**In the Republic of Trinidad and Tobago**

In the High Court of Justice

CV 2008-00099

Between

**Elena Hickson**

Plaintiff

And

**Kayrine Keisha Kathy Cumberbatch**
**Serdon Julien Atwell**
**Garvin Lewis**

Defendants

**Before The Honourable Mr. Justice Devindra Rampersad**

Appearances:
Gail Persad for the Claimant
Mr. Phillip Lamont instructed by M. Harper for the Defendants

**Date Delivered: 2nd June, 2010**

# JUDGMENT

## Contents

## The pleadings:

1. Raphael Nestor Atwell otherwise Nestor Atwell otherwise Raphael N. Atwell ("the deceased") late of No. 2 Francis Street, Tunapuna died on the 24th September 2007 at the Eric Williams Medical Sciences Complex, St. Joseph. The Claimant alleges that the deceased left his last will and testament dated 17/5/04 ("the Will") and the Claimant filed non contentious proceedings **L 2197 of 2007** – 10/9/07. A caveat was lodged on the 7/12/07 by the Defendants followed by a warning on the 4/1/08 and an appearance by on the 4/1/08. This action was brought by claim form and statement of case filed on the 11/1/08 for an order for the removal of the said caveat and an order that a grant of probate be granted to the Claimant. The claim, to my mind, ought to have been for probate in solemn form of the Will but this is not detrimental to the Claimant's claim.

2. A defence was filed on the 18/2/08 by 2 of the children of the deceased in which they say that:

    2.1. The Claimant was not the common-law wife of the deceased.

    2.2. The Will was not executed in accordance with provisions of the **Wills and Probate Act Chapter 9:03**

    2.3. The Will is a forgery and was fraudulent–

        2.3.1. The signature appearing on the Will is not the signature of the deceased– in support of this, the Defendants sought to rely upon a forensic examination of the Will;

        2.3.2. The deceased did not sign or acknowledge signature to the Will in the joint presence of the attesting witnesses or at all;

        2.3.3. The alleged witnesses did not attest and/or subscribe their names in the presence of the deceased;

        2.3.4. At the time of the making of the forged and fraudulent Will the deceased had no property as described and devised and well knew who his children were by name.

    2.4. At the time the Will was executed, the deceased did not know or approve of the contents of the Will.

3. A counterclaim was brought for the court to pronounce against the Will.

4. No defence to counterclaim was filed.

## A brief background:

5. At the time of his death in 2007, the deceased was a foreman with the Unemployment Relief Program (the URP), a "whe whe" banker and was the owner of:

    5.1. A minimart/shop business at the corner of the Eastern Main Road and the Southern Main Rd., Curepe;

    5.2. A bar and snackette business at Morton Street, Tunapuna;

5.3. A property at number 2 Francis St., Tunapuna which comprises a two-story house with 4 two-bedroom apartments -- one of which was occupied by the deceased and the other 3 rented;

5.4. 2 motor vehicles;

5.5. Cash in RBTT Bank Limited, Republic Bank Limited and Hindu Credit Union.

6. The deceased, apparently, never married but engaged in several relationships over the years as the result of which he was the father of 8 children, according to the Claimant. The Defendants are 3 of his children.

7. The Claimant claims to have known the deceased since around the age of 19 (she was 43 years old when she signed her witness statement on 16 September 2008). She had no children with the deceased but claims that her son Nigel Critchlow (who is 26 years old) whom she had with another person after she started her relationship with the deceased, was maintained and looked after by the deceased.

8. On the other hand, the Defendants' witness Karen Gibbings alleged that she had a relationship with the deceased from 1990 until 2002 out of which 2 children were born -- **Tre Raphael Gibbings** (who would have been 11 years old at the time of the making of the Will) and **Jimmy Nestor Atwell** (who would have been 6 years old at the time of the making of the Will).

9. Ms. Gibbings said that the deceased was shot in May 1992 and after that he came to live with her after hospitalization and that he lived with her continuously until 2002 when they broke up (save for a period of 3 years and 4 months when he was imprisoned). He then he returned to live with his mother at number 50 El Dorado Rd., Tunapuna. Whilst living with his mother, he began a relationship with Ms. Orderson and at the end of December 2004 he moved in with Ms. Orderson in his own premises at Francis St., Tunapuna where he lived with her until March 2007 when she left- according to Ms. Gibbings. Ms. Orderson however disputes this stating that she and the deceased lived together until his death and she never really left.

10. He had one child with Ms. Orderson namely **Nestor Orlando Atwell** who was born on 8 January in the same year in which the deceased died.

11. The deceased died on 24 September 2007 at the age of 46 as a result of multiple internal injuries and hemorrhaging resulting from multiple gunshot wounds to his body.

## The Will

12. The Will is a computer generated document printed on both sides of legal sized "deed" or bonded paper. It follows an accepted standard legal format and bears the purported signature of the deceased at the foot of page 2 of the same followed by the signatures of the attesting witnesses who are Yaseen Ali and Sunil Seeram. The writing on the Will is done in typewritten computer fonts save for the following:

12.1. The date "17th" is written in pen on 2 places on page 2 before the printed words and number "*day of May 2004*";

12.2. The signature "*Raphael N Atwell*";

12.3. The words "*ID # 19601024068*" below the typewritten name "Raphael Nestor Atwell" below the spot designated for the place of signature;

12.4. The respective signatures, addresses and occupations of the attesting witnesses in their purported handwritings. Mr. Ali's signature also carried a rubber stamped print of his name and occupation.

13. The Will named and appointed the Claimant to be the sole executrix and trustee of the deceased's estate. The Claimant was described in the Will as the deceased's common-law wife.

14. After the payment of all his just debts, funeral and testamentary expenses, the Will devised and bequeathed the deceased's entire estate as follows:

14.1. Unto to the Claimant all and singular his freehold property situated at number 2 Francis St. Extension, Tunapuna (together with the furniture, appliances, fixtures and fittings herein) for her personal use and benefit, inclusive of the rental income derived there from;

14.2. Unto his children, in equal shares as follows:

14.2.1. The moneys derived from the sale of his 2 motor cars; and

14.2.2. His monies in the Hindu Credit Union, Republic Bank Limited (Tunapuna East) and RBTT Bank Limited (St. Augustine);

14.3. The residue of his estate was left to the Claimant.

## The evidence:

15. Witness statements were filed on behalf of the Claimant in relation to the following witnesses:

15.1. Yaseen Ali;

15.2. Elena Hickson.

16. Witness statements were filed on behalf of the Defendants in relation to the following witnesses:

16.1. Karen Gibbings;

16.2. Natalie Cumberbatch;

16.3. Khabieal Orderson;

16.4. Glen Parmassar.

### Yaseen Ali

17. Mr. Ali, the Attorney at Law who prepared and witnessed the Will, said that he knew the deceased since 1982 until his death in September 2007. He referred to him as "Jimmy" and he said that he did the majority of his legal work including representing him in various magistrates Court matter. He seemed quite familiar with the deceased as he said

that they both lived in Tunapuna and he said that he passed in front of the deceased's mother's house on a daily basis. Mr. Ali said that he had applied for all of the deceased's liquor licenses for his snackette which was situated next to Mr. Ali's office at number 1 Morton St., Tunapuna and, as a good neighbor, he patronized the snackette. To him, the deceased was more than just a client and a neighboring tenant. He said that they had a good relationship.

18. Even though Mr. Ali seemed to be saying in his witness statement that the deceased was well known to him and they had a good relationship, there seems to be a lot about the deceased which Mr. Ali did not know. In cross-examination he admitted to the following:

18.1. He did not know how many children the deceased had although he had no reason to doubt attorney at law for the Defendants when it was suggested that the deceased had 8 children;

18.2. He did not know the names of any of the children;

18.3. He did not really know where the deceased was living;

18.4. He did not know the persons with whom it was suggested that the deceased had relationships over the years and he had no reason to doubt the names of the various women suggested to him by attorney at law for the Defendants nor did he have reason to doubt the number or names of the children these women allegedly bore for the deceased;

18.5. He did not know if the deceased cohabited with the Defendants' witness Ms. Gibbings although he could not deny that they did in fact live together between 1992 and 1995 and also between 1998 and 2007 after he had come out of prison where he had been during the intervening period, 1995 to 1998. He also could not deny that from 1998 to 2007 the deceased lived with Ms. Gibbings at Jackson Street, Curepe;

18.6. He did not know the Defendants' witness Khabieal Orderson. He did not know if the deceased lived with that person at Francis Street from November to December 2004 until his death but he had no reason to doubt that they were so living together;

18.7. He did not know for a fact if the deceased lived together with the Claimant. This was something that he assumed because of the fact that he saw them come and go together to and from the business next door to him; also by the way they got along with each other and their demeanor when they were together. He never actually saw them together in a house living together.

## The preparation and execution of the Will:

18.8. The account given by Mr. Ali as to the circumstances surrounding the preparation and execution of the deceased's Will was not shaken in cross-examination. He said that he was told by the deceased some 2 to 3 weeks before 17 May 2004 in the precincts of the Tunapuna Magistrates Court that he wanted to make his Will. This request was apparently repeated "*many times thereafter*".

18.9. On Saturday, 15 May 2004 the deceased went to the office of Mr. Ali and gave him instructions. He says that he took that opportunity to advise the deceased of the legal requirements of making a Will; for example he must have an executor,

he must have 2 witnesses to attest to his signature of the Will, he must revoke all former Wills and he must decide on his beneficiary or beneficiaries. In cross-examination he admitted that he did not indicate to the deceased that he ought to make arrangements for the welfare of his children. His response to that proposition was that:

> "*Mr. Atwell gave instructions and I followed those instructions. The Jimmys of this world are not amenable to advice.*"

18.10. After that meeting on 15 May 2004, Mr. Ali said that the deceased left his office to return later that morning with the "*relevant information*". When asked in cross-examination what that relevant information was, Mr. Ali said that he did not know and that he could not say. The deceased did not come back that day. On Sunday, 16 May the deceased saw Mr. Ali at the market and insisted that the Will be made that very day. Mr. Ali said that he left his wife in the market and traveled to his office in the deceased's vehicle and there he took the relevant information in writing meaning he made notes of what the deceased wanted to put in the Will. Mr. Ali said he assured the deceased that he would have his wife type up the Will to guarantee its confidentiality and he made a promise to meet again the next day -- Monday, 17 May 2004 at 8:30 a.m. to sign the Will. The deceased was asked to bring a witness.

18.11. Mr. Ali said that on the next day when he reached to the office at 7:45 a.m., the deceased was already parked and waiting for him together with a witness introduced to him as "Sunil". Mr. Ali's evidence as to what transpired thereafter is important as to the circumstances surrounding the execution of the Will and is therefore set out in detail:

> "*16. Jimmy, Sunil and myself entered the office and Jimmy explained to me he came early to avoid the publicity. Again, he did not want 'people' to know his business. I locked my office door and proceeded to give Jimmy the Will to read, so that he could be assured that what was in the Will was the same as the instruction* given.
>
> *17. I further asked him if he had any questions to ask me pertaining to the Will or if there was anything in that he did not understand. Jimmy replied that it is okay and he was ready to sign it. I offered Jimmy my pen and in my presence and in the presence of Sunil, he affixed his signature, "Raphael N. Atwell". I then asked for his I.D. Card which he gave to me and I wrote his I.D. Card number under his type-written name. I then invited Sunil to sign as a witness and the said Sunil affixed his name and address thereto.*
>
> *18. I then affixed my name and address as the final attesting witness to the execution of the said Will. At no time did Jimmy appear to be intoxicated, afraid or under duress or not of sound mind. His main concern was that no one knew his business. He remained in my office for sometime afterwards, discussing the horses and play whe numbers, which he considered to be good for the particular day.*
>
> *19. He then left and went to his snackette, brought my daily quota of cigarettes for me and at about 8.30 a.m., Sunil went away, leaving Jimmy and I in the office. Jimmy gave me further instructions as to the*

*safekeeping of the will and disclose [sic] certain confidential information to me. I then put the will together with written instructions in a file jacket, placed it in a brown envelope and put it in my file cabinet for safekeeping. "*

18.12. None of the preceding evidence was probed or tested or shaken in cross-examination save that it was suggested to Mr. Ali that the Sunday encounter did not happen to which Mr. Ali responded that it did, and when asked for the notes he took relative to the wishes of the deceased to be put in the Will, he indicated that he did not have same with him.

## Elena Hickson

19. The Claimant herself gave evidence in this matter. In paragraph 3 of her witness statement, she stated that she and the deceased had a common-law relationship for more than 25 continuous years prior to his death on 24 September 2007. When asked about this, she admitted that she and the deceased never lived in the same house as man and wife and that what she meant when she said that they had a common-law relationship was that she used to go by the deceased mother's house every morning and from there she went to work. Sometimes she even slept over by the mother's house. She went on to say that what she meant was that the deceased used to "maintain" her and that is why she said they had a common-law relationship. She went on to admit in cross-examination that she and the deceased had a **visiting** relationship. It was not disputed by any of the parties who gave evidence in this matter that the Claimant and the deceased had an intimate relationship – although it is doubtful if any of them could have, save for Ms. Orderson for reasons set out below.

20. Her evidence was that:

20.1. She managed a minimart downstairs of the Apple Recreation Club in Curepe Junction;

20.2. She managed the deceased's snackette and bar on Morton Street. This she ran for about 9 years before he died and which she continued to run for about 3 weeks after his death;

20.3. The deceased was her "man" since she was going to school -- this was not challenged;

20.4. The deceased trusted her with his money and he would ask her to buy clothes, school books and other items for his children whenever those items were needed. It was not in issue that she was the one who made deposits for him at the banks and was aware of his banking habits and procedures. In fact, Ms. Orderson for the Defendants admitted in cross-examination that she was aware that the Claimant collected and paid out money for the deceased as a part of his "whe whe" operation;

21. She denied that she worked for the deceased for a salary but merely assisted when workers were not there.

22. She was not aware of the existence of any Will until around the 26th of September 2007, after the death of the deceased, when she was informed about the Will by Mr. Ali when he came into the snackette to buy a pack of cigarettes. As a result, she knew nothing about the circumstances surrounding the preparation and execution of the Will.

## Khabieal Orderson

23. She was the last person with whom the deceased lived. She says that relationship started about the year 2000 whilst the deceased was living with Ms. Gibbings. She says that she began living together with the deceased at number 2 Francis St., Tunapuna in November to December 2004 and that she had a son -- Nestor Orlando Atwell born on 8 January 2007 -- with the deceased. She claims to have broken up with the deceased in June 2007 when they had a disagreement and that she did not fully leave the apartment until after his death - finally removing all of her personal effects within a week of his death when the 2nd named defendant moved into the apartment.

24. She apparently saw the probate application in the newspaper and reported it to Ms. Gibbings. She indicated that she first saw the Will at an attorney's office and that she had a problem with the Claimant being the executor of the Will. She felt that the deceased's mother should have been the executor.

25. In her witness statement, Ms. Orderson said nothing about her views as to the signature on the Will but in cross-examination she went on to say that the deceased did not sign the Will and that, in fact, he had told her about 2 months prior to his death that he never really wanted a Will. I have great reservations about this aspect of her evidence and I do not believe that she was in a position to assist this court as to the deceased's hand writing since no foundation or basis upon which this evidence could possibly be based was given by this witness.

26. She did go on to say that she was familiar with the Claimant who visited the house at Francis Street, but they were not friends. Ms. Orderson claimed to be aware that the Claimant collected and paid out money for the deceased. She was also aware that the Claimant slept over at the Francis Street property sometimes even when she was there.

27. She agreed that the deceased knew Mr. Ali and that Mr. Ali sometimes acted for him as an attorney and that they had a friendship.

## Karen Gibbings

28. Ms. Gibbings was the mother of 2 of the deceased's children and says that she started a relationship with him since 1990. She says that they lived together from 1992 until 2002 except for a period of 3 years and 4 months when he was in prison from October 1995. According to her, the deceased had a bar on Morton Street, Tunapuna opposite the Tunapuna Magistrates Court which Mr. Ali frequented and from where he conducted his business. She says that although Mr. Ali was often paid by the deceased to represent the deceased's friends who were in trouble with the law, Mr. Ali never really represented the deceased in any matter in which he was involved. This was in conflict with the evidence of Ms. Orderson and Mr. Ali himself who both attested to the latter being the deceased's attorney.

29. Ms. Gibbings said that she used to work in the bar on Morton Street which she managed until 1993 and that the Claimant worked in that bar after she stopped. During the deceased's incarceration, Ms. Gibbings said that the Claimant would make weekly disbursements to the deceased's mother out of the takings from the bar and that the deceased's mother took care of paying the rent for his various businesses. This was not challenged in cross-examination. Neither was it challenged when she said in her witness statement that whatever profits were made from the business and whatever things of value the deceased had was held by his mother.

30. Ms. Gibbings said that the Claimant never lived at the deceased's premises at number 2 Francis St., Tunapuna. She went on to say that 3 of the apartments at Francis Street were rented out and that she was the one who "did the rentals", interviewed the tenants and decided who would rent, obtained the rental agreements and ensured that the tenants and the deceased sign same, which she witnessed and signed as well.

31. She said in her witness statement that she was present when the deceased signed the rental agreements and also when he signed the Ministry of Local Government Unemployment Relief Program form and that she knew the deceased's signature. As a result, she came to the view that the signature which appears on the Will was not the deceased's signature.

32. She exhibited letters written to her by the deceased whilst in prison which were dated 10 June 1997 and 9 October 1997. This was meant to confirm her relationship with the deceased.

33. She said in closing that after the deceased had completed the house at Francis Street in or about November to December 2004 she asked him if he was not going to make a Will to which he replied:'

> "*What dat good for? If I dead let everybody fight. Who dead bury next to me and who live, take it"*

34. It was in her cross-examination that certain peculiar bits of evidence emerged. Firstly, she said that the deceased did not write the letters which were sent to her from prison but that was not stated in her witness statement nor was it clarified in re-examination. If this was an attempt to show some sort of incapacity, I fear that it would be quite irregular and unfair in the circumstances since this would have caught the Claimant's attorney unprepared to deal with such an issue.

35. Further, when it came to the issue of the property at Francis Street, she said that she went with the deceased to see the property but she did not go on to the property. Instead, she remained out by the main road whilst he went to the land itself. This made no sense to me at all as this allegation by her seemed to have been intended to show her as being a person whose opinion was so trusted by the deceased that he took her to see the property presumably for her input but which opinion never realistically materialised.

36. The 3rd bit of peculiar evidence was when she was asked if the deceased was able to read and her response was:

> "*I would say no."*

What concerns me about the last bit of evidence is that this was not raised in any of the pleadings before the court and it was not any part of the particulars that the deceased was illiterate and he did not know the contents of the Will because the same was not read back to him. In this regard, the suggestion that the deceased was unable to read was never put any of the other witnesses. Very importantly, it was never suggested to Mr. Ali that the deceased was not capable of reading. In the circumstances, I have no choice but to disregard that bit of evidence as being inconsistent with the defendant's case as pleaded. If anything, that would have been a material fact which the Defendants were obliged to bring to the notice of the Claimant by the pleadings.

37. Ms. Gibbings said she came to know the Claimant in 1992 when she saw her in hospital whilst the deceased was hospitalized. She also said that she saw the Claimant around the deceased regularly. She admitted that the Claimant was named as the respondent when she made a paternity application in respect of her son Tre, but could not explain why that

happened, blaming it on her lawyers. I have great difficulty in accepting this bit of evidence from Ms. Gibbings. Her lawyers could only have put on the document what she would have told them because they could not have manufactured a name out of thin air. She also admitted that she signed the paternity application documents. I am sure she must have been aware that the respondent named in the application was the Claimant in these proceedings. It is therefore eminently clear to me that she recognized the Claimant as holding some important status in the life of the deceased so much so that the Claimant was named in an application which did not really otherwise concern her. To me, this is some sort of recognition of the Claimant's **peculiar status** in the deceased's life beyond the mere alleged designation of an employee in the deceased's business. The recognition seems more akin to the recognition afforded to a spouse although it is accepted that the Claimant was never married to the deceased and, by the Claimant's own admission, they never lived together.

38. In cross-examination, contrary to what she said in her witness statement, Ms. Gibbings accepted that Mr. Ali sometimes acted as the deceased's attorney at law.

39. She said in cross-examination that she and the deceased had an excellent relationship even though they had broken up and that she would visit him by his mother's house or at Francis Street. I believed that. Despite this, however, he never discussed the Claimant with Ms. Gibbings. When she spoke of the Claimant, Ms. Gibbings showed a certain bitterness and was short and to the point as opposed to the fluent manner in which she was otherwise giving evidence about other matters.

40. Ms. Gibbings was familiar with Ms. Orderson and went on to say that Ms. Orderson actually left in March of 2007 -- in contradiction with Ms. Orderson's statement that she left in June but did not fully remove all of her things until after the death of the deceased.

## Natalie Denise Cumberbatch

41. Ms. Cumberbatch was brought as a witness who was allegedly familiar with the signature of the deceased and who identified the agreed exhibit "K9" as being a document signed by the deceased. She is a clerical officer employed with the Ministry of Works, Unemployment Relief Programme, Tunapuna office. Her familiarity came from the deceased having signed a form in her presence. That form was referred to as "K9" amongst the specimen documents in the Forensic Document Examination Report of Glen Parmassar.

42. In cross-examination, Ms. Cumberbatch said that she got this form from the file at the office and that in fact, she herself filled out the form upon the request of the deceased and that he signed it. It seems to me that her sole purpose in giving evidence was to verify the authenticity of exhibit "K9" since this was the only document which she had seen the deceased sign and so cannot be relied upon as a person who was familiar with the deceased's signature by reason of having seen him sign on numerous occasions.

## Glen Parmassar

43. Mr. Parmassar is a forensic document examiner who has examined and reported on over 2500 cases locally and for several other Caribbean countries as well. He has testified as a

forensic expert at various levels of court including the Supreme Court, the Magistrate Court, the Industrial Courts and Tribunals.

44. Mr. Parmassar prepared a report dated 21 April 2008 in which he discussed an examination of the Will (referred in his report as Q1) in comparison to 9 documents set out in his report. Those documents were:

44.1. K1 A rental agreement dated 9 May 2005;

44.2. K2 A rental agreement dated 11 May 2005;

44.3. K3 A photocopy of a warranty dated the 3rd of February 2004;

44.4. K4 A carbon copy of a Roy Trin Mutual Fund request form dated 29 June 2004;

44.5. K5 A photocopy of a deed dated 10 February 2004;

44.6. K6 Trinidad and Tobago passport number T 644592 issued on 4 June 1999;

44.7. K7 Photocopy of a Trinidad and Tobago driver's permit date of payment 23rd of March 2005;

44.8. K8 A letter dated 20th of August 2005;

44.9. K9 A Ministry of Local Government registration form dated 14th of August 2007.

45. He explained in his report that the purpose of that report was to determine whether or not Q1 was executed by the specimen writer of K1 to K9. He said in his report that he performed a microscopic examination and comparison of the question signature on exhibit Q1 along with the specimen signatures on exhibit K1 to K9. In his examination, significant differences were disclosed in face detail, line quality, letter form, design characteristics. He said that the line quality of the question signature disclosed elements of slow deliberate movements with unusual pen stops and blunt strokes indicative of drawing effects rather than the fluent execution of a normal signature. There was also a lack of agreement in the letter form design characteristics of the letters R, p, h, a, e, l (1st name) and N, A t, w, l, l (last name). As a result, he came to the conclusion that the signature on the Will **was not executed** by the K1-K9 specimen writer. This finding was highest on his scale of opinion terminology. According to Mr. Parmassar, this is the highest level of confidence that can be expressed. It is a definite conclusion based on the evidence found and consequently, he has no doubt in this opinion.

46. In cross-examination, Mr. Parmassar meticulously analyzed and explained the methodology used by him and provided the court with helpful exhibits "GP 2" and "GP 3" which compared the deceased's enlarged signature on one of the rental agreements to the signature on the Will. In those exhibits, he identified 15 points of dissimilarity, pen stops, areas of retouching and blunt strokes.

47. It was important to note that Mr. Ali was not probed about the signature being less than fluent nor in relation to the dissimilarities and I had no evidence to consider in this regard for example in relation to whether or not the deceased signed his name in a fluent manner in one attempt or whether he did it deliberately with several stops and starts.

## The law

### Generally

48. The Honourable Mendonca JA said in **Lalla v Lalla** Civ App No. 102 of 2003:

> "*59. The onus of proving a Will lies upon the party propounding it. He must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator. 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).*
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> *60. The circumstances which have been held to excite the suspicion of the Court are those which relate to the preparation of the Will, its intrinsic terms and the circumstances of its preparation and execution (see Davis v Mayhew supra). Moreover the circumstances are primarily those existing at the time when the Will was executed. However subsequent events may give rise to a suspicion (see Davis v Mayhew, supra, 286 and 287).*
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> *62. It should be noted that the rule that suspicious circumstances should be dispelled before the Court pronounces for the force and validity of a Will, does not mean that the Court's approach must be one of permanent distrust and disbelief of the evidence before it if there are suspicious circumstances. As Lord du Parcq stated in Harmes v. Hinkson [1964] 3 D.L.R. 497, 511:*
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> > *Those rules enjoin a reasonable skepticism, not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth.*
>
> *65. However, it should be noted that it has been held that it is not sufficient for the judge to say that he believes one witness as opposed to the other. He must assess the evidence with the suspicious circumstances in mind (see Thomas v. Thomas (1969) 20 W.I.R. 58 and Bankay v. Sukhdeo, supra)."*

49. Warner JA in the case **Mohammed v Christiani** Civ App. No. 99 of 2002 said at paragraph 13 *et al*:

> "13. *In **Moonan v Moonan 7 WIR 420** and a number of subsequent cases in this jurisdiction, the definition of **'suspicion'** as stated by Lindley L.J., in **Tyrrell v Painton [1894] p 151** was recognised and confirmed. **'Suspicion'** in this context **'extends to all cases'** in which circumstances exist which excite the suspicion of the court. It is used, in reference to the preparation of a Will, not only of its intrinsic terms, but also the circumstances surrounding its preparation and execution. (See **Alvarez v Chandler 5 WIR 1962, Elias v Elias CvA. No. 138 of 1995 (unreported).***
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> *14. In **Moonan** (supra) Wooding C. J. cited the learning set out in Hals. Laws 3rd Edition Vol. 39, p. 858-9. (See later Vol. 17 4th Edition para. 907). The authors state -*
>
> > *"Whenever the circumstances under which a Will is prepared raise a well-grounded suspicion that it does not express the testator's mind, the court ought not to pronounce in favour of it unless the suspicion is*

*removed. Thus where a person propounds a Will prepared by himself or on his instructions under which he benefits, the onus is on him to prove the righteousness of the transaction and that the testator knew and approved of it. A similar onus is raised where there is some weakness in the testator which, although it does not amount to incapacity, renders him liable to be made the instrument of those around him; or where the testator is of extreme age; or where knowledge of the contents of the Will is not brought home to him; or where the Will was prepared on verbal instructions only, or was made by interrogatories; or where there was any concealment or misrepresentation; or where the Will is at variance with the testator's known affections, or previous declarations, or dispositions in former Wills, or a general sense of propriety."*

*15. In a more recent case of* ***Fuller v Strum [2000] EWCA Civ. 1879 (7 December 2001)****, where the trial judge was not satisfied with the* ***'righteousness of the transaction,'*** *the court in setting aside the trial judge's order, had this to say per Chadwick L.J. -*

*"the question is not whether the court approves of the circumstances in which the document was executed, or of its contents, the question is whether the court is satisfied that the contents do truly represent the testator's testamentary intentions. The phrase "the onus of showing the righteousness of the transaction' is not to be taken as a licence to refuse probate of a document of which it disapproves. "*

*In the same case, Longmore L.J. said –*

*"the vigilance and jealousy of the court is directed to being satisfied that the testator did know and approve of the contents of his Will; no less but also no more."*

*This court had adopted the same approach in Elias v Elias (supra). See also the majority decision of this court in Phillips v Demas CvA. No. 34 of 1993 (unreported)"*

50. In **Wintle v Nye** [1959] 1 All ER 552, [1959] 1 WLR 284, the House of Lords affirmed the common sense proposition that, if there are facts which create a suspicion that the deceased did not know and approve the contents of the Will, it is for the person propounding the Will to remove the suspicion. Viscount Simonds said (at p 291) that *'the circumstances were such as to impose on the Respondent as heavy a burden as can well be imagined*' and they demanded *'a vigilant and jealous scrutiny'* by the court. In other cases, as Viscount Simonds pointed out, the degree of suspicion may be *'slight and easily dispelled*'. The degree of suspicion and the evidence required to satisfy the court of the deceased's knowledge and approval vary according the circumstances of the particular case.

51. The standard of proof is the civil standard - -- that is to say, that the court must be satisfied, on the balance of probability, that the contents of the Will do truly represent the testator's intentions – see **Fuller v Strum** [2001] EWCA Civ 1879, [2002] 2 All ER 87, [2002] 1 WLR 1097, [2002] 1 FCR 608 per Gibson LJ at paragraph 70.

## Forgery

52. In CA Civ 149 of 2006:- **Geneva Hills vs. Gerald James and others**, the Court of Appeal mentioned per Roger Hamel Smith, Acting Chief Justice:- "It is well known and trite law that fraud must be specially pleaded and pleaded with particularity."

## Standard of Proof

53. Lord Nicholls of Birkenhead in **Re H (minors) (sexual abuse: standard of proof)** [1996] 1 All ER 1 at 16, [1996] AC 563 at 586 said:

> "*Where matters in issue are facts the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability*'.

54. Lord Nicholls went on to point out there was '*[b]uilt into the preponderance of probability standard . . . a generous degree of flexibility in respect of the seriousness of the allegation*'.

55. Lord Nicholls also said:

> "*This approach also provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters.*' (See [1996] 1 All ER 1 at 17, [1996] AC 563 at 586-587.)

56. This flexibility of approach within the civil standard of proof was mentioned in the observations of Viscount Simonds in **Wintle v Nye** [1959] 1 All ER 552 at 557, [1959] 1 WLR 284 at 291:

> "*In all cases the court must be vigilant and jealous. The degree of suspicion Will vary with the circumstances of the case. It may be slight and easily dispelled. It may, on the other hand, be so grave that it can hardly be removed. In the present case, the circumstances were such as to impose on the respondent as heavy a burden as can well be imagined.*"

57. Lord Bingham CJ said (at pp. 353-354) in **B v Chief Constable of Avon and Somerset Constabulary** [2001] 1 WLR 340:-

> "*The civil standard is a flexible standard to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matters: Bater v Bater [1951] P 35, Hornal v Neuberger Products Ltd [1957] 1 QB 247 and R v Secretary of State for the Home Department, ex parte Khawaja [1984] AC 74....In a serious case such as the present, the difference between the two standards is, in truth, largely illusory.*"

58. An allegation of fraud is very serious and carries with it very grave consequences. In the appropriate case, criminal charges can emanate from a finding by a court in civil jurisdiction if the court is of the view that the matter can be and should be referred to the Director of Public Prosecution. As a result, even though it is to be proved on the civil standard, it lies on the person alleging fraud to reach the higher end of the spectrum in respect of the civil standard.

## Want of Knowledge and Approval

59. Proof of testamentary capacity and due execution will ordinarily be sufficient to establish knowledge and approval of the contents of a Will. But the circumstances surrounding its making may excite sufficient suspicion to throw on those propounding it the burden of adducing affirmative evidence of knowledge and approval: see **Fuller v Strum** [2001] EWCA Civ 1879; [2002] 2 All ER 87, [2002] 1 WLR 1097, at paras 32 and 33, per Peter Gibson LJ. The burden of proof is, however, still the ordinary civil burden based on the balance of probability: see per Chadwick LJ, at paras 70 to 72.

60. The Privy Council held in **Lucky v Tewari and another** (1965) 8 WIR 363 that:

> "*Although in order to raise a case of suspicion it is not essential that the Will should have been prepared by a person taking a benefit thereunder, yet where as in this case that was not so and the Will had been prepared by a person who took no benefit thereunder the evidence of facts giving rise to suspicion must be such as to create* ***a real doubt*** *that the testator did not know or ought to of the contents of the Will."* [Emphasis mine]

## The Burden of Proof

61. The burden of proof of knowledge and approval in this case is on the person propounding the Will and can be discharged by the positive evidence that the testator read and approved the Will.

## The presumption of knowledge and approval

62. The burden may be discharged *prima facie* by the presumption which arises by proof of the capacity of the testator and due execution of a Will regular on the face of it. From these, knowledge and approval of the Will are presumed - see **In the Estate of Musgrove, Davis v Mayhew** [1927] P. 264 and **Lucky v Tewari** (1965) 8 W.I.R.363.

63. In such circumstances, a court may conclude that the propounder of the Will could rely on the presumption to establish the knowledge and approval of the Testatrix.

## Due execution

64. **Section 42 of the Wills and Probate Act Chapter 9:03** provides as follows:-

> ***"42.*** *Save as hereinbefore provided, no Will executed after the commencement of this Act shall be admitted to probate or annexed to any letters of administration or be deemed to have any validity for any purpose whatsoever unless such Will is in writing and executed in manner hereinafter mentioned, that is to say,—it shall be made by a person of the age of twenty-one years or more, it shall either be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses of either sex competent to attest a Will according to the law of England, present at the same time, and such witnesses shall attest and subscribe the Will in the presence of the testator and of each other but no form of attestation shall be necessary. No person shall*

*be a competent witness to any Will executed or purporting to be executed after the 16th of May 1921, who has attested such Will by making a cross or mark or otherwise than by his signature in his own proper handwriting.*"

65. The requirements in law under **section 42** therefore are:

65.1. The Will must be in writing;

65.2. It shall be made by a person of the age of twenty-one years or more;

65.3. It shall either be signed at the foot or end thereof by the testator or by some other person **in his presence and by his direction;**

65.4. Such signature shall be made or acknowledged by the testator in the presence of two or more witnesses of either sex competent to attest a Will according to the law of England, present at the same time;

65.5. Such witnesses shall attest and subscribe the Will in the presence of the testator and of each other;

65.6. No form of attestation shall be necessary;

65.7. No person shall be a competent witness to any Will executed or purporting to be executed after the 16th of May 1921, who has attested such Will by making a cross or mark or otherwise than by his signature in his own proper handwriting.

## The Onus of proof

66. The onus of proving that the Will propounded was executed as required by law is on the Defendant in this case. To quote from **Tristram and Coote's Probate Practice** 30th Edition at page 813:

"*The onus of proving that the Will propounded was executed as required by law is on the Claimant or party propounding it. The onus is a shifting one. It is for the person propounding the Will to establish a prima facie case by proving due execution. If the Will is not irrational, and was not drawn by the person propounding it and benefiting under it, the onus is discharged unless or until, by cross examination of the witnesses, or by pleading and evidence, the issue of testamentary capacity or want of knowledge and approval is raised. The onus on these points is then again on the person propounding. As to other allegations the onus is, generally speaking, on the party making them."*

At page 866, **Tristram and Coote's** continue at paragraph 39.09:-

*"At the hearing the court would have to be satisfied by the party propounding the Will that it was duly executed, that the testator was of testamentary capacity, and that he knew and approved of the contents of the Will. The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved at the trial by their oral evidence given in public."*

## Presumption of due execution:

67. Bereaux J said in the case of **Walker & or v Walker** HCA No. 3703/86 that:

"*The law may be stated thus:*

*(1) The onus lies on a party seeking to propound the Will. He must satisfy the court that the instrument so propounded is the last Will of a free and capable testator per Wooding C J in* ***Moonan v Moonan*** *(1965) 7 W.I.R. 420.*

*(2) In absence of evidence to the contrary a Will which is shown to have been executed and attested in the manner prescribed by law and which appears to be rational on the face of it, is presumed to be that of a person of competent understanding. See* ***Moonan v Moonan*** *(supra).*

(3) *Once there is evidence before the court which casts doubt upon the validity of that presumption in any case, its conscience cannot or should not be satisfied without some affirmative proof. See the judgment of Wooding C J in* ***Alvarez v Chandler*** *(1962) 5 W.I.R. 226.*"

68. Of significance is what is stated at para. 34.19 of **Tristram and Cootes** *supra*:-

"*If the Will is ex facie duly executed the court may pronounce for it although the evidence of attesting witnesses is adverse .....*"

69. This presumption of due execution can only be rebutted by "the strongest evidence". In analyzing the law in this matter, I have on my own, considered the authorities of:

69.1. **Sherrington and others v Sherrington** [2005] EWCA Civ 326, [2006] 3 FCR 538

69.2. **Wright v Sanderson** [1881-5] All ER Rep Ext 1373, Also reported: 9 PD 149; 50 LT 769; 48 JP 180; 32 WR 560; 53 LJP 49

69.3. **Celestine Adolph (Executrix Of The Estate Of Mcdonald Trim, Deceased) v Otris Dickson** CvA. No. 48 of 2001

70. Warner JA in the case of **Mohammed v Christiani** *supra* said in respect of due execution at paragraph 11 of her judgment:

*"If a Will on the face of it, appears to be duly executed, the presumption is in favour of due execution, applying the principle* ***'omnia praesumutur rite esse acta.'*** *The evidence of one of the attesting witnesses, if he deposes to due execution is sufficient. It may be rebutted by the evidence of the other attesting witness, but such evidence must be clear, positive and reliable. (See Hals. 4th Edition Vol. 17 para. 893). Notably, that witness is regarded as the witness of the court. (See Hals. Fourth Edition Vol. 17 para. 892). The court must not give undue weight to the circumstances on which the presumption is founded, and on the other hand, must not lose sight of them. (See Williams on Wills, Eighth Edition, 145).* "

## Resolution of the matter

### In relation to the alleged forgery

71. At the end of the day, it is clear to me that I must look at all of the evidence as a whole and place it in the context of the case and the respective burdens on both sides.

72. On the one hand, I had the benefit of the definitive evidence of Mr. Parmassar. There was no serious challenge to his evidence. I also had the evidence of Ms. Gibbings whose evidence was not reliable. As I have intimated above, she showed a bitterness towards the Claimant and was clearly not an independent witness of truth even though she has no direct benefit to obtain from a declaration in favour of intestacy. I have also indicated above certain concerns I had with her evidence and I especially questioned in my mind why the issue of the deceased's illiteracy was not raised by her in her witness statement or in the pleadings. That would obviously have been a very important matter for the court's consideration but the failure to mention it or to even raise it as an issue in the pleadings raises doubts in my mind as to her bona fides. I did not believe her when she said that she went to the lands at Francis Street with the deceased nor did I believe her when she said that she was not aware that the Claimant was made a Respondent to the paternity application brought on her behalf or that she did not know why. Consequently, I placed little reliance upon the evidence of Ms. Gibbings in relation to the signatures on the documents.

73. On the other, I had the evidence of Mr. Ali which was not really shaken. With respect to the impression sought to be given by Mr. Ali as to the relationship between him and the deceased, I did not find it contrary to the matter at hand or, indeed, unreasonable for Mr. Ali to not know the details of the deceased's personal life. The fact that he suggested that the he and the deceased had a good relationship did not necessarily place him in the position of being the deceased's confidant or best friend to know all of the deceased's details. In one sense if one says that one has a good relationship with another, the term "good" can slide along a spectrum of interpretation. One may know a person for a very long time and have a "good" relationship with that person without getting into the intimate details of his/ her life. The fact of the relationship/friendship between the deceased and Mr. Ali was not placed in serious issue. In fact, Ms. Orderson, witness for the defendant, accepted that there was a friendship between the deceased and Mr. Ali. As a result, Mr. Ali's evidence is not incongruous with the whole picture of evidence presented before me.

74. The evidence in relation to forgery -- the evidence of Mr. Parmassar and Ms. Gibbings and the evidence of Mr. Ali -- are mutually exclusive. If I were to accept the evidence of Mr. Parmassar and Ms. Gibbings then I would necessarily have to make a finding that Mr. Ali was deliberately misleading (lying to) this court. If I were to accept the evidence of Mr. Ali then I would have to disregard the finding of Mr. Parmassar in relation to the signature on the Will. On the evidence before me I must confess that it has been most difficult to come to a satisfactory conclusion as to whose evidence I should prefer in relation to this issue of forgery.

75. Mr. Ali accepted that his credibility was in issue and the submissions were made by the Defendants' attorney that Mr. Ali ought to have produced his written instructions/scribbles/notes. No explanation has been given by Mr. Ali as to his failure to produce these "scribbles". I do not feel that his failure to produce them was so fatal as to destroy his credibility in this matter. It was further submitted that the other witness to the signature on the Will ought to have been called as a witness in these proceedings. The

authority quoted above[1] suggests to me that it was not necessary for the other attesting witness to have been called to give testimony. Maybe, bearing in mind the onus and burden of proof on the Defendants, the Defendants may have wished to summon the other attesting witness of their own accord. That, however, was not done.

76. However, bearing in mind the standard of proof required by the Defendants, on the upper end of the balance of probabilities, I do not find that there is enough before me to disbelieve the evidence of the witness to the execution of the Will whose evidence, as I have mentioned before, was not shaken, especially in relation to the circumstances surrounding the preparation and execution of the Will. For Mr. Ali to be deliberately attempting to deceive this court, it would have had to be suggested that he was involved in some sort of conspiracy with the Claimant to forge the Will since, on the face of it, he received no direct benefit from the Will. That was clearly not put to him at all. On the evidence before me and on the whole, I do not feel comfortable drawing the conclusion that Mr. Ali has deliberately lied to this court which would be the necessary inference if I were to prefer the evidence of Mr. Parmassar. A finding of forgery is ultimately one for the court to make and the expression of an opinion by an expert is not the end of the matter -- however eminently qualified he may be and however confident he may be of his opinion on an issue in question. The Court is empowered to weigh the evidence as to forgery, and in finding as I have, this Court means no disrespect whatsoever to Mr. Parmassar. When I look at the evidence in its totality, I am of the view that the defendant has not crossed the threshold necessary to prove that the Will was a forgery. I therefore find that the deceased attended the office of Mr. Ali on 17 May 2004, after initiating contact with him to have a Will drawn up on 15 May 2004 and giving instructions on 16 May 2004, and that the deceased did in fact sign the Will on 17 May 2004 as stated by Mr. Ali.

77. As a result, the claim that the Will is a forgery is dismissed.

## In relation to due execution

78. Despite the nonappearance of the 2nd attesting witness at the trial, I am satisfied on a preponderance of evidence and on a balance of probabilities that the presumption as to due execution ought to be applied in these proceedings. Even without that presumption, nothing said by Mr. Ali or asked of him in cross examination raises any questions in my mind as to any want of compliance with the Act. In those circumstances, bearing in mind the competence of the deceased, I am of the view that the Will was duly executed as per the provisions of the law and I so find.

## In relation to want of knowledge and approval

79. There is no evidence before me of the deceased being incompetent, unwell, illiterate (other than the bare statement made by Ms. Gibbings and referred to above at paragraph 32 on which I have placed little weight, since it ought to have been a matter stated in the pleadings to allow that allegation to be openly addressed in evidence on both sides rather than what seems to be an afterthought in cross examination). Further there is no evidence

[1] **Mohammed v Christiani** *supra* and see also **Harper v Ramcoomarsingh** Civ App No. 58 of 1989 per Permanand JA at page 5

of the deceased being unfit or incapable of making a Will. From the evidence before me, it is clear that he knew he was making a Will and there is no reason to believe that he was not able to do so.

80. The said Will was not drawn up by the person propounding it. In fact, the Claimant, who propounds the Will, said that she was not aware of the existence of the Will until after the death of the deceased in September 2007 which was more than 3 years after the actual making of the Will on 17 May 2004. That was not disputed in any way.

81. Mr. Ali, who prepared and witnessed the Will, received no benefit whatsoever from it.

82. The Will was regular on its face; it having already been established that the Will had been prepared and signed in accordance with the provisions of the Act.

83. Even if I were to consider that Mr. Ali ought to have advised the deceased in a more proper and thorough manner and to take more particular care in the consideration of the provision to the deceased's children (especially in relation to those who were minors), his failure to do so does not, to my mind, render the circumstances suspicious in the face of the uncontroverted evidence from both sides of the deceased not being amenable to advice. Even if his advice was less than professional, and I am not saying that it was although I would say that greater care ought to be taken in the preparation of Wills especially where minors are in fact involved to ensure adequate provision is made for them and their needs during their minority, that does not mean that there was some sort of impropriety involved or that the deceased did not know and approve of the contents of the Will.

84. The only circumstance which the court can point to as being somewhat suspicious is the anxiety and persistence of the deceased in relation to the preparation and execution of the Will. Quite obviously, the deceased wanted the Will done and wanted it done quickly. There are any number of reasons that may account for such persistence. According to Ms. Gibbings, the deceased had already broken up with Ms. Orderson with whom the deceased had his last child. The deceased was, at the time of making the Will, involved in illegal activities namely the running of a "whe whe" bank. The deceased already had a history of being involved in illegal activities as well having been imprisoned in the past. The deceased eventually died as a result of multiple gunshot wounds. He was quite obviously a headstrong and dominating character as can be gleaned from the evidence of:

    84.1. Mr. Ali (in relation to the statement: "*The Jimmys of this world are not amenable to advice*");

    84.2. Ms. Gibbings who described the deceased as "strong-minded";

    84.3. Ms. Orderson who was aware of the Claimant's sleeping over at the apartment which Ms. Orderson shared with the deceased but who never voiced any objections thereto. Ms Orderson seemed content to fit into a role which co-existed in her seemingly accepted presence with the Claimant's interaction and relationship with the deceased.

Maybe this anxiety and desire for haste may account for the discrepancy in the signature. However, I have no definitive evidence in this regard and this is mere speculation. To my mind, this anxiety does not translate into a suspicious circumstance which needs to be answered by the propounder of the Will. That anxiety does not seem to have been induced by any action of the preparer of the Will and seems to be extrinsic to the Will's preparation and execution -- the source of which anxiety remains unknown.

85. There is no issue in this case as to the capacity of the deceased or that the Will was irregular on the face of it. Also, in my judgment, the due execution of the Will was proved. In these circumstances the Claimant is in a position to rely upon the presumption.

86. The evidence before this court is that the deceased had 8 children although the ages of these children were not given except as mentioned above. There is clear evidence that despite the fact that the deceased had several relationships over the years with different persons, the Claimant in these proceedings remained a constant companion whom he trusted enough for her to handle his banking and financial matters. When I consider the fact of the illegality of his operation in respect of the "whe whe" bank, I see that the deceased reposed great trust and confidence in someone with whom he had a relationship since at least 1992 (although the Claimant says that she had a relationship with the deceased for more than 25 years prior to his death in 2007 and who remained close enough to him that she slept over in his apartment at Francis Street even when Ms. Orderson was present). Why else would Ms. Gibbings have named the Claimant as the sole respondent in her paternity order application? In those circumstances, I cannot say that the Will is so contrary to the known affections of the deceased that it would place the righteousness of the transaction into question.

87. Consequently, in light of my finding of due execution and the failure, to my mind, to raise any suspicious circumstances, I apply the presumption and make a finding that the deceased read over the Will and knew and approved of its contents.

## Conclusion and Order

88. In the circumstances, I shall dismiss the Defendants' counterclaim and grant the following order to the Claimant:

    88.1. The court pronounces for the force and validity of the Will dated the 17th day of May 2004 in solemn form of law;

    88.2. The Defendants are to pay the Claimant's prescribed costs of the claim assessed in the sum of $14,000.00;

    88.3. The counterclaim is dismissed and the Defendants are to pay the Claimant 50% of the prescribed costs of the counterclaim amounting to the sum of $7,500.00 since the definitive finding of the forensic examiner may have been the impetus for pursuing their counterclaim. In the end, however, they were unsuccessful in reaching the necessary threshold of proof.

Devindra Rampersad
Judge (ag.)