THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

San Fernando

CV: 2016-02647

IN THE MATTER OF THE ESTATE OF ANDREW ALLUM, DECEASED

AND

IN THE MATTER OF THE GRANT OF PROBATE OF THE WILL FOR THE ESTATE OF THE LATE ANDREW ALLUM

BETWEEN

FRANCISCA NARDEEN THERESA SHAH-VAN DE WERKEN

(in her capacity of Executrix of the Estate of Rajbal Andrew Allum, deceased by the Will dated 28th September 2015)

Claimant

AND

PRIMDATH LUTCHMANSINGH

(in his capacity of Executor of the Estate of Andrew Allum, deceased by the Will dated 28th February 2011)

Defendant

Before the Honourable Mr. Justice Frank Seepersad

Date of Delivery: February 7, 2019

Appearances:

1. Rajiv Rickhi, Shaun Teekasingh, Renu Teekasingh, Shalini Teekasingh for the Claimant.

2. Mustapha Khan and Faraaz Mohammed for the Defendant.

DECISION

Overview

1. Before the Court for its determination is the Claimant's amended claim by virtue of which the following reliefs were sought:
   a) A declaration that the Last Will and Testament of Andrew Andy Allum, deceased dated September 28, 2015 is valid;
   b) A declaration that the Claimant is entitled to Grant of Letters of Administration with will annexed in respect of the said Andrew Andy Allum, deceased dated September 28, 2015;
   c) An order that the said will be admitted to administration in solemn form of law;
   d) An order that the Claimant be appointed the executrix of the Last Will and Testament dated September 28, 2015 of the deceased and that the will is now established in solemn form;
   e) A declaration that the Defendant holds the said monies in joint TT and US local and joint US foreign accounts on resulting trust for the deceased's estate and the Claimant is to distribute these monies in accordance with the deceased's wishes under the said will;
   f) Or in the alternative, an order that the testator created a fully secret trust;
   g) An order that the Claimant hold the testator's estate as constructive trustee for the beneficiaries under the fully secret trust;

h) An order that the Defendant do transfer the said monies from the joint TT and US local and foreign accounts to the Claimant;
i) An injunction preventing the Defendant from wasting monies in said joint local and foreign US accounts;
j) An order that the Defendant do account for all rents, profits and interest and assets received by him toward the estate of the deceased;
k) Damages for waste and devastavit in the misappropriation and maladministration of the assets belonging to the estate of the deceased, if any to be assessed after the Defendant files the accounts as provided above;
l) Costs.
m) Such further or other reliefs as the Honourable Court deems fit.

2. Also before the Court, is the Defendant's counterclaim by virtue of which the Defendant sought the following reliefs:
   a) A declaration that the will dated February 28, 2011 is the Last Will and Testament of the deceased, Andrew Andy Allum and that the Registrar be directed to continue Probate of the said will;
   b) That the wills dated September 18, 2015 and September 28, 2015 be declared null and void and of no effect and that the Probate of either wills be refused;
   c) An injunction restraining the Claimant, her servants and/ or agents from disposing of any of the assets of the Estate of the deceased;
   d) Costs;
   e) Such and further relief that the Honourable Court deems just.

The Claimant's case

3. The Claimant as sole executrix named in the Will and Testament dated September 28, 2015 of Andrew Andy Allum who died on October 6, 2015 contends that the will dated September 28, 2015 is the Last Will and Testament of the deceased and was duly executed by the deceased in accordance with the provisions of section 42 of the Wills and Probate Act Chap 9:03.

4. Alternatively, the Claimant claims that a presumption of a resulting trust arose from this will, with the Defendant as trustee and that the monies which were held jointly with the Defendant, in TT and US accounts, belong to the estate of the deceased.

5. The Claimant also contends that by an undated letter (which was found in a sealed envelope with the will of the 28th), the deceased created a secret trust by virtue of which, the Defendant holds the deceased's assets on trust for all beneficiaries named in the September 28, 2015 will and that this intention was communicated to the Defendant during the deceased's lifetime and it was an obligation which was accepted by the Defendant.

The Defendant's case

6. By amended defence and counterclaim, the Defendant denied that the will of September 28, 2015 is the Last Will and Testament of the deceased and argued that the said will was fraudulent and was not executed by the deceased.

7. The Defendant also denied that there was the creation of a resulting trust by the deceased and claimed that he was never made aware that the

monies held in their joint names were to be held on trust for any beneficiaries of the deceased's estate.

8. The Defendant stated that the will dated September 18, 2015 is also fraudulent and does not bear the true and correct signature of the deceased and that the Last Will and Testament of the deceased is the will dated February 28, 2011 which was executed by the deceased, in the presence of two witnesses and that same bears the true and correct signature of the deceased and he is the sole executor.

The Issues

9. The issues which arose for determination are as follows:
   i. Whether the Claimant's will dated September 28, 2015 was duly executed and should be admitted to probate or whether the will dated September 18, 2015 was duly executed and should be admitted to probate.
   ii. Whether there exists a resulting trust in relation to the deceased's joint bank accounts (US and TT) in favour of the deceased's estate.
   iii. Whether a fully secret trust existed between the deceased and Defendant in relation to the deceased's assets.
   iv. Alternatively, whether the Will dated February 28, 2011 should be declared as the Last Will and Testament of the deceased and whether the Registrar should proceed with the Defendant's application to probate same.

Law and Analysis

10. The law in relation to the propounding of a will is pellucid and the onus rests upon the applicant to prove that the will was duly executed by the

deceased and to establish on a balance of probabilities that there exist any circumstances relative to the said execution which can reasonably excite suspicion in the Court's mind.

11. In **Shrimatee Gobin Persad v Harrilal Gobin Persad HCA S816 of 1996** Stollmeyer J (as he then was) stated the following:

> "It is for the party propounding a will to prove due execution, but that onus is a shifting one. A duly executed will which is regular and usual in form, rational on its face, not drawn by the person propounding it and benefiting under it, carries two presumptions: first that it is of a person of competent understanding; and second, that it was executed according to law with the testator knowing and approving of its contents. This last requirement is essential because ultimately a court must be satisfied that the will being propounded reflects the testamentary intentions of the testator. The required onus is discharged unless or until, by pleadings and evidence supporting the pleadings, or by cross-examination of witnesses, the issue of lack of knowledge and approval is raised. If that occurs, then the onus reverts to the party propounding the will to put forward affirmative evidence of due execution. In other words, the presumption is rebuttable.
>
> It is important to note that want of knowledge and approval is of the contents of the will. Suspicious circumstances which might place a propounding party in a position where it is required to demonstrate the righteousness of the transaction (as it is referred to), does not carry a connotation of morality, or a requirement that the morality or propriety of the contents of the document be proved (see Fuller v. Strum [2002] 2AllER 87). The question is really

simply whether the Court is satisfied that the contents do truly represent the testator's testamentary intentions. Further, it is the events surrounding the preparation and execution of a will which are to be considered, and generally not subsequent events."

12. In relation to the shifting burden, Hassanali J (as he then was)in **Samuel Smith v Pearl John HCA 11 of 1972** stated that:

> "Where there exists circumstances attendant upon or relevant to the preparation and execution of a will which excite the suspicion of the court, it must be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does not express the true will of the deceased. It is for those who propound a will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only when this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence or whatever else they may rely on to displace the case made for proving the will."

13. In the case of **Fuller v Strum [2001] EWCA 1879** the issue of suspicion and suspicious circumstances was addressed, and the Court stated that:

> " In the ordinary probate case knowledge and approval are established by the propounder of the Will proving the testamentary capacity of the deceased and the due execution of the will, from which the court will infer that knowledge and approval. But in a case where the circumstances are such as to arouse the suspicion of the court the propounder must prove

affirmatively that knowledge and approval so as to satisfy the court that the will represents the wishes of the deceased. All the relevant circumstances will be scrutinised by the court which will be 'vigilant and jealous' in examining the evidence in support of the will […] Suspicion may be aroused in varying degrees, depending on the circumstances, and what is needed to dispel the suspicion will vary accordingly."

14. In **Sharon Kadoo Lawrence v Davey Hamson Joseph CV2013-04275**, Rahim J stated:

"42. In order for a Will to be validly executed, it must be made in accordance with Section 42 of the Wills and Probate Act Chap. 9:03 which provides as follows;

i. The Will must be in writing and made by the deceased;

ii. The Will must be signed at the foot or end of it by the deceased or by some other person in his presence and by his direction;

iii. The signature must be made by the deceased or acknowledged by him in the presence of two or more witnesses;

iv. The witnesses must be present at the time the deceased affixed his signature and they attested and signed the Will in the presence of the Deceased and of each other.

43. The onus of proving that the Will propounded was executed as required by law is on the 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 and 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. Once raised the onus then shifts again to the person propounding. As to other allegations the onus is, generally speaking, on the party making them: See Tristram and Coote's Probate Practice 30th Edition, page 813 paragraph 34.06.

44. Further in **Marilyn Lucky v Maureen Vailoo HCA 1398/ 1996**, page 16 Stollmeyer J (as he then was) summarized the applicable principles to due execution as follows;

"1. The onus of proving a will as having been executed as required by law is on the party propounding it;

2. There is a 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; The onus as to other allegations such as undue influence, fraud, or forgery, generally lies on the party making the allegation."

15. In **Allison Matthews v Patrick Urquhart CV2015-03943** Rahim J stated at paragraph 52:

> "52. The onus of proving that the Will propounded was executed as required by law is on the 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 and 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. Once raised the onus then shifts again to the person propounding. As to other allegations the onus is, generally speaking, on the party making them."

Analysis of the evidence

16. The Claimant testified and relied on the evidence of Herbert Subero, Schehezard Shazard and Felmina Sorillo. The Defendant testified, and he also relied on the evidence of the handwriting expert Mr. Glen Parmassar who was jointly appointed by the parties. The deceased's daughter also testified.

17. In its assessment of the evidence the Court crossed checked its impression of the evidence given by the respective witnesses as against the pleadings,

the contemporaneous documents and assessed same by considering the inherent probability or plausibility of the rival contentions. The Court further considered that deviations from the pleaded case may result in a circumstance where the credibility of the witness may be affected.

18. In relation to the wills dated September 28, 2015 and September 18, 2015, Mr. Subero testified that he attested them as a witness and he mentioned that the deceased affixed his signature to both wills. The September 18 will he said was co-signed by Nisha Bissoon as a witness and the September 28 will was attested by Schehezard Shazard.

19. Ms. Bissoon did not testify but Mr. Shazard did and he confirmed that the September 28 will was read over by the deceased. He said that Mr. Subero read over same to the deceased before the deceased signed same in their presence. During cross-examination Mr. Shazard gave evidence which was generally consistent with Mr. Subero's evidence with respect to the antecedent circumstances such as their respective arrivals at the deceased's home on September 28 and the area in the house where the will was executed. Mr. Subero testified that the deceased called him and that he called Mr. Shazard to attend.

20. There is no legal requirement for the testator to make his own arrangements for attesting witnesses and the absence of evidence in this regard did not excite any suspicion in the Court's mind. There exists no legal requirement for information to be adduced as to the person who physically prepared the alleged will, though such evidence can assist the Court as there is a requirement for the Court to be satisfied that the contents of the will truly reflects the testator's intentions.

21. The Court considered that the attestation clause bore the term testatrix and the fact that Mr. Subero indicated that he did not read over the September 28 will to the deceased which was contradicted by the other attesting witness. The said contradictions did not raise any undue suspicion in the Court's mind, as the Court formed the view that it was plausible that given the passage of over three years, that errors in recall could take place and the word testatrix may have been the result of inadvertence and noted that the said word (testatrix) appeared in both September wills and both wills were in a similar format.

22. The Court also considered the fact that Mr. Subero testified that at the time of execution, the deceased was not in good health and this was the same view which the Claimant shared. It appeared to be a plausible position given that the deceased died shortly after September 28. At the commencement of his evidence, Mr. Subero raised an issue as to an alleged attempt by the Defendant to dissuade him from testifying. The Defendant denied the allegation and the Court disregarded this aspect of evidence from its resolution of the relevant facts.

23. Having considered the evidence of Mr. Subero and Mr. Shazard in the round, the Court found that they were both credible witnesses. Neither stood to benefit from the deceased's estate and there was no evidence to suggest that either was driven by a desire to fraudulently assist the Claimant or that they operated under any ill motive. The Court formed the view that they were both witnesses of truth and they instilled in the Court the unshakeable view that they were truthful. Consequently, the evidence adduced by the Claimant established a *prima facie* case that the September wills were duly executed by the deceased and the Court in arriving at the aforesaid conclusion considered that no evidence was led

that the deceased lacked the requisite testamentary capacity or that he was subjected to undue influence.

24. The Court also considered the fact that no evidence was adduced so as to suggest that it was the Claimant who was responsible for the preparation of the will or that she made the arrangements for Mr. Subero and Mr. Shazard to sign as witnesses.

25. The Defendant did not plead a lack of testamentary capacity, undue influence or suspicious circumstances. The Defendant indicated that he formed the view that the signatures on the September wills looked "funny" and in cross-examination he stated that "funny" meant that the signatures were not the deceased's. There was no evidence that the Defendant was equipped, by mere visual inspection, to conclude that the signatures were not the deceased's.

26. The Court had the benefit of expert evidence and Mr. Parmassar generated an expert report and opined that there was a high probability that the questioned signature of the testator on the will dated September 28, 2015 was not executed by the deceased and it was also his opinion that the September 18 will may have been executed by the deceased.

27. During his cross-examination, the witness outlined *inter alia* that formation detail assessments and line quality tests can assist in the determination as to whether a signature is a forgery. Mr. Parmassar testified that he was supplied with sample signatures from the deceased and the samples which he referred to in the demonstrative chart which was annexed to his report, were photocopies and were not samples which were executed by the deceased either in or around September 2015. The

expert accepted that photocopies can place limitations especially in relation to line flow. The witness testified that he was aware that the deceased had an eye surgery, but he was unaware that he suffered from any other illnesses and agreed that failing health and/or shaky hands could affect the line quality of a signature.

28. Given the conclusions in the expert report in relation to the September wills, the Court had to ask itself "why would Mr. Subero give credible evidence in relation to the execution of the September 18 will and then give less than candid evidence in relation to the September 28 will?" The Court also noted that the September 18 will, which the expert said, with a moderate degree of probability was executed by the deceased, was fundamentally different from the will dated February 28, 2011 which is the will that the Defendant relied upon in his counterclaim.

29. Given the lack of contemporaneous specimen signatures, the use of photocopied samples, the conflicting opinions in relation to the two September wills and having formed the view that it was highly probable that the deceased's failing health could have affected his writing and may have resulted in the appearance of significant differences while also noting, as was acknowledged by Mr. Parmessar that there were similarities, the Court was not inclined to accept Mr. Parmessar's evidence in relation to the September 28 will and preferred the evidence adduced by the attesting witnesses.

30. The Defendant therefore failed on a balance of probabilities to establish that the September 28 will was fraudulent, and the Court must pronounce in favour of the force and validity of the September 28, 2015 will and

hereby declares that same was duly executed by the deceased and should be admitted into probate.

31. Both September wills raised the issue of monies held in joint accounts with the deceased and based on the letter found, the issue as to the existence of a resulting and/or secret trust was raised. The Claimant's evidence was that after her brother's death, she found together with the will dated September 28, a type-written undated letter. The letter gave an explanation as to why the deceased changed his will and was written to suggest that the author wrote same in contemplation of death but there was also a hope of being alive for Christmas.

32. In the letter was reference to the account number US000213109621 and TT#800702683631. During his cross-examination, the Defendant accepted that those numbers were the numbers for the only accounts that he held jointly with the deceased.

33. During this matter, the Claimant made a request for all account numbers and the information was provided by way of letter and so the Court formed the view that it was unlikely that the Claimant had knowledge of these account numbers and that she prepared the letter and felt on a balance of probabilities that the deceased prepared the undated letter. As it relates to the existence of a foreign US account, there was no evidence to establish that any such account actually exists. It was open to the Claimant to explore the obtaining of information from Schlemberger or Tuker and/or to obtain Norwich Pharmacal Orders to determine if monies were paid and if so, into what foreign accounts. Such avenues were not pursued, and the Court had before it no information as to the existence of any foreign account.

34. The Court considered the information contained in the letter and formed the view that information inserted therein came from the deceased. The Court formed the unreserved and unshakeable view that the Claimant was an honest witness. She was firm in her responses and was very direct. The entirety of her testimony was characterised by an air of candour and plausibility. The evidence established that in relation to the local accounts with the Defendant, the funds deposited therein belonged to the deceased and the Court rejected the Defendant's evidence when he asserted that it was his money and that he and the deceased were business partners.

35. The Court, on a balance of probabilities, found that the deceased did communicate to the Defendant that the monies held in the said accounts did not belong to him and same was intended for the deceased's benefit and that of his estate.

36. The Defendant, unlike the Claimant, did not impress the Court. His evidence was characterised by a significant degree of evasiveness. He provided no documentary evidence in relation to the alleged business partnership with the deceased and his contention that the money in the joint accounts was for his absolute benefit appeared to the Court to be a position that was highly improbable. There was no documentary evidence to suggest that the Defendant made either deposits to or withdrawals from the said accounts.

37. The Court also considered the evidence of Felmina Sorillo who was found to be a credible witness. The Court formed the view that she had a close relationship with the deceased and accepted her evidence in relation to the conversations that the deceased had with her. The Court felt that it

was more probable that the joint accounts were set up to enable the Defendant to conduct business for and on behalf of the deceased who was frequently out of the country especially given the fact that at the material times, the Claimant was also out of the country. The Court noted that the Defendant testified that whenever he withdrew funds from the US local account, he would reimburse the deceased and found that it was probable to conclude that he did so because the funds did not belong to him.

38. The Court was therefore resolute in its position that the monies held in the local TT and US accounts did not belong to the Defendant.

39. The Defendant admitted that he received $500,000.00 from Tuker as the named beneficiary. The evidence suggested that the deceased, as reflected in the letter which the Claimant found, was aware that he had named the Defendant as the beneficiary to the said entitlement. However, he did not change same prior to his death and there was no evidence that the deceased directed the Defendant to hold the said sum in trust for any named person or on trust for his\ estate.

40. As it relates to the Defendant's credibility, the Court also noted with alarm, the contradictory position he advanced in relation to the vehicle registered as PCP3684. The Court had difficulty with his evidence that the signature on the receipt dated June 1, 2015 was not his. His evidence with respect to the car was that there was an 'agreement' for the deceased's mother to pay for same and the inclusion of the said vehicle in the inventory filed with the Defendant's probate application was also worrying.

41. For the reasons which have been outlined, the Court hereby orders as follows:

i. The Defendant's counterclaim is dismissed.

ii. It is declared that the will dated September 28, 2015 is the Last Wil and Testament of the late Andrew Andy Alum who died on October 6, 2015 and the Claimant who is therein named as the executrix shall be empowered to probate same in solemn form.

iii. The Court declares that the monies held in account numbers US000213109621 and TT#800702683631 which said accounts were in the name of the deceased Andrew Andy Allum and the Defendant jointly were held in trust for the absolute use and benefit of the deceased's estate.

iv. The Defendant shall account within 28 days of the date herein, to the estate of the deceased, for all sums held in the aforesaid accounts as at the date of death of the deceased.

v. The parties shall be heard as to further relief.

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FRANK SEEPERSAD

JUDGE