

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

PROBATE DIVISION

2016/PRO/cpr/00005

In the Estate of Alicia Maria Stockdale a.k.a. Alicia Maria Valerio-Stockdale late of Bel-Air Estates, Carmichael Road situate in the Southern District of the Island of New Providence one of the Islands of the Commonwealth of the Bahamas.

BETWEEN

BETTY NORMA SMITH-FORBES

Plaintiff

AND

BARRINGTON SMITH

First Defendant

AND

LEON HOWARD SMITH

Second Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: Norwood Rolle for the Plaintiff

Charles Mackey and Bradley Cooper for the First Defendant

Leon Smith Pro Se

14 December 2017, 29 March 2018, 5 July 2018, 28 May 2019, 17 April 2021, 27 May 2021 and 14 July 2021

JUDGMENT

WINDER, J

This action seeks a declaration as to the validity of a Will.

Background

1. On 22 August 2015 Alicia Maria Stockdale, a.k.a. Alicia Maria Valerio-Stockdale (Alicia) died in the state of Florida, U.S.A. Alicia had travelled to the USA a month earlier to seek medical attention.
2. Alicia was survived by her 4 children Betty Norma Smith Forbes (Betty), Barrington Smith (Barrington), Leon Smith (Leon) and Lois Smith-Jones (Lois).
3. Betty seeks to have the validity of a Will, purportedly drawn on the instructions of Alicia on 14 September 2007 ("the 2007 Will"), declared. The validity of the 2007 Will is disputed by Leon, Barrington and Lois. On 8 July 1993 Alicia had made an earlier Last Will and Testament ("the 1993 Will"), in which Betty was also named Executrix.
4. Contending that the 2007 Will is the valid will, Betty submitted it for probate following Alicia's death and was issued a Grant of Probate on 15 December 2015. However, Barrington had filed a caveat on 9 December 2015 objecting to the issue of a Grant with respect to the 2007 Will. As a result of the filing of the caveat by Barrington, the Grant was recalled.
5. On 2 February 2016 Betty filed a Writ of Summons (Specially Endorsed) pleading, inter alia, for the 2007 Will to be decreed in solemn form by the court. On 22 March 2016, following the issuance of the Writ of Summons by Betty, Leon also filed a caveat to the 2007 Will. Upon making application to the court he was joined to this action on 25 May 2016.

6. Barrington and Leon say that the 2007 Will is fraudulent, in that the signature on the 2007 Will is not Alicia's. Betty's siblings draw attention to the fact that the 2007 Will was not prepared by Anthony Thompson who they say was Alicia's usual attorney and who prepared the 1993 Will. The 2007 Will was prepared at the chambers of Commonwealth Law Advocates.

7. The 2007 Will contained the following devises:

1. I HEREBY CONSTITUTE NOMINATE AND APPOINT my daughter, BETTY NORMA SMITH-FORBES, nursing instructor of Long Island, New York in the United States of America to be the Executrix of this my Last Will and Testament and my estate for all purposes.
2. I HEREBY ORDER AND DIRECT my executrix to pay all my just debts, funeral and testamentary expenses as soon as conveniently (sic) after my demise.
3. I GIVE AND BEQUEATH my 1995 Toyota Corona or any vehicle I shall own at the time of my demise to my son, BARRINGTON CLEVELAND SMITH, accountant, of Bel Air Estates, Carmichael Road for his absolute use and benefit.
4. I GIVE DEVISE AND BEQUEATH my freehold property and the building thereon situate on Bel Air Estates, Carmichael Road in the Western district of the Island of New Providence aforesaid to my daughter, BETTY NORMA SMITH-FORBES. I direct my daughter, BETTY NORMA SMITH-FORBES to give my son, BARRINGTON CLEVELAND SMITH \$50,000.00 in consideration of his interest in the said property.
5. I GIVE DEVISE AND BEQUEATH my freehold property in Grand Turk, Turks & Caicos Island to my daughter, BETTY NORMA SMITH-FORBES for her absolute use and benefit.
6. BE IT KNOWN that the Fifty Thousand Dollars (\$50,000.00) which my daughter, LOISE SMITH-JONES received from Imperial Life Insurance Co. by virtue of the One Hundred Thousand Dollars (\$100,000.00) mortgage of my home in Bel Air Estates, Carmichael Road, represents her only inheritance in any of my assets or this my estate.
7. BE IT KNOWN that the Fifty Thousand Dollars (\$50,000.00) which my son, LEON HOWARD SMITH received from Imperial Life Insurance Company by virtue of the One Hundred Thousand Dollars (\$100,000.00) MORTGAGE ON MY HOME IN Bel Air Estates which sums he promised to use to satisfy my mortgage held with the Finance Corporation of the Bahamas which mortgage was never satisfied by himself, represents his only inheritance in any of my assets or this my estate.

8. I GIVE AND BEQUEATH all my jewellery to my granddaughter, NADIA SMITH-DARVILLE for her absolute use and benefit.
9. I GIVE AND BEQUEATH all of my Lladro figurines to my daughter, BETTY NORMA SMITH-FORBES for her absolute use and benefit.
10. I GIVE AND BEQUEATH all of the other contents of my home including furniture, appliances and the like not otherwise disposed of in this my will to my son BARRINGTON CLEVELAND SMITH for his absolute use and benefit.
11. I GIVE AND BEQUEATH all of my clothing to the ST. MATTHEW'S ANGLICAN CHURCH PARISH for distribution to the needy.
12. I GIVE DEVISE AND BEQUEATH all of my personal and real property whatsoever and wheresoever, not otherwise disposed of in this my Will which I may die possessed of or to which I may become entitled to my daughter BETTY NORMA SMITH-FORBES for her absolute use and benefit.

...
Signed by the above-named ALICIA MARIA VALERIO-STOCKDALE...

8. The 1993 Will, which the defendants say is the true Will of Alicia contains bequests to all four of Alicia's children, unlike the 2007 Will. The 1993 Will contains the following devises:

1. I appoint BETTY FORBES of the State of New York, one of the United States of America, my daughter, to be my Executrix and Trustee of this my Last Will and Testament.
2. After all my debts, funeral and testamentary expenses have been paid I GIVE AND BEQUEATH the proceeds of my imperial Life Assurance Policy No.1326681 to my four (4) children, Betty Forbes, Barrington Smith, Leon Smith and Lois Smith-Jones, in equal shares as tenants in common absolutely.
3. I GIVE AND DEVISE my real property situate in Grand Turk, The Turks and Caicos Islands to my daughter, Lois Smith-Jones in fee simple.
4. I GIVE AND DEVISE my property situate at Winder's Terrace Subdivision, New Providence, to my son, Leon Smith, in fee simple.
5. I GIVE AND DEVISE my four (4) apartments situate on Lot 2, Block 1, Carmichael Road, New Providence, to my son, Barrington Smith in fee simple.
6. I GIVE AND DEVISE my property known as Lot 33, Love Estate Subdivision, West Bay Street, Nassau to my daughter, Betty Forbes in fee simple.
7. I GIVE, DEVISE AND BEQUEATH all the rest residue and remainder of my real and personal estate whatsoever and wheresoever situate not hereinbefore or by any codicil hereto specifically dispose of as to real estate in fee simple and as to personal estate absolutely unto my said four children in equal shares as tenants in common.

...

Signed by the above-name Testatrix ALICIA STOCKDALE...

9. Notwithstanding the opposition by her siblings, Betty says that the 2007 Will is 'valid in all respects'; and as Alicia's sole Executrix she is entitled to obtain a Grant of Probate for the estate in the terms of the 2007 Will. The Writ filed by Betty sets out a succinct claim as follows:

1. The Plaintiff claims as sole Executrix named in the Last Will and Testament dated the 14th day of September, 2007 of Alicia Maria Valerio-Stockdale, deceased, ("The Testatrix") late of Bel-Air Estates, Carmichael Road situate in the Southern District of the island of New Providence in the Commonwealth of the Bahamas, and to have the said will established.
2. This Writ is issued against the Defendant, Barrington Smith, a beneficiary named in the said Will and because the said Barrington Smith has entered a caveat.
3. The said Will is valid in all respects, and by reason thereof the Plaintiff is entitled to apply for and to have a Grant of Probate issued to her in the Estate of the said Testatrix.

AND THE PLAINTIFF CLAIMS:-

1. That the Court shall decree probate of the said Will in solemn form of law.
2. A full and complete accounting of all of the assets of the Estate of the Testatrix, the late Alicia Maria Valerio-Stockdale, deceased coming into the hands of the Defendant.
3. The return to the Plaintiff of all assets of the said Estate found to have come into the hands of the Defendant.
4. An Injunction restraining the Defendant from disposing of or encumbering any of the assets of the Estate of the late Alicia Maria Valerio-Stockdale, deceased.

...

10. On 13 May 2016 Barrington filed a Defence and Counterclaim to Betty's claim. The Defence and Counterclaim states:

1. Paragraph one (1) of the Statement of Claim is denied. The purported Last Will and Testament of the 14th day of September, A.D. 2007 is fraudulent and not the Last Will and Testament of the deceased save that the deceased resided at Bel-Air Estates, Carmichael Road situate in the Southern District of the Island of New Providence one of the Islands of the Commonwealth of the Bahamas.

2. Paragraph two (2) of the Statement of Claim is admitted save that the First Defendant is a beneficiary under the Last Will and Testament of the deceased the 8th day of July, A.D. 1993 and not the said purported Last Will and Testament of the 14th day of September, A.D. 2007 as this purported Last Will and Testament is fraudulent and not the Last Will and Testament of the deceased.
3. Paragraph three (3) of the Statement of Claim is denied. The said purported Last Will and Testament is a fraudulent Last Will and Testament and does not comply or conform to the provisions of the Wills Act Section 4b, 5(1), (2b)(i) and (ii).

PARTICULARS

- (a) The deceased from January, 1989 up to the time of her death resided with the First Defendant at her residence at Bel-Air Estates, Carmichael Road situate in the Southern District aforesaid. The Plaintiff from July, 1973 resided in the State of New York one of the United States of America until she moved to (sic) State of Florida in or about 2005 where she is presently residing.
 - (b) That at all material times the deceased informed the First Defendant that she had one (1) Last Will and Testament which was prepared by the firm of Anthony Thompson & Co and he was her only Lawyer. The deceased informed the First Defendant that if anything were to happen to her that the First Defendant should contact the firm of Anthony Thompson & Co. for her Last Will and Testament.
 - (c) Upon review of the Last Will and Testament the contents of the said Last Will and Testament could not be done by the deceased as the information contained therein was untrue and incorrect and could only be done by someone without any knowledge of the affairs of the deceased.
 - (d) That it is clear from the Last Will and Testament that the deceased was never present when the Last Will and Testament was executed.
 - (e) The signature in the Last Will and Testament does not conform to the signature of the deceased.
4. Save as hereinbefore expressly admitted, the First Defendant denies each and every allegation contained in the Statement of Claim as if the same were herein set out and specifically traverse (sic) sereatim (sic).

COUNTERCLAIM

5. The First Defendant admits paragraphs one (1) through three (3) of his Defence.

AND THE FIRST DEFENDANT COUNTERCLAIMS

- (ii) That the Court do grant a Declaration that the purported Last Will and Testament of the 14th day of September, A.D. 2007 be declared null and void on the basis of fraud and that the Court accept the true Last Will and Testament

of the 8th day of July, A.D. 1993 as the true Last Will and Testament of the deceased.

(ii) That the First Defendant be allowed to probate the Last Will and Testament of the 8th day of July, A.D. 1993.

11. On 13 May 2016 Leon also filed a Defence and Counterclaim to the action. It states:

1. Paragraph one (1) of the Statement of Claim is denied save that the deceased resided at Bel-Air Estates, Carmichael Road situate in the Southern District of the Island of New Providence one of the islands of the Commonwealth of the Bahamas. The Last Will and Testament of the 14th day of September, A.D. 2007 is not the Last Will and Testament of the deceased, Alicia Maria Stockdale a.k.a. Alicia Maria Valerio-Stockdale.
2. Paragraph two (2) of the Statement of Claim is admitted save that the Last Will and Testament of the 14th day of September, A.D. 2007 is a fraudulent Last Will and Testament.
3. Paragraph three (3) of the Statement of Claim is denied as the Last Will and Testament is irregular in all respects. It is fraudulent and the signature is not the signature of the deceased and all circumstances surrounding the events will bear out that the Last Will and Testament is false.

PARTICULARS

- (a) The contents of the Last Will and Testament is inconsistent with the facts as was known by the Second Defendant and by the deceased.
- (b) The Second Defendant at all material times knew of all business dealings and the intentions of the deceased up and until the time of her death.
- (c) The Plaintiff did not know the deceased in a personal way. The Plaintiff lived abroad all of her life.
- (d) The deceased made her intentions known to various individuals and refused to comply with the pressure and demands of the Plaintiff.

...

COUNTERCLAIM

5. ...

AND THE SECOND DEFENDANT COUNTERCLAIMS

- (i) A Declaration that the purported Last Will and Testament of the 14th day of September, A.D., 2007 be declared null and void on the basis of fraud.
- (ii) A Declaration that the purported Last Will and Testament of the deceased dated the 8th day of July, A.D., 1993 is the true Last Will and Testament of the deceased.

- (iii) An Order that the Court's nominate a party to probate the Last Will and Testament dated the 8th day July, A.D. 1993.
- (iv) An accounting of all the monies had and received by the Plaintiff since the death of the deceased.
- (v) An Order that all rental proceeds be held in a joint account.

12. The issues for consideration is whether 2007 Will is valid in all respects as claimed by Betty or is it void as alleged by Barrington and Leon for:

- a. non-compliance with Section 4(b), 5(1), 2(b)(c) and (ii) of the Wills Act; and
- b. fraud in that (a) the signature is not that of the Testator and (b) the Testator not being present when the document was signed.

13. Sections 4 and 5 of the Wills Act 2002 provides:

4. To be valid, a will shall be made by a person who —

- (a) is aged eighteen years or over; and
- (b) is of sound disposing mind.

5. (1) Subject to section 6, no will is valid unless it is in writing and signed at the foot or end thereof by the testator or by some other person in his presence and by his direction in accordance with subsection (2).

(2) The signature of the testator or other person mentioned in subsection (1) is effective if —

- (a) so far as its position is concerned it satisfies subsection (3);
- (b) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
- (c) each witness either —
 - (i) attests and signs the will; or
 - (ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness), but no form of attestation is necessary nor is publication of the will necessary.

(3) So far as regards the position of the signature of the testator, or of the person signing for him —

- (a) a will is valid if the signature is so placed at, after, following, under, beside or opposite the end of the will that it is apparent on the face of the will that the testator intended to give effect, by the signature, to the writing signed as his will;
- (b) no will is affected by the circumstances that —
 - (i) the signature does not follow, or is not immediately after, the foot or end of the will;

- (ii) a blank space intervenes between the concluding word of the will and the signature;
- (iii) the signature is placed among the words of the testimonium clause or of the clause of attestation or follows or is after or under the clause of attestation, either with or without a blank space intervening, or follows or is after, under or beside the names or one of the names of the subscribing witnesses;
- (iv) the signature is on a side page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will is written above the signature; or
- (v) there appears to be sufficient space to contain the signature on or at the bottom of the preceding side, page or other portion of the same paper on which the will is written, and the enumeration of the circumstances in paragraph (b) does not restrict the generality of this subsection, but no signature under this section operates to give effect to any disposition or direction which is underneath or follows it, nor does it give effect to any disposition or direction inserted after the signature is made.

(4) No person is a competent witness to the execution of a will if he attests the will in any manner other than by signing his name in his own handwriting.

14. The evidence at trial was given by Desmond Bannister, Abegale Brown, Torsheika Newbold, Betty and Pearline Ingraham in Betty's case. The witnesses for the defence were Barrington, Lois and Leon. All witnesses were subject to cross examination on their evidence.

Evidence

15. Betty's witness statement, filed on 28 November 2017, stated:

1. For all my life I have been acquainted with my mother, Alicia Maria Valerio-Stockdale ("Ms. Stockdale") and have often seen her write and have often corresponded with her receiving letters purporting to come from her (and which I verily believe have been written by her in reply to letters which I have written to her. I have since become acquainted with her handwriting and signature of which I have seen many examples.
2. I have seen the document that is the Last Will and Testament of my mother dated 14th September, 2007 and the signature appended thereto is in the handwriting of my mother.
3. ...
4. ...

5. ...
6. ...
7. ..., on the 24th day of July 2015 my mother informed me that Mr. Bannister has her Last will (sic) and Testament.

...

16. Bannister's witness statement filed on 10 March 2017 stated:
 - (i) He met Alicia during his 2002 General Election campaign for the Carmichael Constituency;
 - (ii) She became his client thereafter;
 - (iii) In 2004 Alicia instructed him to prepare her Last Will and Testament dated 2 March 2004 which excluded Leon from benefit;
 - (iv) In 2007 he took a leave of absence from his practice to serve as a Cabinet Minister. He was advised by Abegale Brown, an employee in his chambers that Alicia wanted to amend her 2004 Will in 2007;
 - (v) During the course of 2015, prior to Alicia's death he had several phone conversations with her in which she spoke of the 2007 Will, confirming her intentions as set out therein.

17. Ingraham's witness statement of 10 March 2017 states:
 - (i) She was called to the Bahamas Bar in September 2006;
 - (ii) In September 2007 she was advised by her pupil master, Bannister to prepare Alicia's Last Will and Testament;
 - (iii) She met alone with Alicia and went through the 2004 Will, and made notes of the changes instructed by the deceased;
 - (iv) She met with Alicia alone once more to finalize the Will, which she did;
 - (v) Brown and Newbold were both present and witnessed the execution of the 2007 Will;
 - (vi) It did not appear that Alicia lacked capacity or was forced or coerced into executing the 2007 Will.

18. Both Newbold and Brown's witness statements were filed on 10 March 2017. They deposed that they were both present when the 2007 Will was executed by Alicia at Bannister's chambers, Commonwealth Law Advocates, having been employed with the chambers as a Legal Assistant and a Legal Executive, respectively. They both attested the 2007 Will.

19. Barrington's witness statement, filed on 10 February 2017, stated:

- (i) Alicia was buried in Grand Turk, Turks and Caicos;
- (ii) That he reviewed the purported Last Will and Testament of Alicia dated the 14th day of September, A.D. 2007 around the time of her burial;
- (iii) Based on its contents it could not have been the Last Will and Testament of Alicia;
- (iv) It could not have been prepared by Bannister and whoever prepared it did not get any instructions from Alicia;
- (v) It also appeared that the parties attesting the purported Last Will and Testament were not present when it was executed.
- (vi) 'That there are many conflicts and errors in the purported Last Will and Testament and all of the facts are not correct and it could not have been the signature of the deceased.';
- (vii) Alicia never attended St. Matthews Anglican Church;
- (viii) Lois name was spelled 'Loise', which was incorrect;
- (ix) There was no mention of the several properties owned by Alicia;
- (x) That both the 2004 Will and the 2007 Will are fraudulent.

20. Leon filed a witness statement on 10 February 2017 which averred at paragraphs 60 and 65:

60. ... a memorial was held at Christ The King Anglican Church where the deceased was an adamant member and has been a member of the Church from 1968 up to her death. ...

65. That the Second Defendant quickly reviewed the Last Will and Testament and noticed the following were inconsistent:-

- (a) There was a problem with the execution.

- (b) There was a problem with the witness.
- (c) There was a problem with the signature.
- (d) There was a problem with the devisees.
- (e) And upon further review of the Last Will and Testament the Second Defendant concluded that this Last Will and Testament could not have been made and signed by the deceased. ...
- (f) ...that the spelling of his sister's name was incorrect...
- (g) The devise to the Second Defendant could not have been prepared by the deceased as she was aware that all matters between the Second Defendant and Imperial Life Financial Mortgage were completed.
- (h) ..., there was no gift to the First and Second Defendants' sister.
- (i) The clothes of the deceased were to be given to St. Matthew's Anglican Church but she was a member of Christ the King Anglican Church. ...
- (j) It also appears that the person who prepared the Last Will and Testament did not know of all of the assets that the deceased had.
- (k) The person who gave the instructions on the Last Will and Testament did not know what properties were owned by the deceased.

21. Leon further highlights what he says are inconsistencies of the attesting witnesses to the 2007 Will in his submissions:

- i) Torsheika Newbold swore on the 14th day of September, A.D. 2007 that the Deceased signed the 2007 Last Will and Testament in the presence of Ms. Newbold and Samantha Bain, and they were the attesting Witnesses;
- ii) Abegale Brown swore on the 14th September, 2007 that the Deceased signed the 2007 Will in the presence of Ms. Newbold and Abegale Brown, and they were the attesting Witnesses.

He contends that this particular inconsistency in the affidavits of attestation invalidates the 2007 Will, as it does not comply with section 5(2) Wills Act (supra).

22. Lois's witness statement was filed on 11 December 2017. She stated that:

- (i) Bannister was not Alicia's attorney as she always conducted her business with the chambers of Anthony Thompson and Co.;
- (ii) Bannister was her own attorney and it was she who introduced Betty to Bannister Partners in or around 1998;
- (iii) That the Imperial Life mortgage was paid off on or around 2003;

- (iv) After reviewing the 2007 Will she believes 'each of the gifts were incorrect and did not make sense';
- (v) Alicia had no affiliation with St. Matthew's Church;
- (vi) Alicia held properties on trust for Barrington not reflected in the 2007 Will.

Submissions

23. Counsel for Betty submits that the Court should declare the 2007 Will valid, the 1993 Will having been for all intents and purposes revoked by the 2007 Will.

24. The evidence of the defendants is noted in the submissions of Betty's counsel. Particularly Barrington's contentions, that the 2007 Will contained many errors and Alicia, being an educated person would not have signed such a document. In retort, counsel for Betty submits that Bannister was instructed personally by Alicia to draft her Will, which he did.

25. The case of ***Channon v Perkins [2005] EWCA Civ 1808*** is cited in aid of the submission by counsel for Betty that there is a presumption that a will is duly executed, otherwise only the strongest evidence that the Will has not been duly executed can rebut this presumption. As per the dicta of Neuberger LJ:

"7. There is good reason for the requirement that one must have "the strongest evidence" to the effect that a Will has not been executed in accordance with section 9 when, as in this case, it appears from the face of the Will that it has been properly executed in all such respect and where there is no suggestion but that the contents of the Will represented the testator's intention. Where a Will, on its face, has been executed in accordance with the section 9, and where there is no reason to doubt that it represented completely the wishes of the testator, there are two reasons, one practical and one of principle, why the court should be slow, on the basis of extraneous evidence, to hold that the Will was not properly executed.

And Arden LJ at paragraphs 45-46 opined the following:

"45. So the question of what constitutes the "strongest evidence" for the purposes of this kind of case remains to be explored. As I see it, there is a sliding scale according to which evidence will constitute the strongest evidence in one case but not in another. What constitutes the "strongest evidence" in any

particular case will depend on totality of the relevant fact of that case, and the court's evaluation of the probabilities. The court must look at all the circumstances of the case relevant to attestation. The more probable it is, from those circumstances, that the will was properly attested, the greater will be the burden on those seeking to displace the presumption as to due execution to which the execution of the will and the attestation clause give rise. Accordingly the higher will be the hurdle to be crossed to meet the requirement of showing the "strongest evidence", and the stronger that evidence will need to be.

46. Likewise, if the evidence of due attestation is weak, then the burden of displacing the presumption as to due execution may be more easily discharged and requirement to show the strongest evidence satisfied. Allegations that were not made, or were not pursued, and mere suspicion, have to be put on one side.

Discussion & Findings

26. The defendants' pleadings and evidence are peppered with allegations that the signature on the 2007 Will was not Alicia's along with allegations that she was not present when it was executed. This, along with what they say were representations made by Alicia form the basis of their claim of forgery and fraud.

27. The general starting point is that the court must be satisfied (as per *Tristram and Coote's Probate Practice 25th edition, 1978 Evidence, Chapter 41, Trial, Page 732, paragraph 4*) of the following:

At the hearing the court will 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 the contents of the will. For this purpose an affidavit by one of the attesting witnesses will usually be sufficient.

28. The well-known case of *Barry v Butlin [1838] 1 CURT 637* which is oft cited in contentious probate proceedings also supports the position that the onus to prove a Will begins with the propounder of the Will:

"...the first, that the onus probandi lies in every case upon the party propounding the Will; and he must first satisfy the conscience of the Court that the instrument so propounded is the free and capable Testator. The second is, that if a party writes or prepares a Will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls on it to be vigilant

and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.”

29. It has been accepted that the rule in *Barry v Butlin* extends to all cases where circumstances exist which excite the suspicion of the court. However where fraud is alleged it must be proven by those alleging it (*Tyrell v Painton [1894] P 151*).

30. Leon acknowledges the serious of allegations of fraud in his submissions at paragraph 45:

An allegation of forgery must be proved to the civil standard of proof, namely the balance of probabilities applies. Forgery is a serious allegation which traditionally required a high standard of proof – *Hornal v Neuberger v Products [1957] 1 QB 247*. Denning LJ held “The more serious the allegation the higher the degree of probability that is required.” This authority has subsequently been followed in authorities e.g. *Ahmed v Addy* and another [2004] EWHC 1465 (QB), *Bush and another v King [2013] EWHC 966 (QB)*.

31. Notwithstanding the above, Leon further relies on the case of *Face v Cunningham and another [2020] EWHC 3119 (Ch)* a recent UK High Court decision wherein the judge opined the following:

“I note that *Haider v Syed* is cited, without adverse comment, at paragraph 9-76 of *Williams, Mortimer and Sunnucks: “Executors, Administrators and Probate”* (21st edn) at footnote 382. It is also cited, again without disapproval, at paragraph 3-034 of *Theobald on Wills* (18th edn) at footnote 145. In a section dealing with undue influence and fraud, it is said that the burden is on the person alleging forgery, and that cogent evidence is required, albeit to the civil standard of proof. I do not accept that the burden is on a person alleging forgery to establish that fact (albeit to the civil, rather than the criminal, standard of proof). It is a formal requirement of the validity of a will that (amongst other things) it is in writing, it is signed by the testator (or by some other person in his presence and by his direction) and it is duly witnessed. It therefore seems to me that the burden must rest on the party propounding a will to establish that it has been validly executed and witnessed. That is one of the formal requirements of a will.”

32. The burden of proving the allegations of undue influence and fraud is upon the party making them. However, the party propounding the Will still has the burden of satisfying the court of its due execution, this is an essential fact notwithstanding other issues raised in the matter (*Hutley v Grimstone (1879) 5 P.D. 24 and Tate v Tate (1890) 63 LT 112*). In consideration of the allegations of fraud, on 18 January 2017 Barry and Leon were granted leave by this court to obtain the opinion of a handwriting expert and file a report with regard to the same. No expert evidence was adduced at trial.

33. Insofar as the defendants were given the opportunity to seek out and present expert evidence, not doing so is not automatically fatal to their claim. There is no mandate for the court to place total reliance on the testimony of a handwriting expert or any other expert who gives evidence at trial. The court must in due course determine whether the evidence tendered by an expert witness is reliable and the weight to be attributed to the testimony based on the law and the facts of the case.

34. The defendants contend that a number of issues ought to lead to the conclusion that the 2007 Will is a forgery. They point to the following:

- i. Bannister was not Alicia's usual attorney;
- ii. Alicia would not read and execute a will with her daughter Lois' name spelled incorrectly on the face as 'Loise';
- iii. Alicia would not gift her clothing to a parish church that she did not attend, St Matthews rather than her home of Christ The King;
- iv. The 2007 Will which lacked specific provision for much of her real property. This is inconsistent with the prominence given to her real property in the 1993 Will.
- v. The attestation of Newbold reflected that someone else, Samantha Bain, witnessed the 2007 Will instead of Brown.

35. In this case the 2007 Will was made some 8 years prior to the death of Alicia. That Will was produced by Attorney Pearline Ingraham who was then a pupil with the Chambers of Commonwealth Law Advocates. Alicia was introduced to Ingraham by her supervisor who had himself purportedly prepared an earlier Will for Alicia in 2004. Bannister was familiar with Alicia as she resided in a constituency which he had earlier contested a general election.

36. I have considered the evidence of Pearline Ingraham, Torsheka Newbold, Abagale Brown and Thomas Desmond Bannister who all speak to Alicia coming into the firm to instruct and execute the 2007 Will. The execution of the Will was witnessed by Newbold and Brown who both signed the Will. I accept this evidence and must therefore accept that the Will is valid and effective. I find that the reference in the attesting affidavit of Newbold to witnessing the Will with a Samantha Bain was simply an error. Likewise the failure to recognize the minor error in Lois' name is hardly a cause for declaring the 2007 Will as fraudulent or a forgery.

37. This is not a question of unsoundness of mind some 8 years prior to Alicia's death. In fact the defendants' case is that she was so sharp that she would not have missed the error in Lois' name. Additionally, contrary to suggestions by the defendants, in their submissions, that the 2007 Will was directed by Betty, this is not a case of undue influence and there is no pleading to that effect. The case is that the document was not signed by Alicia, it is a forgery and Betty is advancing a fraudulent document.

38. The defendants take issue with the degree to which Ingraham, Newbold and Brown were satisfied as to the identity of Alicia. They contend that there is no evidence that they took steps to verify Alicia's identity. I am satisfied with the evidence that Ingraham, who met with Alicia on two occasions in preparation of the Will, was introduced to Alicia by Bannister who had, at that time, known Alicia for 5 years and had prepared the earlier Will in 2004.

39. I accept that the defendants and Lois are surprised by the devises in the 2007 Will and by its very existence. They assert that Bannister was not Alicia's usual attorney and that she did not have a connection to St Mathew's church. They also contend that the 2007 Will did not have the specificity with respect to Alicia's real property as the 1993 Will did. According to Leon, *the Court is invited to dismiss [Betty's] claim in favour of the 2007 Law Will and Testament. Three (3) of the [Alicia's] children support that approach and outcome.* Respectfully, it is the right and prerogative of the testator to, change her mind and her attorneys and to dispose of her property in any manner she sees fit. The fact that

the distribution may not have been as equitable as the 1993 Will does not affect its validity or excite the suspicion of the Court.

40. Leon submits, at paragraph 35 of his submission, that:

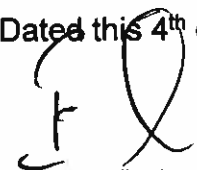
The evidence from Barrington was that he was given permission to construct the (2) stores on the property which was done with the Deceased's consent. All building approvals were given by the Deceased to Barrington. All monies paid for the construction of the buildings were monies paid by Barrington. It is improbable that the Deceased would allow this to have occurred if she intended to give the properties to Betty. The same is more consistent with Betty having been involved in forging the 2007 Will.

The defendants also complain that the 2007 Will does not reflect that some of the properties being disposed of by that Will were only held by Alicia as Trustee and that this should excite the suspicion of the Court to pronounce against validity. Respectfully, any equitable interest which Barrington claims by virtue of his investment in the Carmichael Road property is unaffected by the validity or otherwise of the 2007 Will and his claim would remain against the estate.

41. The defendants do not account for a fact that Alicia may have intentionally chosen not to advise them of her decision to change the terms of her will. There is absolutely no evidence that Betty or anyone forged Alicia's name on the Will. To so find I also must accept that Ingraham, Newbold, Brown and Bannister are being untruthful. I am not prepared to make such a finding, as I find that they were truthful, independent witnesses.

42. In the circumstances I am satisfied, on balance, that the 2007 Will was lawfully executed by Alicia, in accordance with the Wills Act and I so declared it to be valid. The costs of this action are awarded to Betty, such costs to be taxed in default of agreement.

Dated this 4th day of August 2022



Ian R. Winder

Chief Justice