ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2004/0268

In the Matter of the Estate of Claribel Margaret Stephens also known as Ruth Stevens, deceased.

BETWEEN:

MELBOURNE SMITH

First Claimant

LILLIAN BROWN

Second Claimant

And

ELRIDGE BROWN

Defendant

Appearances:

Ms. Asheen Joseph for the Claimants
Ms. Sherrie-Ann Bradshaw for the Defendant

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2008: March 4
September 30

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JUDGMENT

[1] **Blenman, J:** Mr. Melbourne Smith, Ms. Lillian Brown and Mr. Elridge Brown are the children of Claribel Margaret Stephens also known as Ruth Stevens. Ms. Stephens died on 18th May 2003 and after her death, Elridge produced a will dated the 2nd December 2002 which he says Ms. Stephens made. Elridge is named as the sole executor and the

beneficiary in the will. The Grant of Probate, of the will, was made on the 14th January 2004.

[2] Melbourne and Lillian have filed these proceedings and they say that the will is invalid on the ground that Ms. Stephens was not of sound disposing mind and memory at the time she made the will. They also seek declarations that the will is invalid on the basis that Elridge exerted undue influence on Ms. Stephens; the deceased lacked the knowledge and approval required, and finally that the will was not properly executed.

[3] Melbourne and Lillian also seek to have the Grant of Probate of the alleged will revoked.

[4] Elridge disputes that the will is invalid. He asserts that when Ms. Stephens made the will, she was of sound disposing mind and memory. He denies that the will was improperly executed or that he exerted any undue influence on her. He contends that, at the time of executing the will, Ms. Stephens knew and approved of the contents of the will.

[5] Issues

The issues that arise for the Court's consideration are as follows:

(1) Whether, at the time of making the will Ms. Stephens was of testamentary capacity.

(2) Whether Ms. Stephens knew and approved of the contents of the will.

(3) Whether, at the time of making the will, Ms. Stephens was acting under Elridge's undue influence.

(4) Whether the Probate of the alleged will that was granted on the 14th January 2004 should be revoked.

[6] Law

Section 7 of the Wills Act Cap 473 Laws of Antigua and Barbuda states that:

> "No will shall be valid unless it shall be in writing; it shall be signed at the foot, or end, thereof by the testator, or by some other person in his presence and by his

direction, and the signature shall be made, or acknowledged, by the testator in the presence of two or more witnesses at the same time".

[7] Section 21 of the Wills Act states:

> "No obliteration, interlineation, or other alteration, made in any will after the execution thereof, shall be valid, or have any effect, except so far as the words, or effect, of the will, before such alteration, shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration thereof, shall be deemed to be duly executed if the signature of the testatrix and the subscription of the witnesses be made in the margin, or on some other part, of the will, opposite, or near, to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration and written at the end, or some other part, of the will".

[8] Evidence

Deacon Llewely Myers, Mr. Luther Pelle, Mr. David Williams and Ms. Lillian Brown gave evidence on behalf of the Claimants and they were all cross examined. Mr. Elridge Brown and Attorney-at-Law, Mr. Arthur Thomas, Dr. Marlene Joseph, provided evidence on behalf of the defendant and they too were cross examined.

[9] Ms. Bradshaw's submissions

Learned Counsel Ms. Sherrie-Ann Bradshaw urged the Court to accept the evidence of Dr. Marlene Joseph and Attorney-at-Law Mr. Arthur Thomas and find that on the date of the making of the will, Ms. Ruth Stephens had the requisite testamentary capacity. In support of her contention, learned Counsel relied on Arthur v Bokenham [1708] 11 MOD RAP 148; Banks v Goodfellow [1870] LR 5 QB 256; O'Connell v Shortland [1989] 515 ASR 37 and Goode v Carapeto & Goode [2002] WTLR 801 at 841.

[10] Learned Counsel Ms. Bradshaw referred to Banks v Goodfellow ibid and stated that unsoundness of mind may be occasioned by physical infirmity or advancing years as distinguished from mental derangement and the resulting defect of intelligence must be

reduced to such an extent that the proposed testatrix does not appreciate the testamentary acts in all its being. In the case at bar, there is evidence that at the time of the execution of the will, the testatrix had the testamentary capacity. Learned Counsel asked the Court to place great store on Dr. Marlene Joseph's evidence, when the doctor stated that she examined Ms. Stephens on 21st November 2002 and she found her to have a sound mind and memory.

[11] Counsel accepted that the infirmity of the testatrix will strengthen certain presumptions which arise against the will in any case, for example, where the will is contrary to the previously expressed intentions of the testatrix as to her testamentary dispositions. See Harwood v Baker [1840] 3 Moo PC 282. The testatrix capacity need not be perfect. See Barrett v Kaspry KLTL 3/7/2000. Ms. Bradshaw said, however, that the combined effect of the evidence clearly shows that Ms. Stephens had the testamentary capacity at the material time.

[12] Knowledge and Approval

Learned Counsel Ms. Bradshaw said that a testatrix must know and approve the contents of the will. If a will has been properly executed, it is presumed that the will is valid on this ground and, generally speaking, it will have to be proved on the balance of probabilities that the testatrix did not know and approve of the contents of the will. However, if the circumstances surrounding the preparation of the will are such to "excite the suspicion of the Court" (i.e. they are unusual for some substantive reason), the burden of proof can pass to the person seeking to rely on the will.

[13] Learned Counsel Ms. Bradshaw also said that the burden of proof of the testatrix's knowledge and approval lies on the party setting up the will: Barry v Butlin (1838) 2 Moo PCC 480 at 482; Cleare & Foster v Cleare (1869) LR 1 P&D 655. The burden is discharged prima facie by proof of capacity and due execution but where this prima facie presumption is met by the cross examination of the witnesses, the party propounding the will must prove affirmatively that the testatrix knew and approved of its contents. See Tyrell v Painton (1884) P 151 at 157, CA. Counsel, in support of her contention that Ms.

Stephens knew and approved the contents, referred to Mr. Thomas' evidence that after he drafted the will, it was read over to Ms. Stephens and this having been done; she had knowledge and approved of the contents of the will.

[14] Next, Learned Counsel Ms. Bradshaw submitted that Counsel for the Claimants sought to, without success, discredit the evidence of Mr. Thomas by the evidence of Mr. David Williams and Mr. Luther Pelle, the two witnesses to the will. Ms. Bradshaw asked the Court to accept the evidence of Mr. Thomas being credible and honest, and reject the evidence of the witnesses for the Claimants.

[15] Undue influence

Learned Counsel Ms. Bradshaw said that the burden of proving undue influence is on the person alleging it. In this case, it is the Claimants. Strong evidence is required since the allegation is a serious one. If a person makes the allegation without sufficient evidence, the Court may penalize them in costs. See Re Cutcliffe's Estate [1959] PC and Re Good [2002] WTLR 801.

[16] In Wingrove v Wingrove (1885) 1 PD 81, Sir James Hannen said in the course of his address to the jury at p. 82:

> "To be undue influence in the eyes of the law there must be- to sum it up in a word- coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or she make a will in a particular person's favour, because if the testatrix has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testatrix is coerced in doing that which he or she does not desire to do that it is undue influence.
>
> The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life

may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything. This would equally be coercion, though not actual violence".

[17] Allegations of undue influence or coercion are serious ones although the ordinary civil standard of proof is still the same, namely, by reference to the balance of probability. However, even though the standard is the same, in Re H and Others (minors) (1996) AC 563, Lord Nicholls of Birkenhead said at p. 586:

> "The balance of probabilities standard means that a Court is satisfied an event occurred if the Court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the Court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the Court concludes that the allegation is established of the balance of probability. Fraud is less likely than negligence… Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
>
> Although the result is much the same, this does not mean that where a serious allegation is an issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account in weighing the probabilities and deciding whether on balance the event occurred".

[18] Elridge also gave evidence that there was no undue influence on his part. Counsel asked the Court to accept Elridge's evidence in preference to that of Lillian, David, Luther and Deacon Myers. Melbourne and Lillian have not provided the Court with any evidence of undue influence by Elridge. Learned Counsel Ms. Bradshaw submitted that the conclusion is that there is absolutely no evidence of undue influence. Ms. Stephens was of sound

mind, memory and understanding and further, Ms. Stephens has made a disposition precisely along the lines which she wished to make, having knowledge of her will and approved its contents. There exists no single piece of evidence to persuade the Court that the acts of Elridge induced Ms. Stephens to make a disposition that she did not intend to make.

[19] Ms. Asheen Joseph's submissions

Despite the Court having extended several indulgences to the defendant to submit written closing arguments, none was furnished even up to the date of the trial. The Court has not had the benefit of any assistance from Counsel for the defendant in its determination of the matter. This could hardly be acceptable.

[20] Court's finding of facts and analyses

The following represents my finding of facts. I have reviewed the evidence in this matter and let me say straight away that I find both Lillian and Deacon Myers to be very credible and reliable witnesses. Deacon Myers struck me as a neutral, simple gentleman who has no interest to serve. He had constant contact with Ms. Stephens over the years and was a most straight forward and honest witness. Where there is any conflict between their evidence and that of the defendant's witnesses, I accept both Deacon Myers and Lillian's evidence.

[21] Melbourne, Lillian and Elridge are the children of Ms. Stephens, who died on 18th May 2003. Ms. Stephens lived by herself, and as she aged, Lillian, who at that time was residing not far from her mother, took care of her. As Ms. Stephens grew older and weaker, it became more of a challenge for Lillian to continue to care for her mother. Lillian therefore wanted to place her in a nursing home, since Ms. Stephens started to do some strange things. However, Elridge, who had lived in the United Kingdom for in excess of 40 years, was not in agreement. He undertook to pay persons to care for his mother. He commenced doing so but soon thereafter, he discontinued this altogether. Lillian's son David cared for his grandmother thereafter. Melbourne also lived abroad for several years and he had also contributed financially to his mother's care; but ceased after a while.

[22] Ms. Stephens became ill and was hospitalized for different periods from January 2003 to the end of March 2003. Lillian was able to visit her mother while Ruth was in the hospital and up to the end of March 2003. On Ms. Stephen's discharge, Elridge took her to an undisclosed location and Lillian never saw her. Ms. Stephens was a Catholic who originally attended church on Sundays however, during her last years she stopped attending church and would turn up at church during the week. I have no doubt based on Deacon Myers and Lillian's evidence that her health deteriorated. She also wandered around the community, so steps had to be put in place to keep her locked in her home for her own safety. I believe that Ms. Stephens defecated around the house and wandered in the area where she lived, before December 2002, as stated earlier. I have found Deacon Myers to be a very reliable witness when he said that he visited Ms. Stephens at her home every Sunday to give her communion, until the last week of December 2002 when she was moved to a nursing home. Deacon Myers visited Ms. Stephens at her home and gave her communion for several years.

[23] I am equally satisfied that on several occasions, leading up to her removal from her home in December 2002, Ms. Stephens was unable to have a coherent conversation. During Deacon Myers' administering of communion to her, she had difficulty understanding and would refuse to take it. There is no doubt in my mind that Ms. Stephens' mental condition had deteriorated by 2000. By later, Deacon Myers was unable to administer communion to her but simply prayed with her. It is clear to me that as Ms. Stephens' health deteriorated; she became aggressive and violent. By December 2002, she experienced mood changes and did not readily recognise persons whom she knew.

[24] I am fortified in my view, based on an examination of Luther Pelle's evidence, which corroborates that of Lillian and Deacon Myers. On the mental capacity of Ms. Stephens, I am afraid that I am unable to accept the medical evidence of Dr. Marlene Joseph, who did not strike me as convincing. In any event, she did not examine the testatrix in December 2002. Also, it is strange to me that Elridge took his mother to the doctor to get a medical check up a mere few weeks before the execution of the will. It is clear that this was part of the plan he had to have the will prepared. He hoped to be able to use that visit to bolster

any possible defence, if need be, that Ms. Stephens had the sound disposing mind and memory. It is equally passing strange that the doctor never attended to Ms. Stephens before or after the deceased's only visit. I will approach her evidence with great caution and attach very little weight to it. The doctor could only provide evidence of the Ms. Stephens' medical condition in relation to the one occasion when she examined the testatrix; this is in relation to a date well before the execution of the will.

[25] Elridge, in the last few months, contributed almost exclusively to the costs of his mother's care. So in 2002, when he returned to Antigua from England, he got David to take Attorney-at-Law Mr. Arthur Thomas to Ms. Stephens' house. She was 85 years old at that time. At that time, David and his uncle Elridge were getting along very well. He was on his uncle's side since Elridge and one of David's sisters Sandra, had "bad blood" between them. It was David who, on the instructions of Elridge, retained Attorney-at-Law Mr. Arthur Thomas. Elridge gave instructions to Mr. Thomas, who had travelled to Ms. Stephens' house to prepare the will. David assisted by furnishing the details of the parcel of property. On 2nd December 2002, at Ms. Stephens' home, Mr. Thomas prepared will, which she signed in the presence of Luther and David. No other relative was present at that time. The will makes no provision for Ms. Stephens' other children Melbourne or Lillian, but gives everything to Elridge. On the same day that Ms. Stephens made the will, Elridge removed her from her home and placed her in a nursing home. Neither Lillian nor Melbourne knew of her whereabouts despite their efforts to locate her. Lillian subsequently learnt that Ms. Stephens was in a nursing home and she was prevented from visiting her by the staff of the nursing home, based on Elridge's instructions.

[26] Subsequently, Mr. Arthur Thomas caused the front page of the two page will to be changed, among other things, to include the words "the land described as Registration Section: Central Block: 14 2189F Parcel 52". The changes were not signed by Ms. Stephens, neither was the will witnessed anew. The changed will was probated (after Ms. Stephens died on 18th May 2003).

[27] Issue No.1

Whether Ms. Stephens was of testamentary capacity on the 23rd day of December 2002, when the will was executed.

[28] Testamentary capacity

A will is wholly invalid if the testatrix lacked testamentary capacity at the relevant time. The classic exposition of the degree of mental competence required to make a will was enunciated by Cockburn CJ in Banks v Goodfellow [1870] LR 5 QB 549 at 567. The basic rule is that the testatrix must be mentally competent when the will is executed. If competence at the relevant time is established, the fact that the testatrix lacked such competence before or after the execution of the will, will not invalidate the will. Hence, a will made in a lucid interval is invalid. See In the Estate of Walker [1912] 28 TLR 466.

[29] The burden of proof

The onus of proof lies in every case, upon the party propounding a will and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator.

[30] Banks v Goodfellow [1870] 5 QB 549 is authority for the proposition that at the time of making the will, the testatrix must possess a "sound disposing mind and memory". Cockburn CJ said at page 565:

> "It is essential to the exercise of such a power that a testatrix shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, prevent his sense of right, or prevent the exercise of his natural faculties – that no insecure delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would have been made".

[31] Applying the principles to my findings of facts, the Court is afraid that it is far from satisfied that when Ms. Stephens signed the will, she had the mental competence. I place great

store on the evidence of Deacon Myers, Luther Pelle and Lillian Brown as to the general mental condition of Ms. Stephens. It was for Elridge to establish on a balance of probability that Ms. Stephens had the mental capacity on the 2nd December 2002 when the will was signed; he has failed to do so.

[32] In so far as the Court has rejected Elridge's evidence as not being credible, and has attached very little weight to the evidence of the lawyer, since it proved to be less than reliable, the defendant was therefore left to rely on the doctor's evidence. However, the Court is of the respectful view that very little weight, if any, could be placed on Dr. Joseph's evidence, in so far as the doctor attended to Ms. Stephens only on one occasion and this was well before the day of the execution of the will. The doctor therefore, could not give any credible evidence as to whether the deceased had the mental capacity at the time of making the will. In addition, the Court approaches the doctor's evidence with great caution since she examined Ms. Stephens on 21st November 2002 and only prepared her report on 6th September 2004 (well after these proceeding were filed).

[33] In Wood v Smith [1992] 2All ER 556, the testator made a will two days before he died. He was age 82 and had been transferred to the hospital. There was compelling evidence-especially from a solicitor who had visited the testator shortly before the latter died, that the testator was confused and incoherent. The Court held that the onus of establishing testamentary capacity had not been discharged; there was insufficient evidence that the testator was able to comprehend the extent of his property or the nature of the claims of those he was excluding.

[34] The Court does not have the slightest doubt that well before the execution of the will, Ms. Stephens was roaming the streets; she took windows out of the house; defecated on the floor of the house, and the door of her house had to be kept locked so as to prevent her from roaming the streets. Equally, I believe that when Elridge returned from England in 2002, after several years of living abroad, his mother did not recognise him for several days and complained that a strange man was in her house. All of these support my view that Ms. Stephens did not have the testamentary capacity when she signed the will.

[35] There are numerous cases in which the Court held that the testator did not have the mental capacity. In Harwood v Barker [1840] ER 12, Mr. Justice Erskine stated that:

> "in order to constitute a sound disposing mind, the testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard; but that he must also have the capacity to comprehend the extent of his property and the nature of the claims of others, whom by his will he is excluding from all participation in that property".

The will in Harwood v Barker ibid was declared invalid because of the illness of the testator, it was clear that at the time of making the will, he was incapable of recollecting who would make claims against the Estate (his relatives), the nature of the claim and of forming a deliberate and intelligent position to exclude them from sharing in his estate.

[36] In Warring v Warring (1848) 6 Moo PC 341 the testator made a will which was challenged by his nephew, his only relative, who had been excluded. As the will was rational and correctly executed, it was presumed to have been made by a mentally competent testator. However, evidence was produced that when he made the will, the testator was suffering from insanity, induced partly by his belief that he was destined for "eternal perdition" as he has partaken in a church service while "unworthy". The evidence rebutted the presumption of mental competence. Thus, the burden of proof shifted to the propounder, who was unable to satisfy the Court of the testator's mental competence.

[37] In Re Simpson, Schaniel v Simpson (1977) 121 Sol Jo 224 states that:

> "When a testator is elderly and infirm his will should be witnessed and approved by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and who records his examination and findings".

[38] In the case at bar, there is no doubt in mind, given Ms Stephens' medical state and the fact that she could not even understand or communicate with Deacon Myers during communion, that a medical doctor should have been asked to witness the execution of the will. This would have gone a far way in properly establishing if the witnessing doctor was able to say that Ms. Stephens had the mental capacity and understanding when she

executed the will. This was not done. Ms. Stephens could not recognise her son Elridge; this raises several issues in relation to her capacity which Elridge has failed to rebut.

[39] Parry and Clark on the Law of Succession SEVENTH EDITION states at page 33 that:

> "If there is any reason at all to anticipate that the will about to be executed may be challenged in the future on the ground that the testator was not of sound mind, memory and understanding, it is a useful precaution to arrange for the presence of at least one experienced medical practitioner so that he may examine the testator's state of mind at the time when he executed the will and, if he is satisfied, be an attesting witness to the will. This precaution is particularly important in cases of senility where there may be marked variations in mental capacity from time to time".

It is important to note that Dr. Marlene Joseph gave no opinion as to mental condition of Ms. Stephens on the date she signed the will. The doctor was not asked as to the nature of the medical check up that was provided to Ms. Stephens. Dr. Joseph did not strike me as a witness who willingly testified on the issue of Ms. Stephens' mental capacity. Be that as it may, the Court has no doubt that the onus of proving testamentary capacity has not been discharged.

[40] Based on the totality of evidence, I am far from satisfied that, at the time of making the will, Ms. Stephens possessed the requisite testamentary capacity. On this ground alone the Court holds that the will is invalid.

[41] Issue No.2

Whether Ms. Stephens knew and approved of the contents of the will.

[42] Knowledge and Approval

It is a fundamental principle that a will is invalid unless the testator had the intention to make it. More specifically, the requirement is that the testator must have intended that his wishes – as expressed in the appropriate form - should take effect on his death. It follows

that these wishes must be entirely the result of his volition: the testator must know and approve of the contents of the will.

[43] The Court has no doubt, based on the totality of circumstances, that Ms. Stephens' long held intention was for all her children to benefit from her estate, this is the reason why she did not make a will for her entire life. It is more than curious that on the day when Elridge was taking her to the nursing home, she made a will leaving everything she owned to him. The Court's suspicion is further executed in view of the fact that Elridge, at that stage, appears to have decided to finance her care. In passing, I note that Elridge concealed her whereabouts from his siblings.

[44] The general rule is that the testatrix must know and approve of the contents of the will. This knowledge and approval must be present at the time of execution. The burden of proof is on the defendant. See Thomas v Thomas (1969) 20 WIR, where it was held that it was not affirmatively established that the testator knew and approved of the contents of the will. It was further held that where the Respondent takes an interest under the will, the onus rests on him to remove all suspicious circumstances and prove the righteousness of the transaction.

[45] In Barry v Butlin [1838] 2 Moo PC 481 Parke B stated that:

> "If a party writes or prepares a will, under which he takes the benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and zealous 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 express the true will of the testatrix".

[46] I am far from satisfied that Ms. Stephens knew and approved of the contents of the will. Elridge has not persuaded me at all that she knew and approved of the contents of the will. Further, there are numerous suspicious circumstances that point to the conclusion that the will did not express the mind of the testatrix; and that she did not know or approve its

contents. Of significance is the fact that he instructed the lawyer and he is the only beneficiary.

[47] The presumption that the testator knew and approved the contents of the will usually arises in all cases. In Tyrell v Painton [1894] P 151 at 159 Lord Justice Davies said that:

> "The presumption does not apply where the circumstances raise a well-grounded suspicion that the will does not express the mind of the testator. In that event, the will is not admissible to probate unless the suspicion is removed".

[48] In Parker v Felgate [1883] 8 PD 171 Hanner P stated at page 173 as follows:

> "If a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to thin thus far, 'I gave my solicitor instructions to prepare a will making a certain disposition of my property'. I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out".

In that case, the testatrix, who was ill instructed her solicitor to prepare a draft will. Before the will could have been executed, she lapsed into partial coma. She occasionally roused and on one such occasion, her doctor rustled the will in front of her face and said this is your draft will. It was then signed on her behalf. The Court found that the testatrix did not understand or remember the instructions that she had given and that she could not have understood the clauses in the will. Nevertheless, the will was upheld since she understood that "she was engaged in executing the will for which she had given instructions".

[49] In Battan Singh v Amirchand [1948] AC 161, the Privy Council stated that:

> "a will could be valid when the testator who had testamentary capacity at the time when he gave instructions to a solicitor for the preparation of the will, provided that (i) the will is prepared in accordance with his instructions and (ii) at the time of the execution, he is capable of understanding and does understand, that he is executing the will for which he has given instructions".

The Privy Council however cautioned that the above mentioned principle should be applied with the greatest caution where the testator gives instruction to a lay intermediary who repeats them to a solicitor.

[50] The rule in Parker v Felgate ibid appears to be confined to where instructions are given to a solicitor or to an intermediary to give to a solicitor. As stated earlier, it is clear to me that it was Elridge who gave Attorney-at-Law Mr. Thomas instructions to make a will and he was assisted by David. I do not for one minute believe that Ms. Stephens gave any instructions to the lawyer to prepare the will. David gave the lawyer the details about the parcel numbers, but I have no doubt that 85 year old Ms. Stephens gave no instructions to have a will prepared.

[51] Further suspicion surrounds the fact of the will; the circumstances of execution and the motive of Elridge in having Ms. Stephens sign a will on the date that she was heading to the nursing home.

[52] In Wintle v Nye [1959] 1 WLR 284, it was stated that:

> "It is not the law that in no circumstances can a solicitor or other person who has prepared a will for a testatrix take a benefit under it. But the fact creates a suspicion that must be removed by the person propounding the will. In all cases the Court must be vigilant and zealous. 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".

[53] In Thomas v Jones [1928] P 162, the testator's solicitor prepared a will which included a residuary clause substantially benefiting the solicitor's daughter. The will was prepared after lengthy interviews with the testator, whose mental capacity was failing; no attempt was made to obtain independent medical advice as to the testator's competence. The residuary clause was excluded from probate.

[54] Applying the above principles to the facts of the case, the Court is of the respectful view that Elridge has failed to negative the well-grounded suspicions that surround Ms. Stephens' making of the will.

[55] Issue No.3

Whether the will is invalid on the ground that it was executed under undue influence.

[56] Undue Influence

Anyone who challenges a will on the grounds of fraud or undue influence must prove the allegation. The onus is not on the propounder to disprove the allegations. See Boyse v Rossborough (1857) 6 HLC 2. See also Craig v Lamoureaux [1920] AC 349. As stated earlier, I do not for one moment believe that it was Ms. Stephens who instructed the lawyer to prepare the will. To the contrary, the instructions came from Elridge and he was ably assisted by David.

[57] In Re Browne, Robinson v Sandiford [1963] 1 WIR 505 at page 512, Field J stated that:

> "The onus in respect of these issues; undue influence, rests on the defendant to establish directly or by proof of such facts and circumstances from which the Court could properly infer it".

[58] Based on the totality of facts as I have found them, I have no doubt that Elridge exerted undue influence on Ms. Stephens and got her to sign the will. I believe that he no doubt was of the view that since he was going to be solely responsible financially for her nursing care expenses, in her last few months, he was entitled to have all of her property. It is reasonable to infer from all of the circumstances that Elridge exerted undue influence of Ms. Stephens.

[59] Issue No.4

Whether the Probate of the alleged will that was granted on 14th January 2004 should be revoked.

[60] Revocation of probate

The Court is clothed with the power to revoke grants of probate. One of the better known grounds for revoking a grant is where it was obtained based on a false statement. Tristan and Coote's Probate Practice Thirteenth edition page 610 provides examples of false statements and states as follows:

> "Where a grant has been made to a person who was entitled to it, either where he has acted in ignorance of true facts or where he has acted fraudulently, e.g. by making a false statement or by concealing some material fact from the Court".

[61] In Tristan and Coote's ibid at page 82, under the heading "Suspicion as to Will" states at paragraph 3.159:

> "Where a will is propounded which raises the suspicion of the Court that it does not express the mind of the testator, the onus is on those who propound it to remove the suspicion. This is not confined only to cases in which the will has been prepared by a person taking a primary benefit under".

[62] In contradistinction, in Clancy v Clancy [2003] EWHC 1885, the Court found for the validity of a will which had been properly drawn up in accordance with the instructions of the testatrix who had at least the capacity to understand that she was executing a will prepared in accordance with her instructions.

[63] Want of due execution

Also, the Court will revoke the grant of probate if want of due execution is discovered since the grant. By way of emphasis, I state that the will that was admitted to probate is not the one that Ms. Stephens had signed (since the Attorney had changed the entire first page of the original will and did not have the testatrix re-execute the changed will. See Tristan and Coote's ibid at page 615 paragraph 17.29, where it states that:

> "If it is discovered after the issue of a grant that a will proved was not duly executed, application should be made for revocation of the grant".

[64] It is clear that the changed will was not properly executed; accordingly, I have no hesitation whatsoever in revoking the grant of probate; based on all of the legal principles stated above.

[65] Alterations

In Re Winte [1990] 3 All ER 1 it was held that the will in its amended form could not be admitted to probate as an altered will because, among other things, the alterations had not been signed by the testator or any other person in his presence and by his direction.

[66] Based on my findings, when Mr. Thomas changed the first page of the will that Ms. Stephens had executed, no steps were taken to have the alteration executed. It is the law that if the alteration was made before the will was executed, which it was not, the will would be valid. If the alteration was made after the will was executed, but the will was re-executed, again the alteration is valid. See in Goods of Shearn (1880) 50 LJ p15.

[67] In view of the totality of circumstances, the will that was admitted to probate is not the will that Ms. Ruth Stephens signed. The lawyer quite candidly admitted, during cross examination, when confronted with two different wills, bearing the same date, that he caused the first page of the will to be changed after Ms. Stevens had signed it and after it was witnessed. There can be no denying that it was incumbent to have the second will executed afresh by the testatrix and also witnessed anew. This was not done.

[68] Conclusion

In view of the foregoing reasons, I am of the considered opinion that the probate of the will that was granted on 14th January 2004 be revoked forthwith.

[69] Mr. Elridge Brown is ordered to pay prescribed costs to Mr. Melbourne Smith and Ms Lillian Brown, unless otherwise agreed.

Louise Esther Blenman

High Court Judge