***comprises overt acts of improper pressure or coercion such as unlawful threats.*** *Today there is much overlap with the principle of duress as this principle has subsequently developed****. The second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage… In cases of this latter nature the influence one person***

has over another provides scope for misuses without any specific overt acts of persuasion. The relationship between two individuals may be such that, without more, one of them is disposed to agree a course of action proposed by the other. Typically this occurs when one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests."

Paragraph 8-13 page 208

Actual undue influence

"In cases where no overt pressure is exerted ***actual undue influence may be proved by adducing evidence of the relationship of ascendancy and by the court drawing the inference that C was acting under D's direction without any independent thought… If actual undue influence is proved the transaction will be set aside even if the transaction was not clearly or obviously disadvantageous to the victim.***

Paragraph 8-14

Presumed undue influence

But in many cases across the spectrum ***C cannot point to any overt acts or statements from which the court can make direct findings of undue influence*** *and* ***the relationship between the parties is not one of domination or complete ascendancy. Even if C is, therefore, unable to prove undue influence directly, undue influence may be presumed upon proof of (1) a relationship of influence and (2) a transaction which excites suspicion or calls for explanation. "Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof." The onus then shifts to D to provide a satisfactory explanation and to satisfy the court that C was free from D's influence altogether or that any reliance placed by C upon D was not abused. If D is unable to provide a satisfactory explanation then the***

court may draw the inference that C was induced to enter into the transaction ***and the legal burden of proof is discharged.***

Paragraph 8-15

It is also important to emphasize that the fact in issue which is the subject of the presumption is not the existence of a relationship of influence but that this relationship has been wrongfully abused*. In Barclays Bank Plc v O'Brien* ***it appeared to be suggested that proof of a relationship of influence was sufficient to give rise to the presumption of undue influence and that any exercise of influence by one party over another (and, in particular, husband over wife) would be wrongful. This suggestion has now been rejected.*** *Further, there is bound to be a substantial overlap between actual and presumed undue influence particularly in cases of actual undue influence which involve no overt pressure.* ***Where the court finds on the evidence, therefore, that there has been no express or actual undue influence it is not open to the court to infer undue influence from the nature of the relationship between the parties. The claim must be dismissed.***

Paragraph 8-28

Nature of transaction

In ***National Westminster Bank plc v Morgan*** *it was held that the presumption of undue influence will not arise unless the transaction is manifestly to the disadvantage of the person influenced. In Royal Bank of Scotland plc v Etridge (No. 2) the House of Lords declined to depart from their earlier decision although they considered that because of its ambiguity the expression "manifest disadvantage" should be discarded.*

*Accordingly****, the presumption does not arise unless the nature of the transaction is sufficiently unusual or suspicious to require D to provide an explanation****: "so something more is needed before the law reverses the burden of proof, something which calls for an explanation.*** *When that something more is present, the greater the*

disadvantage to the vulnerable person, the more cogent must be the explanation before the presumption will be regarded as rebutted.

Paragraph 8-30

Rebutting the presumption

"In the case of gifts, the presumption may be rebutted by affirmative proof that "the gift was the ***spontaneous act of the donor*** *acting under circumstances which enabled him to exercise* ***an independent will*** *and which justify the court in holding that the gift was the result of a free exercise of the donor's will" Put more shortly,* ***D must establish that the gift was made as a result of "full free and informed thought about it"***

Paragraph 8-31

The most obvious way for D to rebut the presumption is to prove that C received independent legal advice. ***The normal standard of the advice required to rebut the presumption is that S, C's adviser, explained the nature and consequences of the transaction to C with full knowledge of the relevant circumstances.***

SUMMARY OF PRINCIPLES

86. Applying these principles to the facts I therefore turn to consider the following:

1. Is there evidence of actual undue influence?

i. Was there a relationship of ascendancy?

ii. Can an inference be properly drawn on the evidence that the deceased acted under the influence of the defendant without any independent thought?

2. Is there any basis for a finding of presumed undue influence?

i. That is - Is there evidence of a relationship of influence?

ii. If so, is there evidence that such relationship has been abused?

iii. Is the transaction one which calls for explanation or excites suspicion?

iv. Was there anything suspicious or unusual about an elderly testator, in the final stages of cancer, transferring to one daughter, by his will, control over his main asset, and allowing her to effectively determine the disposition of his estate to his other children?

If the above are satisfied, then the burden shifts to the defendant for an explanation of the transaction, in the absence of which the transaction may be set aside.

RELATIONSHIP OF INFLUENCE AND ASCENDANCY

87. The deceased was a cancer patient. By the time the will was executed he could not drive and was reliant on others, including the claimant, for transport. The deceased lived alone. On the evidence of the claimant herself, he had isolated himself and distanced himself from the majority of his family and friends before his death. He was therefore dependant on others for obtaining food, or groceries, or medication.

88. The claimant appears to have been the main such person in contact with the deceased at that time. She attests to having several conversations with him in which they shared his ideas on the disposition of his estate and the management of his business.

89. She arranged for the transmission of his alleged instructions to the attorney. She arranged for the reduction of those instructions into a will. She did not arrange for the deceased to be brought to the attorney, although she arranged for the deceased to be taken for a drive by her to Rituals – a coffee house, just days before.

90. She did not arrange for the attorney to be brought to the deceased. If she had, then the attorney would have had the opportunity to, inter alia,

a. ascertain for himself the physical and mental condition and testamentary capacity of the deceased,

b. satisfy himself that the will represented the instructions and wishes of the deceased,

c. satisfy himself that there was no undue influence being brought to bear upon the mind of the deceased,

d. recommend the involvement of a medical practitioner to ascertain the physical and mental state of the deceased .

91. Further, the claimant appears not to have given priority to ensuring the physical well being of the deceased. The day after the execution of the will the deceased was found dehydrated and weak at his home. The evidence is that on September 10th 2010 - the day after the will was executed, the deceased was weak and dehydrated. The fact that he had an intravenous line inserted at the nursing home corroborates the testimony of his sister that he was dehydrated.

92. The claimant had possession of the bank books of the deceased, who had to rely on her to settle his bill, from his own funds, at Medical Associates. The claimant checked the deceased out of Medical Associates because the bills were mounting, regardless of the fact that it was the deceased's own money which was used to pay those bills.

93. The deceased could not take care of himself after his discharge from Medical Associates. He had been discharged "under medical care". (Evidence of Carol Cedeno) His sister, Carol Cedeno, looked after him at his home until September 17th 2010 when she had to leave. After she had to leave, rather than arrange for a continuation of in -home nursing care for him, the claimant arranged for the deceased to be admitted to a hospice which did not charge fees, although the deceased was the sole owner of a business and a warehouse which was producing a monthly income. He died 3 days later on September 20th 2010.

94. A relationship of ascendancy is clearly revealed on this scenario. The deceased was dependant on the claimant for transport, and access to food and medication. His financial resources had been entrusted to the claimant. There is no satisfactory explanation as to why this was so. The claimant never initiated any medical intervention for the deceased, and in fact

terminated such intervention at Medical Associates, because the bills, paid for out of the deceased's own resources, were mounting.

95. Control over his finances is a strong indicator of a relationship of ascendancy in this case. I find that the deceased was weak, isolated, and vulnerable before his death, and at the time of execution of the will.

96. I find that the claimant was in a **relationship of ascendancy** over the deceased at the time of preparation and execution of the will.

IF SO, IS THERE EVIDENCE THAT SUCH RELATIONSHIP HAS BEEN ABUSED?

97. I find that the relationship was **abused** by the incorporation into that will of terms that were manifestly to the advantage of the claimant, and which terms substituted the wishes of the claimant for the wishes of the deceased as to the disposition of his estate.

98. I find that the keeping apart of the deceased from the attorney who drafted the said will, or any attorney at law, is another matter of suspicion. Certainly the fact that the claimant never took the deceased to receive medical attention at the time of execution of the will or thereafter, despite his physical deterioration, which required hospitalisation less than 24 hours later, and must have been obvious at the time, appears to be not only callous, but highly suspicious.

IS THE TRANSACTION ONE WHICH CALLS FOR EXPLANATION OR EXCITES SUSPICION?

99. The disposition favouring the claimant is at first sight suspicious. That suspicion is only augmented by the appearance that she was, in the deceased's final years, influencing his belief that she was the person who was most qualified to interpret and give effect to his wishes, and his apparent alienation from other members of his family including Cian – a person whom he always regarded and supported as his daughter.

WAS THERE ANYTHING SUSPICIOUS OR UNUSUAL ABOUT AN ELDERLY TESTATOR, IN THE FINAL STAGES OF CANCER, TRANSFERRING TO ONE DAUGHTER, BY HIS WILL, CONTROL OVER HIS MAIN ASSET, AND ALLOWING HER TO EFFECIVELY DETERMINE THE DISPOSITION OF HIS ESTATE TO HIS OTHER CHILDREN?

100. When viewed in conjunction with the terms of the will, (see supra) it is clear that the deceased, a previously strong willed and independent person, had effectively abdicated to the claimant the disposition of his business and estate. In fact there is a suggestion on the evidence that he had done so with respect to his finances even before his death, as the claimant was in control of his "bank books".

IF THE BURDEN SHIFTS TO THE DEFENDANT FOR AN EXPLANATION OF THE TRANSACTION IN THE ABSENCE OF WHICH THE TRANSACTION MAY BE SET ASIDE, HAS A SATISFACTORY EXPLANATION BEEN PROVIDED?

101. I find that it has not. The claimant attempted to suggest that her father had come to repose great trust and confidence in her because of her education, and the fact that she appeared to understand his wishes. However, the will itself made it clear that his wishes had not quite crystallized in his mind. The will confers extraordinarily wide discretion in the claimant to vary the percentage which each beneficiary would receive, to the extent that she could effectively disown any or all of them.

102. Further she benefits from a share of the gross rental income of the warehouse property for 5 years, while the other beneficiaries await their share. The explanation, that it was intended that the loan for the property be paid off as quickly as possible, does not explain why the discretion afforded to the claimant is so wide. Examination of the will confirms that effectively the will represents her wishes, rather than those of the testator.

103. While the suggestion of counsel for the claimant, in effect, that

a. It would have been reasonable for the deceased to have concluded that the first and second defendant would not be capable, in light of their lack of business experience and limited education- which he had spoken to them about – of handling his affairs, and

b. It is not irrational that he would have, in the circumstances, faced with the available options, decided to entrust his affairs to a daughter who, though he became closer to her in his later years, may have appeared to him to be taking an interest and to be capable,

appears reasonable, the totality of the circumstances surrounding the execution of the will and the contents thereof, arouse a degree of suspicion that must be addressed.

RED FLAGS

ISOLATION

104. Increasing isolation from friends and his family - (See claimant's witness statement (supra).

DEPENDENCE

105. The deceased was no longer able to drive and was becoming progressively weaker. To leave his house he had to rely on others. To be supplied with food and groceries he would have had to rely on others.

SECRECY

106. The claimant did not ensure that deceased actually saw the attorney, if even once, to confirm that the final draft of the will represented his actual instruction and wishes. In fact, as she was able to drive him to the mall, it can be inferred that she would have been able to drive him to the attorney. It is not credible that the strong willed person, as the deceased was consistently described, would decline to see the lawyer if that opportunity were afforded him, or even suggested to him. It is suspicious that such a visit never occurred.

107. Similarly it is a matter that arouses even greater suspicion that the priority of the claimant appeared to be to arrange execution of the will, arranging this more than once. Yet no effort was

made to arrange for her elderly, weak, cancer stricken father to see a doctor, either before or after he executed the will.

108. The deceased was kept away from the discerning eyes of a lawyer or a doctor, whether by accident or design. The involvement of a lawyer was obviously called for in the circumstances where a will disposing of all the assets of the deceased was being prepared and executed. The involvement of a doctor was obviously called for in circumstances where the deceased was cancer stricken and becoming weaker, as evidenced by the need for his hospitalization the very next day after executing the will.

109. The claimant needs to provide a satisfactory explanation for the suspicious absence of such involvement, and the aura of secrecy and isolation of the deceased, in which she was complicit. She has not been able to do so.

HANDOVER OF FINANCIAL CONTROL

110. On July 28th 2010 the deceased added the name of the claimant to his bank account, which then allegedly became a joint account into which he put monies so that the claimant could have enough finance to take care of his ill health and passing. (Paragraph 16 of her witness statement).

111. Joint financial responsibility is explicable. In fact however, he could not write a cheque or use a credit card to settle his deposit for admission to Medical Associates, out of his own funds. Placing himself in a position of **complete** financial dependence on someone, even a daughter, who would allow him to remain home alone, and become weak and dehydrated to the point where he could not rise to open his own front door, is inexplicable.

112. The deceased was a successful self made businessman. To have placed himself in a position of such complete financial dependence on others whose decisions on how he spent his final days were critical to how he would live, and die, was not characteristic. It was not consistent with a strong willed individual, uninfluenced by others.

113. In fact, on the evidence presented in this case, it was completely and utterly unnecessary. The deceased was allegedly of sound mind. He could go for drives. He could express himself verbally. He could execute a will. If so, equally he could sign his own cheque. He could use his own credit card. He could himself go to his bank. Why would he deprive himself of the ability to do so? He clearly had done so as the claimant had to be called to settle the nursing home bill.

114. I find that these are matters that must arouse a court's suspicions. This state of affairs raises alarm bells which have not been quelled by any explanation or testimony of the claimant. If anything, such testimony has only exacerbated the degree of suspicion aroused. In those circumstances the will cannot be admitted to probate. I find that the will is void and of no effect. The claimant's claim is dismissed.

PATERNITY OF CIAN BROWN-THE THIRD DEFENDANT

115. It was contended that, as the estate of the deceased must now devolve on the basis that the will is of no effect, there is therefore a need to make a determination as to the paternity of the Third Defendant. Though a counterclaim was filed this is not a relief expressly claimed. However, a declaration was sought that the **Defendants** are entitled to apply for a grant of letters of administration of the estate of the deceased.

116. Having considered that:

i. "Defendant**s**" includes the third defendant,

ii. The list of issues filed by the claimant herself lists this as an issue,

iii. Evidence has been led extensively on this issue, and

iv. The court has a duty to deal with and dispose of all matters that can be properly adjudicated upon in a proceeding so as to avoid a multiplicity of proceedings, (section 20 Supreme Court of Judicature Act – see also section 16)

there is no reason to avoid such a determination at this stage.

117. With respect to paternity **Section 10 (1) (b) and (d) of the Status of Children Act** provides:-

> "(1) Any person who—
>
> *(b)* alleges that the relationship of father and child exists between himself and any other person;
>
> *(d)* being a person having a proper interest in the result, wishes to have it determined whether the relationship of father and child exists between two named persons,

may apply in such manner as may be prescribed by Rules of Court to the High Court for a declaration of paternity, and if it is proved to the satisfaction of the Court that the relationship exists the Court may make a paternity order whether or not the father or child or both of them are living or dead."

118. **Section 9(5)** of the above mentioned Act states:-

> "Where the High Court makes a paternity order under section 10 of this Act … the Registrar of the Supreme Court or the Clerk of the Peace, as the case may be, shall forward a copy of such order to the Registrar General for filing in his office under this section, and on his receipt of any such copy the Registrar General shall file it accordingly as if it were an instrument of the kind prescribed in subsection (1)."

119. The usual procedure involves evidence on affidavit, with the assistance of the report of a field investigator appointed by the Registrar General's department. Such report usually attempts to verify matters that the claimant or deponent attests to. In the instant proceeding there is a departure from the norm. However, despite this, I find that the procedure in the instant matter has produced more compelling evidence than would usually be obtained.

120. It does not suffer from any deficiency in not having the report of a field investigator, as such investigator could have no direct knowledge of the matter in issue, and the persons who would be likely to have been interviewed testified before the court, and were available for cross examination.

121. The evidence includes that of Cian's mother, as well as her step sister Joanne Philbert a person who might be expected to have interests adverse to hers. All the evidence, including that of the claimant, supports that at least up to 2010 the deceased treated and acknowledged Cian to be his daughter.

122. The change of attitude of the deceased toward her has not been explained, and appears irrational. There are other instances of irrational behaviour on his part, including cursing his sister uncharacteristically, allegedly giving instructions for the said will, isolating himself from family members in his final months, and the incident where he crouched down in the claimant's car, and had the claimant drive past his house to ensure that he not be seen by family members who had earlier contacted him by telephone.

123. In the absence of a sensible or rational explanation for the change of attitude by the deceased, who had for the majority of Cian's life accepted her as his daughter, I find that, on a balance of probabilities, that she was. It is his later change of attitude that is inexplicable, not his acceptance of paternity for most of Cian's life.

124. I find on the unchallenged evidence as to the relationship which existed between the deceased and the Third Defendant, and the supporting evidence of Maureen Hospedales, Carol Cedeno, Patricia Brown, the First and Second Defendant, it has been proven to the requisite standard that the Third Defendant is the daughter of the deceased.

TESTAMENTARY SCRIPTS

125. Submissions were made with respect to documents allegedly found in an envelope, referred to by the claimant as testamentary scripts. Though filed, these were disclosed to the defendants for the first time at trial. I do not propose to burden this judgment with the submissions made with respect to these, save to indicate that I consider them to be of no relevance to the issues in this case, and that I accept the submissions of the defendants in this regard that:-

a. The first document is dated the 23rd day of February, 2010; it named the Claimant as the Executor. It simply lists his assets.

b. The second document is in a different coloured ink. It is not dated. It repeats some of the things stated in the first document. It is not witnessed. It named five (5) children, but bequeathed an equal distribution to them, contrary to the alleged Will.

c. A portion of the third document is missing. No Executor is stated, nor is it dated. Assets are listed. However there is no indication of their distribution, nor is the document signed or witnessed.

CONCLUSION

126**.** a. The said will was duly executed in accordance with the requisite formalities.

b. The deceased was able to execute a will, he knew that what he had executed was a will, and the execution of the will was the act of a competent testator. There is no evidence of unsoundness of mind, or mental illness in the deceased.

c. The burden of proving that the deceased **knew and approved** of its full contents and effects has not been discharged.

d. The circumstances and facts surrounding the preparation and execution of the said will give rise to a well-grounded **suspicion** that the said will does not express the will of the deceased. The circumstances of suspicion surrounding the execution of this will have not been dispelled.

e. The execution of the said will was the product of the presumed **undue influence** of the Claimant, which presumption has not been rebutted.

f. The said will is invalid and ought not to be admitted to probate.

g. The third Defendant, acknowledged by the deceased for most of his life, but who disavowed paternity before his death, is, on a balance of probabilities, the daughter of the Deceased.

DISPOSITION AND ORDERS

127. i. The claimant’s claim is dismissed.

ii. A declaration is granted that the purported will of the deceased dated September 9th 2010 is null and void.

iii. A declaration is granted that the defendants, including the third named defendant, are entitled to apply for a grant of letters of administration.

iv. A declaration is granted that the deceased is the father of the third named defendant.

v. Liberty to Apply.

vi. The claimant is to pay to the Defendants costs in the sum of $14,000.00.

Dated this 18th day of January, 2013

Peter A. Rajkumar
Judge