

IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV 2021-02764

BETWEEN

IN THE ESTATE OF GREGORY LOCKIBY (DECEASED)

MARGARET LOCKIBY

**(As the named Executrix in the Will of Gregory Lockiby
who died on the 29th December 2017)**

CLAIMANT

AND

VERONICA ANGELLA LOCKIBY

DEFENDANT

JUDGMENT

Before: The Hon. Mr Justice Westmin R.A. James

Date: 10th May 2024

Appearances: Mr. Prem Persad Maharaj and Mr. Michael Maharaj, Attorneys-at-Law for the Claimant

Mr. Mustapha Mushim Khan, Attorney-at-Law for the Defendant.

JUDGMENT

Background

1. This claim concerns a dispute over the validity of what is purported to be the Last Will and Testament of GREGORY LOCKIBY ('the Deceased') dated 16th December 2017 ('the Will'). Veronica Lockiby 'the Defendant', the sister of the Deceased pleads that the Will is invalid as the testator lacked the testamentary capacity to produce the Will. Margaret Lockiby 'the Claimant', the sister of the Deceased denied such allegations and contends that her late brother possessed the requisite testamentary capacity to properly execute the document.

2. The Deceased passed away on 29th December 2017. He had no lawful spouse or children. He was survived by his mother and siblings. The Claimant applied for a grant of probate of the Last Will and Testament of the Deceased on 25th September 2018.
3. The Defendant caused a caveat to be filed against the Deceased's estate on 27th August 2019. A Caveat notification was dated 16th January 2021 and a Warning to the Caveat was filed on 2nd March 2020. The Defendant renewed a caveat on the Deceased's estate on 5th May 2020.
4. By Amended Fixed Date Claim Form dated 25th May 2018, the Claimant sought the following relief from the Court:
 1. An Order that the Will of Gregory Lockiby (hereinafter "the deceased") dated the 16th December, 2017 is the last Will and Testament of the deceased.
 2. An Order that the court do pronounce in favour of the force and validity of the Will dated the 16th December, 2017.
 3. A declaration that the claimant is entitled as the Sole Executrix to Probate the Last Will and Testament of the deceased dated 16th December 2017.
 4. An order that the Registrar do issue a grant of probate in the estate of the deceased having regard to the Application filed as EST 3031 of 2018.
 5. An order that all caveats filed including caveat dated the 27th August 2019 and renewed on the 5th May 2020, and all subsequent caveats filed in the Estate of Gregory Lockiby in Proceedings Number EST 3031-2018 be struck out and/or removed by the Registrar.
 6. Interest and costs, and
 7. Such further and/or other relief.
5. The Defendant by Defence and Counterclaim filed on 1st July 2022 denied the Claimant's claim and counterclaimed that the Will dated 16th December 2017 was not signed and/or marked by the Deceased; that at the time of execution of the 2010 Will, the Deceased was of unsound mind, memory and understanding and the Will was procured by undue influence. The Defendant therefore counterclaimed for the following reliefs:
 1. An Order pronouncing against the validity of the Last Will and Testament of Gregory Lockiby dated the 16th day of December 2017 who died on the 29th day of December 2017 at the San Fernando General Hospital, San Fernando.
 2. An Order that the Registrar of the High Court of Justice, Probate Section do expunge Estate Application EST 3030/2018 filed in respect of the Estate of Gregory Lockiby deceased.
 3. Costs.
 4. Such further and other relief.

6. By Reply to Defence and Defence to Counterclaim filed on 19th August 2022, the Claimant denied the counterclaim. The Defendant filed a Reply to Defence to Counterclaim on 30th November 2022.
7. The matter was reassigned to this Court in May 2023. The Trial took place on 15th April 2024. The Claimant filed his written submissions on 22nd April 2024 and the Defendant has not filed any Closing Submissions.

Issues to be determined

8. The issues in this case are:
 - a. Whether the Will dated 16th day of December 2017 was procured by fraud.
 - b. Whether the Deceased had testamentary capacity at the time of execution of the Will dated 16th January 2015.
 - c. If he did then whether the Deceased had knowledge of and approved of the contents of the 2015 Will.
 - d. Whether the 2015 Will was procured by undue influence.

Whether the Will was procured by fraud

9. The evidence of the execution of the Will came from the Claimant's witnesses.
10. Ms. Sharmela Rampaul, an Attorney-at-Law gave evidence that she was approached by the Claimant to do a Power of Attorney and a Will for the Deceased. She wrote to the Legal Advisor of the San Fernando General Hospital requesting a mental capacity evaluation of the Deceased. She later was requested to visit the Deceased at V's Rest Home in San Fernando to meet with the Deceased in respect of the Power of Attorney and the Will. She gave evidence that she advised the Claimant that she was not the client and she could not be present when she was taking instructions from the Deceased. She said that she paid a visit to the Deceased and had a conference alone with him where she gave him legal advice and he requested that the Claimant be the sole executrix and beneficiary of his Last Will and Testament. She said she asked him of any other beneficiary and he did not name any other beneficiary. She indicated that she asked if he was forced by anyone to do these documents and he quite forcefully said no and stated that no one could make him do anything against his wishes.
11. She also gave evidence that she advised him that he needed a letter from a doctor to confirm his state of mind on a date before the execution of the two documents. She said he stated that his body was failing but his mind was still good. She got the Manager to witness the release forms and she agreed. She read the contents of each form to him and then had him sign a release form with his instructions for the power of attorney and one

for the Will. Ms. Rampaul then gave evidence that her instruction book and these forms were placed in safekeeping but in 2017 there was water damage from a burst pipe at her office and she could not locate the documents anymore.

12. She also gave evidence that when she received the medical certificate, she typed up the documents and then went to the home the next day on 16th December 2017.
13. She gave evidence that on the day the Will was executed she had a conference with the Deceased and handed him the two documents, the Will and the Power of Attorney. She gave evidence that she spoke to him for about twenty minutes and read aloud the entirety of the two documents and explained the meaning of each page. She said he answered clearly and accurately and then she reconfirmed her instructions. She also gave evidence that she explained the purpose of the documents and its implications. She also gave evidence that she then called in the Manager and read out all of the documents for him again in front of the Deceased and he was then assisted to sit up on his bed by the Manager and he was given the document and he read each page himself. After the Deceased read all the pages and agreed with its contents, she then asked if he wanted to sign all the documents and he said yes that he did. With the knowledge that two of the sisters would act as witnesses, she called the sisters into the room and they commenced the process of signing the documents.
14. Ms. Patricia Duntin, a retired nurse and one of the sisters of the Deceased, said that the Attorney asked the Deceased what he was going to sign and showed him two documents one after the other. She firstly showed him the Power of Attorney and he was asked the nature of the document to which he responded that it was a Power of Attorney. They then signed the Power of Attorney. Thereafter the Will was shown to him which he identified and he was directed where to sign in the presence of all of them and then she was asked to sign after her sister, Rebecca.
15. The Claimant also gave evidence similar to that of Ms. Duntin save that the Claimant did not sign as witnessing the Will.
16. The Defendant did not provide any evidence to substantiate her allegation regarding the Will not being executed by the Deceased or being fraudulent. The Defendant had pleaded that the signature was not the signature of the Deceased but led no evidence of this at Trial by any expert. The signature while shaky was similar to the medical notes that he signed. The witnesses of the Claimant were unshaken in cross-examination and their credibility was not undermined in any way. On a balance of probabilities, I believe them that the Deceased signed the Will. In those circumstances the presumption of due execution (*Omnia praesumuntur rite et solemniter esse acta*) applies where a Will is regular on its face, with an attestation clause and the signatures of the testator and at

least two witnesses in their proper places. Consequently, on the evidence, the 16th December 2017 Will was at least, formally valid or executed in accordance with the Wills and Probate Act, Chap 9:03.

Whether the Deceased had testamentary capacity at the time of execution of the Will

17. The main issue for this Court's determination is whether the Deceased had the requisite *animus testandi* or testamentary capacity at the time of the execution of the Will.
18. While on its face, the Will may be formally executed by the Deceased, the question remains whether it is also substantively valid. In her text, **Non-Contentious Probate Practice in the English-Speaking Caribbean** 2nd edn, 2004 page 34-35, Karen Nunez-Tesheira, posits that in order to possess the necessary *animus testandi* or testamentary capacity, it must be established that (a) the testator had the mental capacity to make the will (b) the testator knew and approved of the contents of the will and (c) the will was that of a free and capable testator, that is, the testator must have exercised genuine free choice in the making of the will and more particularly that the testator did not make the will as a result of the undue influence or fraud of another.
19. The Defendant's pleaded case was that the Deceased did not have testamentary capacity because of lack of mental capacity, lack of knowledge and undue influence. I will deal with each in turn.

Mental Capacity

20. A Will can be challenged on its substantial validity on the basis that the testator did not have the requisite sound mind, memory and understanding to make the Will. The Defendant's pleaded case was that the Deceased was not of sound mind, memory and understanding at the time that the Will was executed. The pleaded particulars of lack of testamentary capacity were as follows:
 - a. The Deceased was in and out of the hospital during the period of the 1st December 2017 up until his death on the 29th December 2017 suffering from end stage renal disease which would have [affected] his mental capacity.
 - b. The deceased at the time of the execution of the said Will dated the 16th December 2017 was impaired and or lacked the mental capacity to give instructions for the preparation of and to understand the nature and effect of the said Will dated the 16th day of December 2017.
21. There is the presumption of due execution where the will is regular on the face of it, with an attestation clause and the signature of the testator and witnesses in the proper places.

However, where any dispute or doubt exists as to the capacity of the testator, his testamentary capacity must be established and proved affirmatively. This is a question of fact. Where there are circumstances which excite the suspicion of the Court, the Court will not pronounce in favour of the will unless the suspicion is removed to the extent that the Court is satisfied that the will propounded does express the true will of the Deceased. Suspicious circumstances include the preparation of the will, its intrinsic terms and circumstances of its execution.

22. The Court has considered the learning of Mr. Justice Rahim in ***Christian Wilhelm Nothangel v Nicholas Christian Nothangel*** CV2016-01952, paras 140- 142; Mme. Justice Donaldson-Honeywell in ***Dalia Ramsammy v Ivy Ramsammy*** TT 2023 HC 100 and Mme. Justice Rajnauth-Lee by the Caribbean Court of Justice in the Guyanese case of ***Sasedai Kumarie Persaud v Sherene Mongroo, Zenobia Rosenberg and Indranie Mulchand*** [2023] CCJ 16 (AJ) GY paras [37]-[38].
23. At trial, the Defendant conceded the question of mental capacity. The Defendant in cross-examination agreed that the Deceased was competent to make medical decisions and admitted in cross-examination that the deceased was competent to do a will.
24. This is supported by the medical evidence by Dr. Keith Imambaksh. Dr. Imambaksh prepared a report dated 15th December 2017 having visited the Deceased. Dr. Imambaksh is not only a general physician but has qualifications in Psychology and Psychiatry. While he was not clear as to the exact date of the visit, whether it was on 13th December 2017 or 15th December 2017 when the report is dated, it was clearly before the Will was executed. The report indicated that he did a mental status examination on the Deceased and a Folstein Mini Mental Examination. Dr. Imambaksh's assessment was that the Deceased was competent and well able to make decisions on his own behalf and execute a will should he so desire. Dr. Imambaksh said in cross-examination that his findings were not so temporal that the Deceased would have lost capacity in a matter of days. He said if that were the case he would not have given the statement. The evidence of Dr. Imambaksh was not shaken in cross-examination.
25. Dr. Imambaksh's evidence of mental capacity is also supported by the findings of the hospital. There is evidence in the medical evidence from the hospital before the Court in which the hospital certified that the deceased was capable of making medical decisions and was competent and able to refuse medical treatment. There is no question that the Claimant's physical health was failing. He had Renal Disease, refused dialysis and was bedridden. That however did not have to do with his mental capacity.
26. There is therefore no evidence to suggest that the Deceased was not able to appreciate the nature of the exercise as it relates to the making of a will. There was no medical

evidence brought by the Defendant to suggest that the Claimant was not of sound mind. All of the evidence is consistent with the assertion even by the Defendant that the Deceased's mental health was not failing. There is simply no evidence to suggest that the Deceased lacked the requisite mental capacity to execute a will.

27. Having regard to the Defendant's evidence, along with the evidence of the Claimant's witnesses for the Claimant in particular Dr. Imambaksh and Ms. Rampaul, the Court is satisfied on the evidence that on a balance of probabilities, the Deceased had the mental capacity at the material time of the execution of the Will.

Knowledge and Approval

28. The Defendant has also submitted that the Deceased did not know and approve of the contents of the Will.
29. There is no dispute that a testator must not only have the requisite mental capacity to make a will but he must know and approve of the contents of the said document at the time of its execution. There is a distinction between mental capacity and knowledge and approval. See ***Jimmy Wilson and others v Rosa Dardaine*** TT 2020 CA 21, Jones J.A. (as she then was) paras 18-27; ***Doreen Fernandes v Monica Ramjohn Nadeau et al*** CV2006-00305 Stollmeyer J (as he then was); ***Christian Wilhelm Nothangel v Nicholas Christian Nothangel*** CV2016-01952; ***Visham Lalla v Suruj John Lalla Civ App No.102 of 2003***, Mendonça JA paras 55-60.
30. Evidence as to knowledge and approval is usually best obtained from the persons who were present at the material time the will was in fact executed. Such witnesses can assist the Court in its determination as to whether the testator understood the contents of his will having read same in their presence, whether he expressed any disapproval and/or positively demonstrated his approval by appending his signature to the said document in their presence. (see Seepersad J in ***Alicia Campbell Rogers v Rekha Ramjit*** TT 2023 HC 212).
31. The evidence is that on the face of the Will, it was duly executed. Further, the evidence of Sharmela Rampaul, the Attorney-at-Law and Patricia Duntin, a witness to the Will, was that the Deceased had knowledge of the contents and approved the Will.
32. As previously outlined in this judgment, Ms. Rampaul gave evidence that she confirmed with the Deceased that he had the knowledge of the contents of the Will and was signing the Will of his own free will, before executing it. She gave evidence that on the day the Will was executed she had a conference with the Deceased and handed him the two documents, the Will and the Power of Attorney. She gave evidence that she spoke to him

for about twenty minutes and read out aloud the entirety of the two documents and explained the meaning of each page. She said he answered clearly and accurately and then she reconfirmed her instructions. She also gave evidence that she explained the purpose of the documents and its implications. She also gave evidence she then called in the Manager and read out all of the documents for him again in front of the Deceased. He was then assisted to sit up on his bed by the Manager, he was given the document and he read each page himself. After the Deceased read all the pages and agreed with its contents, she then asked if he wanted to sign all the documents and he said yes that he did. With the knowledge that two of the sisters will act as witnesses, she called the sisters into the room and they commenced the process of signing the documents.

33. Ms. Duntin also said that the Attorney asked the Deceased what he was going to sign and showed him two documents one after the other, firstly the Power of Attorney and he was asked the nature of the document to which he responded that it was a Power of Attorney. They then signed the Power of Attorney. Thereafter the Will was shown to him which he identified and he was directed where to sign in the presence of all of them and then she was asked to sign after her sister, Rebecca.
34. This was similar to the evidence of the Claimant.
35. There is thus a presumption that the Deceased had knowledge of the contents and approved of the Will.
36. That however is not the end of the matter. If 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.
37. Justice Rahim also addressed the issue of suspicious circumstances in ***Christian Wilhelm Nothangel*** (supra). The Court accepts the law as outlined in ***CV2008-00099 Elena Hickson v Kayrine Cumberbatch et al*** with reference to the circumstances which can or should excite the suspicion of the court. These circumstances can relate to the preparation of the will, its intrinsic terms, and also the events surrounding the will's preparation and execution, with primary regard being given to the operative factors and/or conditions which prevailed at the time at which the will was executed. The Court also addressed its mind to the law as advanced in ***Moonan v Moonan (1963) 7 WIR 420*** and noted that it is possible for subsequent circumstances or events to give rise to suspicion. Further, as outlined in that case, the Court held the circumstances which could excite suspicion in the Court's mind bearing in mind that the Court was not restricted to regard just the intrinsic terms of the will but could consider all the factors which operated in relation to the preparation of the will and all the attendant circumstances involving its execution.

38. The Defendant pleaded that the manner in which the said Will was executed is quite suspicious as the Will names the Claimant as sole executrix and beneficiary and has been witnessed by two relatives, namely the Claimant's sisters, who both are resident out of the jurisdiction.
39. There is no suspicion aroused by naming the Claimant as sole executrix and beneficiary since the Claimant is his sister just as the Defendant and the witnesses. The evidence was that he loved all his sisters equally. Further, the fact that the other sisters witnessed the will is also not suspicious. The sisters resident abroad came back because they knew that the Deceased's health was failing and that he refused treatment and so would have died soon. There was no evidence that the sisters had any animosity or issues with the Deceased. In a situation where the Deceased had no spouse or children, family are usually the people around to witness a will. There is no evidence that somehow the Defendant was not being provided for. The Defendant was named beneficiary on certain policies of the Deceased's Account which did not form part of the estate but could not be distributed before Grant of Probate and so almost \$300,000.00 or almost 1/3 of the Inventory will be going to the Defendant. Therefore the Defendant has been adequately provided for by the Deceased.
40. There was evidence that the Deceased was not happy with the Defendant conducting his business and why the Deceased did a Power of Attorney in favour of the Claimant however this does not raise suspicion of the Will.
41. Having regard to the above, the Court did not form the view that the contents or the circumstances were suspicious and dispelled the presumption of the duly executed Will and the evidence of the witnesses of the Will that the Deceased read over the Will and approved of its contents.

Whether the Deceased was operating under undue influence at the time of the execution of the Will

42. Unlike testamentary capacity there is no presumption of undue influence, the allegation must be proved and the burden of establishing it rests upon the party alleging same. There must be positive proof of coercion overpowering the volition of the testator. The mere proof of the relationship of brother and sister does not constitute proof of undue influence or give rise to a legal presumption, although where it is coupled with, for example, the execution of the will in secrecy, such a relationship may help the inference.
43. The Defendant has not proven, on a balance of probabilities, undue influence. The Defendant did not know what occurred during the time of the execution of the Will as stated in her cross-examination. The Deceased was not dependent on the Claimant but in fact, if anything, previously dependent on the Defendant.

44. As stated previously the specific bequeathments in the Will, having regard to the provisions already made for the Defendant, do not by themselves raise the suspicion of the Court. There is nothing suspicious about the Deceased giving his sister all the assets as there was conversations as to what to do. Further, the other sisters knew of the provisions.
45. The evidence surrounding the execution of the Will confirmed that the Deceased was so executing without any pressure. There is therefore not sufficient evidence for this Court to determine on a balance of probabilities that the Claimant exerted undue influence on the Deceased.

DISPOSITION

46. Having regard to the above. The order of the Court is as follows;

- [1] Judgment for the Claimant against the Defendant.
- [2] The Defendant's counterclaim is dismissed.
- [3] The Court pronounces for the force and validity of the Will of Gregory Lockiby, deceased, dated 16th December 2017 and declares it to be the Last Will and Testament of the Deceased.
- [4] The caveat(s) filed by the Defendant be struck out.
- [5] The Registrar do expeditiously proceed with Application for the Grant of Probate in the Estate of the Deceased
- [6] The Defendant to pay the Claimant's prescribed costs of the claim assessed in the sum of \$14,000.00.
- [7] The Defendant to pay the Claimant's prescribed costs on the counterclaim assessed in the sum of \$14,000.00.

/s/ Westmin James
Westmin R.A. James
Judge