EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2015/0169

BETWEEN:

LARINA JACOBS – LAMOTHE

Claimant

-AND-

[1] JANET HENDRICKS

First Defendant

[2] RONA ANITA HENDRICKS – BROWN

Second Defendant

[3] BERNICE HENDRICKS-GOMES

Third Defendant

Appearances: Ms. Ruthann Richards and Ms. Christina Hart of Maximea and Co. for the Claimant
Ms. Nadine Whyte and Ms. Jamealya Fahie of O'Neal Webster for the Defendants

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2018: September 25th

JUDGMENT

[1] Ellis J.: Sidney Basanul Hendricks ("the Deceased") died on 7th March 7, 2010 leaving his wife, Adina Hendricks and eight (8) natural children including, Janet Hendricks, the First Defendant, Rona Anita Hendricks-Brown, the Second Defendant, Bernice Hendricks-Gomes, the Third Defendant, Bassanue Hendricks, Sidney Hendricks, Jr., Val Hendricks, Joycelyn Hendricks-Vanterpool and Theresa Hendricks.

[2] Mrs. Hendricks had two (2) daughters prior to her marriage to the Deceased; the Claimant, Larina Jacobs-Lamothe and Edith Jacobs. The Claimant is therefore the step daughter of the Deceased and the half-sister of the Defendants.

[3] At the date of his death, the Deceased's estate comprised of the following:

a. A bank account with CIBC First Caribbean International Bank containing approximately $30,000.00;

b. Real property located at Jost Van Dyke and registered as Parcel 92 of Block 1640A, Jost Van Dyke Registration Section which comprises of the matrimonial home;

c. A leasehold interest in real property located at Jost Van Dyke registered as Parcel 113 of Block 1640A, Jost Van Dyke Registration Section; and

d. The Deceased and Mrs. Hendricks also established and operated Sidney's Peace and Love Bar & Restaurant (**the "Restaurant"**) in Little Harbour, Jost Van Dyke.

[4] Prior to his death, the Deceased had not completely liquidated his debts. He had taken a loan in or around 6th October, 2008 with FirstBank VI ("the Outstanding Loan"), a loan for which the Claimant stood as guarantor. At the date of his death, there was an outstanding balance of $17,000.00.

[5] On 18th December, 2014, the Defendants obtained the grant of letters of administration of the Deceased's estate.

[6] In January 2015, the Claimant discovered the Last Will & Testament of the Deceased dated 22nd March, 1996 (**"the Will"**) in which the Deceased left his entire estate to Mrs. Hendricks for life and upon her death to the Claimant absolutely.[1] The Claimant was also appointed as Executrix. It appears that prior to his death and unknown to the Parties, the Deceased executed the Will on or about 22nd March, 1996 in the presence of two (2) witnesses. The fact of the existence of the Will was unknown to the Parties until it was located in the vault of McW Todman and Co. Law Chambers.[2]

[1] Witness Statement of Mark Antonio Martin page 31 paragraph 16

[2] Witness Statement of Larina Jacobs – Lamothe pages 63 – 64 of Trial Bundle B paragraphs 63 – 64; Witness Statement of Mishka Jacobs pages 1 – 3 of Trial Bundle B

[7] After discovering the Will, the Claimant filed an exparte application for an order restraining the Defendants from having any further dealings with the Deceased's estate, an order freezing the Deceased's account, and various other orders and declarations.

[8] By order dated 30th June, 2015, the Court granted the Claimant an order restraining the Defendants from any further dealings with the Deceased's estate, and his account (the "Injunction"). On 20th July, 2016, the Defendants applied to discharge and/or vary the Injunction. The application was heard on 24th July, 2015 and on that day, the Court:

a. dismissed the application to discharge the Injunction.

b. varied the Order by permitting the Defendants and Mrs. Hendricks to continue operating the Restaurant.

c. made an order for the Defendants to provide monthly accounts.

The Defendants' Case

[9] The Defendants' contend that the Will is not valid for the following reasons:

1. The Deceased did not know and approve the contents of the Will in that he could not read, and it was not read over to the him;

2. The Deceased did not understand the nature and effect of the documents which he signed as he could not read and the contents of the Will were not explained to him; and/or

3. The Deceased did not sign the Will freely or voluntarily as the execution of the Will was obtained by the undue influence of the Claimant.

[10] In the circumstances, they asserted that the Claimant is not entitled to a grant of probate, nor is she entitled to an order that they account to her for their dealings with the Estate between 2010 and 2014 because she has no interest in the estate. Instead, they contended that the Letters of Administration was properly granted and ought not to be revoked.

[11] In the event that the Court finds that the Will is in fact valid, the Defendants submit that the Claimant is only entitled to an order that they account to her from the date of the Letters of Administration as they were not under any duty to account prior to that date.

The Claimant's Case

[12] On the other hand, the Claimant asserts that the Will was properly executed as required by law in that the Deceased knew and approved the contents of the Will and was not unduly influenced to execute the same. She submits that the Will should be proved and that a grant of probate should be issued to her as executrix.

[13] The Claimant also seeks an order revoking the Letters of Administration granted to the Defendants. The Claimant asserts that the Defendants have assumed the role of administrators even prior to the grant of Letters of Administration and have managed the Restaurant and the Deceased's estate and have co-mingled the funds of the estate with their personal funds. She therefore ask that they provide an account of their dealings with the assets of the Deceased's estate.

[14] In a collateral claim, the Claimant also asserts that prior to his death, she guaranteed a loan for the Deceased (**"the 2008 Loan"**) and that when he died, there was an outstanding balance of $13,146.38 which was repaid in full from her personal funds. She states that she was repaid the sum of $8,000.00 by Mrs. Hendricks and therefore the estate owes her the remaining amount of $5,146.58.

[15] The Defendants however dispute this claim. They contended that the Deceased's estate does not owe the Claimant $5,146.58 or indeed any amount. First, they say that on obtaining the proceeds of the 2008 Loan, the Deceased gave the Claimant $9,000.00 which was used to secure the loan and that she was also given an additional $1,000.00 for her services. Consequently, they submit that the $9,000.00, which was held on her account as security for the 2008 Loan and which was used to repay that loan was the Deceased's money. Finally, they say that following the Deceased's death and at the demand of the Claimant, Mrs. Hendricks paid the Claimant an additional $9,000.00.

ISSUES TO BE DETERMINED

[16] In light of the foregoing, the following issues fall for determination:

1. Whether the Will is invalid because the Deceased did not know and approve the contents of the Will and/or did not understand the nature and effect of the document which he signed;

2. Whether the execution of the Will was obtained under the undue influence of the Claimant;

3. Whether the Order and Grant of Letters of Administration dated 18th December, 2014 should be revoked;

4. Whether the Claimant is entitled to an account and information regarding the administration of the Deceased's estate and if so, for what period; and

5. Whether the Deceased's estate owes the Claimant $5,146.58.

IS THE WILL IS VALID?

Formal Validity

[17] Generally, the formal validity of a will depends upon compliance with applicable legislative requirements. In order to be valid under the laws of the Virgin Islands, a will must meet the requirements of section 7 of the Wills Act, Cap 81 of the Laws of the Virgin Islands. This provides that:

> " No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say), 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 such signature shall be made, of acknowledged, by the testator in the presence of two, or more, witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

[18] Section 9 of the Wills Act also provides that:

> "Every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed valid within the enactment in section 7 as explained by this section, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of

the will that the testator intended to give effect by such signature to the writing signed as his will…"

[19] The evidence before the Court discloses a Last Will and Testament executed by the Deceased on 22nd March, 1996 in the presence of Joanne Turnbull and Dolly Liverpool, legal secretaries employed by the law offices of McW Todman & Co. The initials of the Deceased appear on pages 1 and 2 of the Will and his signature appears on page 2. The Claimant's evidence is that this Will was in the sole control and custody of McW Todman & Co. until 26th January 2015 when it was released to the Claimant.

[20] The attesting witnesses both produced affidavits in which they aver that the Deceased executed the Will at the law offices of McW Todman & Co. in their presence by signing his name at the foot or end of the document. They also state that then attested and subscribed the will in the presence of the Deceased and in the presence of each other.

[21] The senior associate of McW Todman & Co., Ms. Mishka Jacobs also provided evidence in support of the Claimant's case. In her witness statement, she states that the Will was prepared by the Chambers of McW Todman & Co. and that like any other will, the deceased would have had to seek legal advice from the Chambers and have given instructions for its preparation otherwise, they would not have known to prepare the Will. Ms. Jacobs relied on affidavits of the attesting witnesses, Joanne Turnbull and Dolly Liverpool who she confirms were legal secretaries employed by the law firm.

[22] At law, there is a presumption which presupposes the due execution of a will. The authors of Williams Mortimer and Sunnucks Executors Administrators and Probate[3] define the position in the following terms:

> "The presumption that everything was properly done (*Omnia rite et solemniter esse acta*), arises whenever a will, regular on the face of it and apparently duly executed, is before the court, and amounts to an inference in the absence of evidence to the contrary, that the requirements of the statute have been duly complied with."

[3] Seventeenth Edition at page 146

[23] And in Smith v Smith (1866) LR 1 P&D 143, Sir James Wilde noted:

> "The presumption omnia rite esse acta is strong in a case like the present, and the Court ought to be very careful not to defeat the intention of the testatrix by setting aside the will, unless the evidence clearly rebuts that presumption."

[24] A court must take into account all of the relevant circumstances of the case in determining whether there has been due execution.[4] In Thomson v Hall[5] the court considered these circumstances:

> "The character of the witnesses, the length of time which has elapsed since the transactions took place, the nature of the facts deposed to – whether they are likely or not to have made an impression on the minds of the witnesses – are circumstances to be taken into account, to which is to be added this consideration also, whether the case admits of the principle – the presumption – omnia rite esse acta."

[25] In the case at bar, the Will was prepared by attorneys at the law firm of McW Todman & Co. The Will contains an attestation clause with the names of two witnesses who are legal secretaries employed by the law firm. This leads the Court to the conclusion that that the Will was executed by the Deceased who understood the formal requirements.

[26] The Defendants do not dispute that the Deceased's signature is endorsed on the Will. Moreover, the Defendants do not dispute that the Will observed all of the formal requirements prescribed by the Wills Act and in light of the clear and largely untraversed evidence presented in support of the Claimant's case, the Court is satisfied that the Will meets the requirements of formal validity under the Wills Act.

[27] The Defendants however, have gone on to challenge to the Will on the basis of substantial invalidity. They say that the Deceased did not know or understand the contents of the Will as he could not read and there is no evidence that the Will was aver read over to him. They further contend that even if the Deceased knew or understood the contents of the Will, he did not sign it freely or voluntarily. They further assert that in any event he was unduly influenced by the Claimant.

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[4] Blake v Knight (1843) 3 Curt. 547

[5] (1852) 2 Rob 426 at page 432

Substantial Validity

[28] Distinct from formal validity, a challenge based on substantial invalidity requires a court to consider whether the testator's mind matches with the testamentary act. A court must therefore consider issues of testamentary capacity, knowledge and approval and undue influence. Where a testator does not know or approve the contents of a will or where he is deceived into making it by fraud or compelled to make it by threats or undue influence, the document purporting to be executed by the testator cannot be proved or admitted to probate.

[29] At law, where a will has been executed correctly (i.e. the testator has in accordance with statutory requirements, signed the will in the presence of two (2) witnesses who have also signed the will) and the testator is found to have had the necessary testamentary capacity, knowledge and approval will be presumed.[6] However, there are certain circumstances, where it must be proved that the testator had the necessary knowledge to understand the content of their will and that they approved the content.

[30] The law as to the burden of proving knowledge and approval is very clearly set out in the following passage from the judgment of Lord Penzance in Cleare v Cleare.[7]

> "That the testator did know and approve of the contents of the alleged will is therefore part of the burthen of proof assumed by everyone who propounds it as a will. This burthen is satisfied, *prima facie*, in the case of a competent testator by proving that he executed it. But if those who oppose it succeed by a cross-examination of the witnesses, or otherwise, in meeting this *prima facie* case, the party propounding must satisfy the tribunal affirmatively that the testator did really know and approve of the contents of the will in question before it can be admitted to probate."

[31] Certain circumstances of suspicion may cause a court to refuse probate. The rule as stated by Parke B, in Barry v Butlin[8], was amplified by Davey LJ, in Tyrrell v Painton ([1894] P 151), page 159 as follows:

> "It must not be supposed that the principle in Barry v Butlin ((1838), 2 Moo PCC 480, 1 Curt 637, 12 ER 1089, PC, 23 Digest (Repl) 131, 1357) is confined to cases where the person who prepares the will is the person who takes the benefit under it – that is one

[6] Blackman v Man [2008] WTLR 389

[7] ((1869), LR 1 P & D 655, 38 LJ P & M 81, 20 LT 497, sub nom Cleare v Fowler & Cleare, 17 WR 687, 23 Digest (Repl) 279, 3402) ((1869), LR 1 P & D at pp 657-658)

[8] (1838), 2 Moo PCC 480

state of things which raises a suspicion; but the principle is, that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the court ought not to pronounce in favour of it unless that suspicion is removed."

[32] In Re R[9] , Willmer J. considered what sort of circumstances could be taken into account in arousing such suspicions as could lead a court to refuse probate. The learned Judge concluded:

> **"In dealing with a question of knowledge and approval of the contents of a will the** circumstances which are held to excite the suspicions of the court must be circumstances attending or at least relevant to, the preparation and execution of the will itself. This view is, I think, confirmed by the decision of the Court of Appeal in *the Estate of Musgrove, Davis v Mayhew* ([1927] P 264, 96 LJP 140, 137 LT 612, 43 TLR 648, 71 Sol Jo 542, CA, 23 Digest (Repl) 253, 3088), where it was held that a suspicion engendered by extraneous circumstances, arising subsequent to the execution of the will, was not a sufficient reason for rebutting the presumption of due execution of a will regular on its face. In the course of an exhaustive judgment Lord HANWORTH MR, said ([1927] P at p 280):
>
> > 'What of the suspicion? It is not such as attaches to the document itself in the sense in which Sir James Wilde uses the term in Guardhouse v Blackburn, or as it arose in Tyrrell v Painton ([1894] P 151, 70 LT 453, 42 WR 343, 6 R 540, CA, 23 Digest (Repl) 132, 1368) in the preparation of the will. The wide definition of suspicion stated by Lindley LJ., in the latter case, that it "extends to all cases in which circumstances exist which excite the suspicion of the court," appears to have been used in reference to the preparation of the will, its intrinsic terms, and the circumstances surrounding its preparation and execution, and Davey, LJ, seems to have had the same matters in mind. Their judgments were not intended to alter, but to affirm the principles laid down in the cases I have cited." Emphasis mine

[33] It follows that knowledge and approval must be affirmatively proved by those propounding the will in circumstances where those who oppose it succeed in meeting the *prima facie* case raised by proof of execution. If the testator is deaf and/or dumb; cannot speak or write or is paralysed; blind or illiterate; or the will is alleged to have been signed by another person for the deceased at his direction, the court will require sufficient evidence to prove that the testator understood and approved the contents of the will.

[34] If the circumstances surrounding the will being executed raise such suspicion, it will then be for those who believe the will to be valid to call evidence to dispel the suspicions. The greater the

[9] [1950] 2 ALL ER 117

suspicion the greater the burden on the person trying to prove the will, to dispel that suspicion. However, even if there are suspicious circumstances, if the will is a simple document, it is often easier to prove knowledge and approval.

[35] The Court is mindful that in such cases, the question is not whether the court approves of the circumstances in which the will was executed or of its contents. The question is whether the court is satisfied that the contents do truly represent the testator's testamentary intentions.[10] There is no requirement to prove "the righteousness of the transaction" if this is taken to impose a greater burden than proving knowledge and approval.[11]

[36] In this case, no issue arises in respect to testamentary capacity and due execution of the will. However, the Defendants rely on the principle that the circumstances surrounding the execution of a will are such as to arouse suspicion. It therefore falls to them to establish a *prima facie* case within this principle. Only then will the Claimant be required to prove actual knowledge and approval in the sense that the Will does represent the wishes of the Deceased.[12]

[37] The Defendants allege that the Deceased was illiterate, in that he could not read. They assert that he could not therefore know or approve the contents of the Will and did not know the nature or effect of the document which he signed as he could not read and there is no evidence that the documents was read over to him or that the contents were explained to him. To support this contention they advanced several witnesses of varying relevance.

[38] The Claimants relied on Vivian Hendricks Dewindt, the Deceased's sister who in her witness statement expressed that it was imperative to know that the Deceased was illiterate. Therefore, she asserted that any document taken to him for signature without it being read over to him should be declared invalid. When she was cross-examined, she told the Court that she had lived in St. Thomas, United States Virgin Islands for over forty-five (45) years but that she visited her family in the BVI intermittently. She testified that she has been around her brother and his family enough to know that her brother did not do his own banking because he was not knowledgeable enough and

[10] Fuller v Strum [2002] WLR 1097, at paragraph [65]
[11] Griffin v Wood [2008] WTLR 73, at paragraph [35]
[12] Fuller v Strum [2002] 1 WLR 1097

he could not read. However, when Mrs. Dewindt was asked about a loan which the Deceased had taken out to build the Restaurant, she testified that she was not present when he would have signed the loan documents. Despite this, she stated that she could in her own personal knowledge say that the Deceased was unable to read at that time because she is a trained retired schoolteacher who has been around him long enough. When she was further taxed however she agreed that in her own personal knowledge she could not say that the Deceased was unable to read at the time of signing that loan document or indeed during the over forty-five (45) years that she resided in the USVI. Notwithstanding this, Mrs. Dewindt continued to insist that her brother could not read.

[39] Counsel for the Defendant has commended Mrs. Dewindt as a witness of truth, however, in light of her limited interaction with the Deceased and the limited knowledge of his business affairs, the Court has some difficulty with her purported certitude.

[40] The Court also heard from Mrs. Adina Hendricks, the Deceased's widow. In her witness statement she stated that she is unable to read or write. She stated that although she attended elementary school with her deceased husband, they both could not read. She stated that although they could count, sign their names, and give instructions, if they received a letter or document, they would have to call someone to read it to them. She also stated her belief that the Deceased did not know or understand the contents of the Will as he could not read and there is no indication that the will would have been read over to him. She further stated that even if the Will had been read over to him, she believes that he was forced to execute the same by the undue influence of the Claimant.

[41] However, when she was cross-examined under oath, Mrs. Hendricks' evidence vacillated significantly. She testified that she and her husband used to pray together and that they would get up early in the morning for devotions. She stated that her husband would read the Bible with her. When she was reexamined and the unequivocal evidence in her witness statement was put to her, she shifted her position, stating that if the letters were big (as presumably the Bible was) she would be able to read.

[42] In light of this prevarication, it is not surprising that the Court found Mrs. Hendricks' evidence to be unreliable. Having had a chance to observe her under oath, the Court was not satisfied that she was a truthful witness. She seemed intent on vilifying the Claimant disavowing any assistance which she would have rendered, even when this was clearly at odds with her own witness statement. Her oral testimony during the trial materially revised her witness statement and the Court was left with the distinct impression that she was revising her evidence to meet a prescribed narrative.

[43] The Court also heard from the Defendants in the case. Their written evidence is essentially the same. Janet Hendricks, the Deceased's daughter, stated that it was her firm belief that her father did not understand the contents of the Will as he could not read and there was no evidence that the will was read over to him before he signed it. This statement was repeated verbatim by Rona Anita Hendricks–Brown who also stated that her father would always asked them to read over documents to him.

[44] Bernice Hendricks–Gomes also gave similar evidence. She also stated that her father trusted his daughters including the Claimant. As such, he never read documents which they asked him to sign. He would sign almost any document which they asked him to sign because he trusted them. She also asserted that the fact that the Will reflects the full name of her mother and her siblings raises her suspicion that the Will was not prepared on her father's instructions and that someone accompanied him to the lawyers to get the document prepared. Her suspicions were aroused because according to her, her father did not know their real names.

[45] When they were cross-examined under oath, the Defendants maintained with varying degrees of equivocation that the Deceased could not read. Under oath Janet, testified that her father successfully ran the restaurant business for thirty-five (35) years, maintained a bank account, purchased stock for the restaurant, sold real property and boat, and secured loans with no assistance or involvement from her.

[46] When she was cross-examined, Rona also agreed that he father sometimes did his own shopping and banking. She also testified that she could not say that her father did not understand the

contents of the Will or that he did not sign it of his own free will because she was not present when it was prepared or executed and could not say what took place.

[47] Finally, when she was questioned about a lengthy seabed lease agreement which was executed by the Deceased in 1992, Bernice could not say that he did not understand what he signed. Critically, in re-examination she testified that her father could *barely* read and that he had to spell the words out to write. She further stated that the Deceased had to think before he wrote to know whether to spell out an "A" or "C" or otherwise.

[48] During the course of the trial, it became clear that the Defendants had limited knowledge of the Deceased's business dealings. They were unable to explain how he was able to effectively conduct such dealings as an alleged illiterate because none of them could indicate any actual involvement or participation in the same. The Court was therefore left with their bare and often equivocal evidence.

[49] The Court has had to weigh this evidence against the case made out in the Claim that the Deceased was literate. The Claimant's evidence is that the Deceased was not a book learned man. He could read and write but he preferred to deal with figures and money. She stated that he always did his own shopping and banking and that he paid his own bills. While he may have been assisted from time to time, she stated that the Deceased essentially managed his affairs himself. She relied on two promissory notes signed by the Deceased in 2005 and 2008,[13] as well as a lengthy seabed lease agreement which was also executed by him.

[50] The Claimant's husband, Glenworth Lamothe corroborated her evidence. He asserted that because he was close to the Deceased he would ask him to help with purchases for the restaurant and they would frequently talk. He stated that the Deceased could read and write but he was not good at spelling and had to read slowly. Because of this, the Deceased would ask him to fill out certain forms which he would then sign after reviewing the document. He further stated that the Deceased was excellent with figures and counting. He asserted that the Deceased was an intelligent businessman who was more than capable of giving instructions. When he was

[13] Pages 109 and 113 of Hearing Bundle C

examined under oath, Mr. Lamothe reiterated that although he could not say that the Deceased was the best reader, he could read and write and whatever he wanted to do, he would get done. He based this belief on the fact that when he went shopping with the Deceased, the Deceased would read the shopping list and tell him what was on it. While he would fill out forms for the Deceased, he stated that this was not because the Deceased could not read.

[51] In the Court's judgment, both the Claimant and her husband presented as forthright witnesses. Their evidence disclosed that while the Deceased may not have been particularly adept, he was sufficiently literate to read and understand at a basic level. Having considered the totality of the evidence in this case, it is clear that the Deceased was a successful businessman who conducted his business independently and with the minimum involvement of his family members. It is apparent that he was involved in many complex legal transactions with no previous concern being raised as to his competence or literacy. In the Court's judgment, the evidence advanced in support of the *prima facie* case was not sufficiently cogent or persuasive.

[52] If the Court is incorrect in this conclusion and the Deceased was in fact illiterate, then it is clear that the court cannot grant probate of the Will, or administration with the will annexed, unless the court is first satisfied, by proof, that he had at that time knowledge of its contents. The Defendants have submitted that on the face of the Will there is no evidence that the contents of the Will were in fact read over to the Deceased before he executed the same. They therefore contend that the Court cannot be satisfied that the Deceased sufficiently knew the contents of the Will. Having reviewed the Will and the evidence before the Court, there is indeed no indication that the contents were read over to him before he signed the Will.

[53] Counsel for the Claimant however, has argued that the Court may nevertheless infer from the document itself that the testator knew and approved of its contents. In support of this contention she cited the Privy Council judgment in Christian v Instiful.[14] In that case, an elderly testator, whose eyesight was defective, handed a document to a man who had been a solicitor's clerk who, at the testator's request, typed it out for him. It was then signed by testator and witnessed as his will without it having been read over to him. The will was an elaborate one, leaving to a large

[14] [1954] 1 WLR 253

number of parties, relations and friends of deceased, various sums of money, and it was never suggested to the solicitor's clerk that he had any such knowledge of testator's relationships and friendships. The evidence did not establish that testator was incapable of reading the document.

[54] The Board held that even assuming that he was blind, the court, in determining under Order 49 r 29 whether it was satisfied 'by what appears on the face of the will... that he had at that time' — when the will was made — 'knowledge of its contents', was entitled to take cognizance of the elaborate nature of the contents of the will, which was not a document which one who was not intimately acquainted with testator's life could possibly have devised. Taking that matter into consideration, as well as the question of testator's eyesight, it appeared that testator in fact understood what he was doing and intended to do it, and the will was accordingly valid.

[55] The ratio of Court is set out at page 253 of the Judgment:

> "The will is an elaborate one, leaving to a large number of parties, relations and friends of the deceased, various sums of money, and it is not a document which one who was not intimately acquainted with the testator's life could possibly have devised.
>
> Their Lordships are entitled, in their view, to take cognizance of this fact. It was never suggested to Mr. Arthur, the solicitor's clerk, that he had that or any such knowledge of the testator's relationships and friendships, and their Lordships are entitled to take that matter into consideration, as well as the question of his eye-sight, in making up their minds as to what advice they should humbly tender to Her Majesty."

[56] The fact that the testator gave instructions for his Will and that it was read over to him or by him is the most satisfactory form of proof of knowledge and approval, but it is by no means the only satisfactory form of proof deceased even in a case of doubtful capacity.[15] In numerous cases, courts have been satisfied as to the knowledge and approval of the testator without such evidence provided that other evidence and the circumstances of the case warrant such a conclusion.[16]

[57] In the case at bar, all of the Parties have indicated that they were unaware of the fact that the Deceased had made a will. It is not disputed that the Will was prepared by law firm of McW Todman and Co. and that it was executed in their law offices and in the presence of staff members

[15] Barry v Butlin at page 485
[16] Fincham v Edwards (1842) 3 Curt 63, 163 ER 656; Re Axford (1860) 1 Sw. & Tr. 540

who attested the Deceased's signature. There is no evidence to suggest that the Deceased was accompanied by any member of his family during this process. Although the Will is not particularly complex, there is also no evidence to suggest that the staff of McW Todman and Co. would have known the Deceased's relationships, the names of his wife and stepdaughter, or the properties which he owned. The formality of the process implies that Deceased who by all accounts was an experienced, and intelligent businessman was able to communicate specific instructions to his attorneys.

[58] The Defendants have also sought to persuade the Court that there are other circumstances which should excite the vigilance and suspicion of this Court. They rely on the fact that the Deceased did not tell any member of his family (including the potential beneficiaries) that he had made a will. In fact they say that he consistently asserted that he did not have a will. Next, they submit that the contents of the Will are contrary to the expressed wishes of the Deceased who on a number of occasions stated that he wanted to sell the property and distribute the income equally to his wife and children. The evidence of the Deceased's grandson, Rajah Smith was relevant in that regard. His evidence is that the Deceased told him that he had no will and wanted the Restaurant separated from the family land so he could sell it, to right a wrong that he had done to his children. The wrong – the Deceased sold real property which had been gifted to his children by his father. Mr. Smith went on to state that in furtherance of his desire to sell the Restaurant, the Deceased, his wife the first Defendant and the Third Defendant went to a law firm in 2009 with the intention of dividing the property so that the Deceased could get his share of the property to enable him to sell the Restaurant. He stated that the Deceased constantly spoke to him about selling the Restaurant and dividing the proceeds among his children. This persisted even after he was admitted to Peebles Hospital.

[59] The Defendants further assert that the Deceased loved all his children and had a good relationship with them and would not have wished to disinherit them. They say that there is no good reason why the Deceased would have wished to disinherit his biological children whom he loved and with whom he had a good relationship and who assisted him in his business for most of their lives. The Defendant also find it suspect that the Will contained the proper names of his wife and that of the

Claimant because on the evidence of the Third Defendant, he did not know the Claimant's name or his children's proper names.

[60] The greater the suspicion, the higher the degree of proof of knowledge and approval that is required. In some cases the suspicion will be so great that it cannot be removed. In other cases, it will be low and can be rebutted relatively easily. Ultimately, the Court must review the whole of the evidence and determine, on the balance of probability, whether the testator knew of and approved the contents of a will.[17]

[61] The court have made it clear that whether circumstances are such as to arouse the suspicion of the court is a question of fact in each case, and should not be reduced to some box-ticking exercise. In the Court's judgment, the features identified as arousing suspicion must be judged in the light of the full background of the relationships between the relevant parties.[18]

[62] Having had a chance to observe all of the witnesses under cross-examination, the Court has no hesitation in concluding that the Claimant was in fact a strong source of financial and emotional support to her parents during the Deceased's lifetime. No doubt this explained why the Claimant appeared to be more informed of the Deceased's business arrangements. The Claimant's support appears to have been appreciated by the Deceased. The Court heard credible evidence from several witnessed in this regard, including Allan Callwood, the step father of the Deceased's widow who stated that while all of the Deceased's children used to help in the Restaurant, the kind of care and help that the Claimant gave him (since she was young) outstripped all of them by far. At paragraph 8 of his witness statement he recalls:

> *"…although she was not his biological daughter, Sidney raised her has his own child. When the time came, she cared for him more than his own children did. In fact it was something that Sidney used to quarrel with his children about; they were not attentive to him and Adina, and worse still when he looked at how Larina was dutiful to him and Adina."*

[17] Fuller v Strum [2002] 2 ALL ER 87; Reynolds v Reynolds [2005] EWHC (Ch) 6
[18] Singellos, Singellos v Singellos [2010] EWHC 2353 (Ch) at [91]

[63] When he was examined under oath he trenchantly maintained this position and asserted that he was not surprised about the contents of the Will because the Claimant used to take care of the Deceased.

[64] The Defendants have made much of the fact that the Deceased told no one of his Will. Given the fact that he disinherited all of his natural children, it is not surprising that he would seek to conceal this from his family during the course of his lifetime even to the point of denying that he had a will at all. However, the Court also heard from Mark Antonio Martin, the bother of the Deceased's widow who despite vigorous cross-examination, also gave cogent evidence. He professed to be a confidant of the Deceased and he also expressed no surprise about the contents of the Will. In his witness statement, he testified that:

> "In all my talking to him, Sidney only ever had good things to say about Larina. He never talked bad about her. From what he said to me, Sidney knew that the child who supported him was Larina. The truth is that he did not keep this thought to himself either but told his children that he could rely on Larina to help him. Although it was true, his children did not like to hear that, and they quarreled with him.
>
> He often remarked to me how he was not sure how he would get by if Larina did not help him. He often said to me in quiet moments: "Bros, if I close my eyes tomorrow, I leave everything to Larina." He also said to me on several occasions: "if I had a last dollar in my *pocket, I would give it to Ri." That told me where his mind was. I could understand why he would say something like that."*

[65] At paragraph 16 of his witness statement, Mr. Martin's recalls a private conversation which he had with the Deceased in 2009. He recalls that there were seated outside the restaurant by the dock when the Deceased told him; *"Bros when you hear the news what happen, I will be gone….Bros I do not want to tell anybody about it but I done make my will."* He stated that from this indication he knew that the Deceased had made a will and may not have left his biological children anything. Mr. Martin also testified that when he visited the Deceased at Peebles Hospital when he took ill, the Deceased said to him, "*Bros make sure that RI get what leave for her."* He stated that he knew the Deceased was talking about the Will he had made.

[66] When he was cross-examined under oath, this evidence remained unshaken. When he was asked to explain why he chose not to disclose this information prior to these proceedings, he told the Court that "*that there are certain things in life you do not let out of your mouth*." He further

explained that he did not tell Larina because "*you do not go up and down running your mouth all the time. You keep it to yourself and when the dirt hit the fan, it blow off*."

[67] This evidence is clearly at odds with that of Mr. Rajah Smith whose evidence spoke to a purported intent on the part of the Deceased to sell the Restaurant and distribute the proceeds among his children. His evidence was also unshaken in cross examination. However, it did not significantly advance the Defendants' case. It may well be that in 2009, the Deceased intended to sell the Restaurant and divide the proceeds but this would not have affected the validity of his Will which would speak from death, devising any property which he would have possessed as at the date of his death. There is no evidence that the Deceased took any active steps to revoke the said Will.

[68] In Boudh v Bodh[19] the deceased died at the age of 77. Her main asset was her house, of which she was the sole owner. Her eldest son, the first defendant, was the sole executor and beneficiary under a will dated 8th March 2000. He obtained probate of the house, sold it, and from the proceeds made substantial payments to his children. Subsequently, another will, dated 30th November 2000, emerged, which consisted of one page and named the claimant and the second defendant, two grandsons of the deceased, as sole executors and beneficiaries under the will. The second defendant was the first defendant's son. The claimant brought proceedings seeking a declaration that the will dated 16th November, 2000 was the last true will of the deceased and that probate of the will dated 8th March, 2000 granted to the first defendant be revoked.

[69] The Court in that case found that the contested will was not a very suspicious or even a particularly surprising document because there was credible evidence that the testatrix wanted to change her will in favour of her grandchildren. The Court also considered that the one page will had been prepared and witnessed by a solicitor. Although there was some evidence that the solicitor was of bad character, the Court found that he had not stood to benefit under the will, or to gain anything from giving false evidence. On appeal, the Court found that the judge had been entitled, looking at the totality of the evidence available, and the probabilities of the overall situation, to conclude that the evidence was sufficient to satisfy him that the deceased had known and approved of the

[19] [2008] WTLR 411

contents of the one page will. Accordingly, very little evidence was required to prove knowledge and approval, and the Will was upheld.

[70] In Paynter & Or v Hinch[20] the deceased had three surviving children, S, V and F, at the time of his death. She had made a number of wills, including (the 1996 will and the 2004 will). Under clause 2 of the 2004 will, the defendant, F, was appointed as the sole executor. Under clause 4, the whole of the estate was left to F, with a gift over in default to S and V. Probate of the 2004 will was granted to F. In the first instance proceedings, S and V challenged the validity of the 2004 will seeking revocation of the grant of probate and a grant in solemn form of the 1996 will. The Claimants contended that the deceased had not known or approved the contents of the 2004 will when she had executed it. Therefore, the issue before the court was whether the 2004 will was valid.

[71] The Court found that on the facts, the case was not one where the suspicion of the court was aroused. The Court was satisfied that the testator knew the contents of that Will and approved them on executing it. From the testator's diaries for 2006 and 2007 (no diary for 2004 was found nor for any other years) no evidence was found of any problem in the relationship between the testator and F; indeed entries recorded a loving relationship with all three of her children. S accepted in cross-examination that the testator would tell F what she wanted him to do and he would do it. Neither S nor V could name any incident when F had tried to control the testator. Witnesses described the relationship between the testator and F as very good with much friendly banter between them and thought she remained mentally active until about 2 weeks before she died. Behrens J found no evidence of any "tyrannical' behavior by F towards the testator nor of any 'improper influence' by him over her. The claim was therefore dismissed as the court was satisfied on all the evidence that the deceased had known the contents of the will and had approved them when she had executed the will.

[72] In Blackman v Man[21] the claimants were all nephews or nieces of the testatrix. Following the death her husband and son, the first two defendants, who had been involved in running a Chinese

[20] [2013] EWHC 13 (Ch)
[21] [2008] WTLR *389*

restaurant, had been described by the testatrix as her best friends. The third defendant was the testatrix's executor under two wills dated May and August 1994. Pursuant to those wills, the first two defendants were named as the major beneficiaries of the testatrix's £10 Million estate. The Claimants sought to challenge the validity of the wills on the basis that at the time they were made the testatrix lacked testamentary capacity and on the basis that she did not have the requisite knowledge or approval of the wills' contents. The claimants relied on medical evidence that the testatrix was suffering from mild dementia prior to commissioning the wills. The first and second defendants relied on the fact that the testatrix had independently obtained and completed a will writing form when commissioning her May 1994 will as evidence of her capacity and intent.

[73] The Court found that the manner in which the testatrix had the wills drawn up had been significant. Although she had been suffering from mild dementia, the testatrix had understood the implications of making the will and had contemplated the claims the claimants had to her estate.

[74] In Sherrington v Sherrington[22] the testator, a wealthy and experienced solicitor, executed a will in favour of his second wife a few weeks before his death in a car crash. The will made no provision for his three children by his first wife, to whom he was devoted, or for his mother, for whom he was financially responsible. The will was prepared by the legally unqualified daughter of the second wife. The trial judge held that the testator did not know of or approve the contents of the will because there was no evidence that he had read it before signing it, and because it had been executed in suspicious circumstances. The Court of Appeal accepted that there were suspicious circumstances, such as the fact that the will had been prepared by the legally unqualified daughter of the second wife, and that the testator's children were excluded, except as default beneficiaries. However, the Court of Appeal criticized the trial judge's reasoning that credible evidence needed to be produced that the testator had read the will before signing it. The Court held that a judge must consider the inherent probabilities and in so doing it must look at all the relevant evidence, including the evidence of what happened after the Will was executed. In that case the testator was an experienced and successful solicitor and businessman. He had ample opportunity to read the will, the substantive provisions of which comprised three pages and which contained only two short and simple dispositive provisions. He also signed each of the pages of the will, and the Court

[22] [2005] WTLR 587

found that it would have been astonishing if he had signed without looking at the will first, especially since it had been prepared by someone with no legal qualifications. The Court found that although it was surprising that he excluded his children, this might be explained by the fact that he believed that his second wife was also making a will leaving her estate to him.

[75] The fact that a deceased gave instructions for his will or that it was read over to him or by him is without a doubt the most satisfactory form of proof that he or she had the requisite knowledge and approval of its contents. But it is not the only satisfactory form of proof.[23] In these cases illustrate that a court will not require it in every case, provided that there is other evidence and the circumstances of the case warrant such a conclusion.

[76] In the case at bar, the Deceased would have given his testamentary instructions to an independent and reputable law firm and would have been present when those instructions were carried out. There is no indication that he was assisted in that endeavor by anyone relevant to this case, including the Claimant who was unaware that he had made the Will and who, like the rest of the family, remained in ignorance some five years after the Deceased's death. He was admittedly a savvy businessman and there was no indication that he lacked mental capacity. The Will in question is two pages long with three brief dispositive provisions. The authenticity of his signature on the Will is not disputed and it is apparent that he initialed every page. There is no evidence that the attorneys who prepared the Will were familiar with Deceased or his family members or that they had anything to gain from preparing the Will in these terms. Although the witnesses advanced by the Claimant did not personally deal with that transaction and could not speak definitively as to what occurred in 1996 after the Deceased instructions were received, it would be surprising to the Court if the law firm were to prepare testamentary documents which were inconsistent with the wishes of a testator.

[77] It is not essential to prove that a will was read over to the deceased provided that it is proved that the he completely understood adopted and sanctioned the disposition proposed by him and that the instrument itself embodied that disposition.[24]

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[23] Barry v Butlin at page 485; Guardhouse v Blackburn (1866) ER.1 P&D 109
[24] Constable and Barley v Tifrell and Mason (1833) 4 Hass.Lcc 465 at 477

[78] The evidence of Mr. Martin indicates that the Deceased was well aware of the nature of the document he had signed. He clearly had the opportunity of seeing the document because he initialed each page. The provisions of the Will were neither complex nor difficult to grasp. In the Court's judgment any presumption of want of knowledge and approval, arising out of the alleged suspicious circumstances, would be rebutted in the circumstances of this case.[25] However, the Defendants also maintain a claim based on undue influence.

[79] They say that the Deceased spent a lot of time alone with the Claimant, to the exclusion of his wife and they advance a disturbing explanation for this closeness. The evidence of Bernice Hendricks-Gomes is that during that time when the Claimant lived with the family, she would dress to tantalize the Deceased and would spend a lot of time alone with him, going into his room when his wife could not. She therefore began to suspect that her father was having an affair with the Claimant and she concluded that the Claimant used her influence sexually and otherwise to get whatever she wanted from the Deceased.

[80] While this evidence is not specifically corroborated in other written evidence filed in support of the Defendants' case, there appears to be some support from the Claimant's mother, Mrs. Adina Hendricks, who clearly felt that the Claimant was trying to take her husband away from her. She stated that the Deceased would spend a lot of time alone with the Claimant and that on the few of the occasions that she went with them to St. Thomas or Tortola she would feel like the third wheel. According to her, it seemed that the Claimant was the wife and she was the mistress. She further stated that the Claimant always wanted to be around the Deceased when he was handling his business affairs.

[81] The Defendants contend that the Deceased became totally dependent on the Claimant and was effectively under her control. They state further that the Claimant would shout and curse at the Deceased and would badger the Deceased constantly until she got what she wanted. In order to preserve the peace, he did everything which she demanded even against his own wishes. For over twenty (20) years and on a daily basis he would consistently represent to him that she was the

[25] Wilkes v Wilkes [2006] WTLR 1097; Hoff v Atherton [2005] WTLR 99

only one who could help him, the only one he could trust. The Claimant reinforced that he could not trust or depend on his biological children for support and this sphere of influence persisted from the late 1980's until a few years before the Deceased's death.

[82] Sir J. P. Wilde initially defined undue influence in the case of Hall v Hall[26] in the following terms:

> "Even a reprehensible placing of pressure on a testator will not always be undue influence so as to avoid the will: 'To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affection or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like – these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping distress of mind or social discomfort, these, if carried to a degree in which the freeplay of the testator's judgment, discretion or wishes is overborne will constitute undue influence, though no force is either used or threatened. In a word a testator may be led but not driven and his will must be the off-spring of his own volition and not the record of someone else's'."

[83] The Court in Gurton Goddard v Jane Jack[27] clarified the law in regard to the burden of proof in a claim alleging undue influence:

> "In law, the burden of proving that the will sought to be propounded is the last will of a free and capable testator rests upon the party propounding it. Once he has *prima facie* discharged that burden, it shifts to a defendant alleging undue influence.

[84] This burden of proof is high. Unlike *inter vivos* transaction, there is no presumption of undue influence in the case of a testamentary disposition of assets. It is a question of fact whether undue influence has affected the execution of a will. The judgment in Edwards v Edwards[28] best illustrates this principle. In that case, the deceased had initially executed a will leaving her residuary estate in equal shares to her three sons. The deceased had a close relationship with two of her sons, yet shortly before her death she made a new will leaving her entire estate to her third son, despite an obviously strained relationship with him. At the same time, she also started making false allegations against the son to whom she was closest, accusing him of stealing things.

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[26] [1868] [1868] LR 1 P&D 481
[27] (1959) 1 WIR 169
[28] [2007] EWHC B4 (Ch)

[85] The court asserted that there was "*no other reasonable explanation*" for the deceased's behaviour other than her mind had been deliberately poisoned by her third son. The court concluded that the deceased's purported last Will had been affected by her third son's undue influence. The court held that "…it is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis."

[86] The Court also set out the following defining principles for proving undue influence – [1] the facts are inconsistent with any other hypothesis; [2] influence is exercised by coercion (the deceased's own discretion and judgment is overborne) or fraud; [3] coercion is pressure that overpowers the testator's own wishes without actually changing their mind; [4] the person making the will has not acted as a free agent in making their dispositions.

[87] The Court also held that the physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overpower the Will. The amount of influence required to induce a person of weak mind and in ill health to make a will may be considerably less than that necessary to induce a person of strong mind and in good health. However, a "drip drip" approach may be highly effective in sapping the will.

[88] In a claim alleging undue influence, proof of causation is critical. In order to establish the presence of undue influence, it is not enough to establish that a person has the power to overbear the will of the testator. It must be shown that the will was a result of the exercise of that power. In Wingrove v Wingrove,[29] Sir James Hannen held:

> "…to be undue influence in the eye of the law there must be – to sum it up in one 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 testator 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 testator is coerced in to 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

[29] [1885] 11 PD 81

> 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 quiteness' sake, to do anything. This would equally be coercion, though not actual violence."

[89] The term "coercion" was recently defined in Edwards v Edwards in the following terms:

> "…coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that over bears the testator's free judgment, discretion or wishes, is enough to amount to coercion in this sense."

[90] When it comes to testamentary dispositions, it follows that the influence which will set aside a will must amount to force and coercion destroying free agency; it must not be mere influence or affection or attachment. The relevant case law also makes it clear that there is a whole class of questionable conduct which would not amount to coercion, however, appeals to family ties or affection, to the sentiment of gratitude for past services, or pity for future destitution is not sufficient to amount to coercion.

[91] Even very strong persuasion and heavy family pressures are insufficient in themselves. Procuring the execution of a will by deliberate concealment does not amount to coercion. Nor does wheedling one's way, (even by reprehensible means), into the affections of a vulnerable testator, with a view to influencing the testator to make a will in one's favour amount to coercion, so long as the testator's will is not overborne. There will only be undue influence if the testator was in such a condition that, if he could speak his wishes to the last, he would say: "this is not my wish, but I must do it".

[92] In Vaughan v Vaughan[30] the testatrix had come under pressure from members of her family to change her will, and in the end made a will substantially in favour of one of her sons. Even though the Court found that the behaviour of her family, including her son, had been "little short of disgraceful", it did not consider that the will had been procured by undue influence. The testatrix had seen other members of her family regularly, but had made no complaint that she was being

[30] [2005] WTLR 417

subjected to undue influence. This case illustrates the high hurdle which needs to be overcome in order to establish undue influence.

[93] In Wilkes v Wilkes[31] the testatrix made a Will in favour of her son (one of her five surviving children). It was alleged that the son was in a position to influence the testatrix and that she, by virtue of her mental frailty, would have been susceptible to such influence. There was also evidence that the son was capable of acting in a domineering and aggressive manner. However, there was no evidence that he was aggressive to his mother, or that he sought to coerce her into dealing with her affairs against her will. The claim of undue influence was dismissed. Again, this case illustrates that it is necessary to prove affirmatively that undue influence was exercised to overcome the testator's will, not simply that there was a capacity to influence the testator.

[94] Another example of a case of morally dubious conduct, not amounting to coercion, is Abbott v Richardson[32]. Here, the testatrix had told her carer (R) that she wished to make a Will leaving her house to R, and she maintained a consistent and rational wish to make a Will to that effect. Thereafter, R, acting in her own interests, did everything that she could to ensure that the testatrix made such a Will. She even participated in drafting a letter of instruction to solicitors. However, it still remained the case that the testatrix wanted to do what she did. The Court found that it was most unlikely that R would have been able to force the testatrix to give instructions she did not want to give.

[95] Undue influence requires positive proof of coercion. Mere opinion – even of a solicitor – that a will was obtained by undue influence, is not sufficient unless there is positive evidence of same. In some cases the Court will be presented with virtually direct evidence of the undue influence from the mouth of the undue influencer. However this is rare given that the very nature of the act means that it happens behind closed doors. The case of Carapeto v Good[33] illustrates the very real difficulty facing a claimant seeking to set aside a will on the grounds of undue influence, where there is no direct evidence of coercion.

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[31] [2006] WTLR 1097
[32] [2006] WTLR 1567
[33] [2002] EHWC 640

[96] In that case the testatrix was a highly intelligent, well-educated, 87 year old woman. She had no children, but had three nephews. In the year before her death, she changed her will a number of times, ultimately leaving her residuary estate to Mr. and Mrs. C, who had lived with her for twenty (20) years, providing domestic help. In January 1999, the testatrix made a will leaving the bulk of her estate to Mr. and Mrs. C. In April 1999 she made a will reducing the entitlement of Mr. and Mrs. C, but still leaving them a substantial legacy. Almost immediately the testatrix had second thoughts. She instructed the solicitor who had prepared the April 1999 will to return to her house, and to destroy the will (which he did). In May 1999, the testatrix made her final will, using a new solicitor, suggested by Mrs. C's son-in-law. The May 1999 will left various legacies to charities and family members, and the residue to Mr. and Mrs. C. Mrs. C was present on a number of key occasions when the testatrix gave instructions for the April 1999 will to be destroyed, and during part of the time when instructions were given in respect of the May 1999 will. Mrs. C may well have been instrumental in ensuring that a new solicitor was brought in for the purposes of the May 1999 Will.

[97] In that case there may well have been a legitimate suspicion that undue influence may have been exercised, however, the Court was not satisfied that there were sufficient grounds for inferring that Mrs. C had coerced the testatrix into making the May 1999 will. The Court found that the facts were "also consistent with a perfectly innocent explanation". Mrs. C and her family had lived with the testatrix for 20 years, and were on hand day and night to help her (she was disabled with polio). The testatrix had become very close to Mrs. C and her family, and was genuinely very fond of them. The testatrix was, at the time of the May 1999 Will, still a very intelligent, sensitive and independent-minded woman, who was capable of making her own decisions. The Court found that it was not unlikely that she would have come to the conclusion, of her own free will, that the calls of Mr. and Mrs. C on her bounty outweighed those of her family.

[98] Courts are however prepared to infer undue influence in a proper case. In Schrader v Schrader[34] the court inferred that the deceased's execution of her will must have been the result of undue influence despite there being no direct evidence of coercion. In that case, the deceased originally left her entire estate to be divided equally between her two sons, Nick and Bill, but later executed a

[34] [2013] EWHC 466 (Ch)

new will leaving her house, the main asset in the estate, in its entirety to Nick. The Judge was persuaded that undue influence had been present by a series of factors including Nick's involvement in the preparation of the later will; his forceful personality; his view that he had not been treated equally to his brother; the deceased's vulnerability and her dependence on Nick and the lack of any other identified reason for changing her will. Nick had also waited six months to disclose the original will and was found to have given a false reason as to why the family solicitors were not engaged to prepare the will.

[99] Again, in Edwards v Edwards the testatrix executed a will in favour of one of her two surviving sons (T). The testatrix had suffered a fall and was admitted to hospital. T was a heavy drinker and the testatrix was afraid of him. He was fearful of being evicted from the house in which he lived with the testatrix. The testatrix was subsequently taken to T's home against medical advice, and her other son and his wife (with whom the testator had a good relationship) were prevented from visiting. A solicitor was called to the house and a will made solely in favour of T, which represented a significant departure from her previous will under which the residuary estate was left equally between the testatrix's sons.

[100] The Court considered whether there was any hypothesis other than undue influence for the testatrix's decision to change her will. For instance, it examined the reason which the testatrix gave for making a new will in favour of T. T claimed that he looked after his mother and did everything for her including washing and cleaning the house. However, this was plainly untrue. In all, the Court considered four alternative hypotheses for the testatrix deciding to leave the whole of her estate to T, to the exclusion of her other son and close family members. None was convincing. On the other hand, the hypothesis that T had exercised undue influence to procure the Will was entirely plausible. He had the motive and the opportunity to take advantage of his mother's frail and vulnerable state. The testatrix had leveled false accusations against her other son and daughter-in-law, and had given a palpably inadequate and false explanation to the solicitor of the reasons for changing her Will. There was no other reasonable explanation for this conduct other than that T had deliberately poisoned his mother's mind by making deliberately untruthful accusations, the effect of which was to cause her own discretion and judgment to be overborne. In changing her will, the testator was simply doing as she was told.

[101] Applying these principles to the case at bar, there is no evidence before the Court that the Deceased was a person of weak mind or in ill health at the time when he executed the Will. To the contrary, it appears to be common ground that the Deceased was actively engaged in his business. He was personally responsible for securing the stock and supplies for the Restaurant and maintained a bank account in his sole name. His financial dealings were competently carried out. He secured loans from financial institutions with apparently no concerns as to his competence and he also engaged in real property transactions of some complexity.

[102] The Defendants have painted a picture depicting the Claimant as a domineering or bullying daughter of both parents. It is apparent that she maintained a close relationship with the Deceased who relied on her in his business dealings. What is apparent to the Court is that the Claimant is a successful businesswoman in her own right. The Court accepts the evidence of her siblings that she is educated, financially independent, well-travelled, progressive and business savvy. It is therefore not shocking that both of her parents would rely on her for advice, support and assistance.

[103] The Court does not doubt that the Claimant was primarily instrumental in securing the family residence. The Court also has no doubt that at times she supported her parents financially, securing or guaranteeing loans for them. While her name was not on the Deceased's bank account it was on her mother's account and Mrs. Adina Hendricks does not allege that there was any impropriety with her bank account. In the premises, the Court has some difficulty in accepting that the Claimant would have defrauded the Deceased who was clearly a vigilant business owner. The closeness of the relationship is demonstrated in the recount of the events following the Deceased's illness in 2010 when it is clear to the Court that the Claimant was tasked with funding the Deceased's travel overseas for medical treatment.

[104] It is clear that the closeness between the Claimant and the Deceased gave rise to some significant family tension. When the Court has regard to the totality of the evidence, it is clear that unfortunate comparisons were made between the Claimant and her siblings which may have been fostered by the Claimant and endorsed by the Deceased. The Court also has no doubt that as Deceased and his wife became older, their reliance on the Claimant increased and that over time she would have

adopted a more parental and paternalistic posture. The obvious consequence of this is that she would have some influence over the Deceased. But would this amount to coercion?

[105] Clearly mere influence or affection or attachment would not be enough. Pointing out family ties or affection, "I am the only one you can count on" would not be enough. Underscoring sentiments of gratitude for past services, "remember all the things I have done for you" would also not be enough. Even heavy family pressure would be insufficient in itself. The influence must be undue. It must amount to force which destroys free agency with a view to influencing the Deceased to make a will in Claimant's favour. The Defendants simply have not met this threshold.

[106] Even if the Court accepts that the Defendants' picture of the domineering, nagging seductress, the hurdle that Defendants face is the unchallenged evidence that the Claimant had no knowledge that the Deceased had in fact made the Will. She asserts that she and her mother thought that the Deceased had died intestate and had in fact sought legal advice on the matter of his Estate. There is no evidence that she asked him to make a Will or that she sought any specific devise thereunder or that she was instrumental in procuring its execution.

[107] From all accounts the Deceased secured this will without the involvement of Claimant or indeed any other family member. The Deceased clearly had the benefit of independent legal advice. Moreover, during his lifetime he kept the fact of its existence very close to his chest. There is no evidence that the Deceased ever complained to other family members that any force or compulsion was being brought to bear by the Claimant. The Court therefore has some difficulty in accepting that he would have been forced or coerced into making the same.

[108] Further, the Court considered alternative hypotheses for the Deceased deciding to leave the whole of his estate to the wife and Claimant, to the exclusion of his other children. It is clear that the relationship between Claimant and the Deceased was a close one. He depended on her and she provided much support to him and it appears that he had come to the conclusion that he needed to ensure that she was rewarded after his death. The Court accepts the evidence of Mr. Martin that the Deceased was concerned about this because he had certain reservations about his other

children. Whether this was justified or not, it was clearly his perception that they neglected to provide the level of support which he felt was his due.

[109] The course which he adopted was obviously extreme and prone to exacerbate familial discord. He clearly discounted the affection and dedication of his other children who were also instrumental in the success of his business. However, the question is not whether a court considers that the testator's testamentary disposition to be fair because, ultimately a testator may dispose of his estate as he wishes. Ultimately the question for the Court is whether in making his disposition the testator has acted as a free agent. This Court is not satisfied that the Defendants have discharge their burden to prove that he was not. In the present case, the evidence adduced by the Defendants falls short of demonstrating that the Deceased's will was overborne and that the circumstances of execution were inconsistent with any other view but undue influence.

Revocation of the Grant of Letters of Administration/Duty to Account

[110] The Claimants submit that the Court is empowered to revoke the Letters of Administration on the grounds of the mistaken averment that the Deceased died intestate. She further contends that the Defendants are entitled to provide detailed accounts or to facilitate the taking of an account by a professional. The Claimant contends that the Defendants waited well over 4 years before taking out letters of administration, during which time the income generated from the Restaurant was deposited into the personal account of the First Defendant. She also contends that the Defendants allowed parts of the Estate to be sold referring in particular to the alleged sale of the vessel in 2015. She therefore submits that the Defendants were managing the Deceased's Estate receiving income and disposing of estate property even before they obtained a grant of administration and that they comingled funds generated with their personal assets, treating the same as their own personal property until they were precluded from doing so by order of the Court.

[111] As the executrix of the estate, the Claimant contends that she has a duty to administer the estate. She states that she is unable to effectively execute this duty unless she is provided with a full account of the Defendants' administration.

[112] In skeleton submissions filed before the trial, Counsel for the Defendants conceded that in the event that the Will is declared valid that the Court would be entitled to revoke the grant of letters of administration and the Claimant would be entitled to account from the date of the grant as the Defendants did not come under a duty to account until that day. In their closing submissions, Counsel failed to address the point any further.

[113] It is clear that the Court has the power to call in a grant which should not have been made or which was made in error. It is not disputed that a grant made wrongly may be revoked because it was issued on the basis of a false representation whether intentionally or otherwise.[35] So that where at the time the grant was made, the full facts of the Deceased testamentary affairs were unknown for example where the grant of administration was made because the deceased was thought to have died intestate and his will was later found, the Court may revoke or call in the grant.

[114] Given the conclusions drawn herein, the Court is satisfied that the grant of administration issued to the Defendants must be called in and revoked. The effect of such revocation will be that the Defendants no longer have the power to act as administrators. But what of their liability during the period when they were authorized to act.

[115] It is clear that administrators who in good faith act under a grant of administration are protected despite the revocation. Section 27 of the English Administration of Estates Act 1925 provides:

> "(1) Every person making or permitting to be made any payment or disposition in good faith under a representation shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of the representation.
>
> (2) Where a representation is revoked, all payments and dispositions made in good faith to a personal representative under the representation before the revocation thereof are a valid discharge to the person making the same; and the personal representative who acted under the revoked representation may retain and reimburse himself in respect of any payments or dispositions made by him which the person to whom representation is afterwards granted might have properly made."

[116] By section 11 of the Eastern Caribbean Supreme Court (Virgin Islands) Act, the law and practice relating to probate, as administered in the High Court of Justice in England was received into the

[35] In the Estate of Napier (1809); In the Goods of Moore (1845)

Laws of the Virgin Islands. In the Court's judgment, section 27 of the Administration of Estates Act 1925 is therefore relevant.[36] It means that in circumstances where the administrators distributed the Estate to those entitled on intestacy and they spend or otherwise alienate it, if as in this case a will is later discovered and the grant of administration revoked, the administrators will be indemnified against any claims which might be made by the beneficiaries under the will. See: In the Estate of Bloch (1959) CLY 1251.

[117] This statutory provision essentially codified the position which had been settled at common law.[37]

[118] In the Court's judgment, this limits any potential liability on the part of the Defendants. It consequently means that any accounts which to be rendered will be purely for the sake of information and to facilitate the Claimant's administration of the Deceased's Estate.

[119] The Claimant has also claimed that the Defendant's intermeddled in the Deceased's estate prior to obtaining the grant. The Administration of Estates Act 1925 is the basis for the doctrine, and states that if any person obtains, receives or holds any asset of a deceased person without receiving full consideration, or effects the release of any debt or liability due to the estate of the deceased then they become an 'executor of their own wrong' and will have intermeddled. Broadly speaking, acts which involve dealing with the deceased's assets in a manner which goes further than merely safeguarding them and their value are acts which are likely to be classed as intermeddling. Actions which are almost certain to land a beneficiary in those realms are those such as continuing to run any business of the deceased[38] and both collecting and paying the debts of the deceased. Taking steps such as disposing of or selling the deceased's property are also sufficient to cross the line.

[120] The allegations of intermeddling appear to centre on the fact that Defendants continued to operate the Restaurant after the death of the Deceased and before the grant of administration. This does

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[36] Farah Jackie Theodore v Jacqueline Theodore, DOMHCV2014/0016

[37] In Hewson v Shelley [1914] 2 Ch 13, the English Court of Appeal considered a case where the deceased's widow was granted letters of administration as if on intestacy and conveyed to a purchaser part of the real estate; a will appointing executors was afterwards found, and the executors, after obtaining probate, sued the widow for recovery of the sold realty. The Court of Appeal held that the purchaser retained a good title.

[38] Padget v Priest (1787) 2 TR 97

not appear to be disputed between the Parties. It is also not disputed that the income generated from such operation was deposited into a personal account. In the Court's judgment, to that extent the Defendants are obligated to account for all the assets received by them prior to obtaining the grant of administration and where they have applied the same in the course of such administration, they must declare the same.

The Debt

[121] The Claimant contends that the she guaranteed a loan for the Deceased from FirstBank in the sum of $40,620.48 inclusive of interest on or around 6th October 2008. As at the date of the Deceased death, there was an outstanding balance of $13,146.58 to be repaid. The Claimant's evidence is that following the Deceased's death, the Bank contacted her about the balance owing. Because the guarantor would be legally obligated to settle the outstanding amount owed, the outstanding sums were summarily deducted from her personal account. The evidence discloses that this deduction was made on 30th August, 2011 and that the loan was thereby liquidated.

[122] Counsel for the Claimant submitted that because the Deceased owed this money to the Bank as at the date of his death, it stands to reason that it was a debt owed by the Estate.

[123] The Defendants contend that there is no debt owed to the Claimant. First, they say that shortly after the loan was secured, the Deceased gave the Claimant $10,000.00 ($9,000.00 which was used to secure the loan and $1,000.00 for her services). They state also that the Claimant's mother, Mrs. Adina Hendricks paid the Claimant $9,000.00 towards this debt. The Claimant states that she only received $8,000.00 from her mother. She therefore argued that in addition to the sum balance of $5,146.58 which is owed to her, the Estate owes Adina Hendricks the sum of $8,000.00.

[124] The Claimant relies on an Assignment of Deposits executed by her on 6th October, 2008 in which she agreed to pledge certain case deposits as security for the indebtedness of the Deceased to FirstBank VI. What is immediately clear from the evidence is that the Claimant agreed that upon default in the payment or performance of any obligations under the Deceased's loan agreement, the Bank may hold any and all of the money representing the deposits or apply all or any portion of

such deposits to all costs and expenses incurred by the Bank in enforcing its rights under the loan and then to the payment of interest due on the indebtedness and finally to the payment of the principal.

[125] On the basis of these arrangements, the Deceased would have undertaken to repay the loan and in the event of his default, the Claimant would then be legally liable to either repay the same or surrender the deposits which she had assigned to the Bank. Under a simple guarantee, in the event that the Bank commenced proceedings against the Claimant, it may well have been open to her to claim contribution and/or indemnity against the Deceased during his lifetime. However, in this case the Claimant chose to secure the Deceased indebtedness by assignments of deposits which stood to her credit thus creating her own personal obligations to the Bank.

[126] The Court must ascribe liability on the basis of what the parties themselves have agreed – that is that they are jointly and severally liable in respect of the obligation to service the debt. The Bank would therefore have been entitled to enforce the obligation in full against either of them or both of them and performance by either one of them would have discharged the obligation.

[127] The Court is not satisfied that it could be properly advanced that this arrangement could *without more* entitle the Claimant to maintain a cause of action against the Deceased's Estate. While it may well be argued that a moral obligation arises, no viable legal basis has been advanced which would establish any liability on the part of the Deceased's estate to the Claimant who essentially assumed her own independent legal obligations to the Bank which would have been invoked upon default.

[128] It may be that the Claimant may have been able to maintain a claim for contribution and/or indemnity against the Deceased[39] during his lifetime. However, within the context of this case it was clear that the Claimant did not advance any specific claim along these lines. Moreover, having reviewed the evidence, the Court is not satisfied that any of the constituent elements of a contract existed between the Claimant and the Deceased which would give rise to an enforceable obligation as against his Estate. This Claim is therefore denied.

[39] Brook's Wharf and Bull Wharf's Ltd. Goodman Bros 1937 1 K.B. 534 at pages 544 – 545

Costs

[129] The costs of a contentious probate action, like those of any other civil claim, were within the discretion of the court pursuant to CPR Part 64. The general rule, enshrined in CPR Part 64.6, was that the unsuccessful party would be ordered to pay the costs of the successful party. However, there are long established exceptions to this general rule which are helpfully illustrated in the judgment in Kostic v Chaplin.[40] In that case the claimant brought proceedings challenging the testator's will, in which £8 Million had been bequeathed to the Conservative Party Association. The court decided that the testator had been unable to form a proper appreciation of the claimant's claims on his estate, and therefore lacked the testamentary capacity to make the relevant will. The issue of costs fell to be determined.

[130] The Court held that if a person who made a will, or persons who were interested in the residue, had been the cause of the litigation, a case was made out for the costs to come out of the estate. However, if the circumstances led, reasonably, to an investigation of the matter, then the costs could be left to be borne by those who had incurred them. In that Court's judgment, the Association had been fully justified in investigating the issue of the testator's testamentary capacity once the Claimant's challenge to the will had been advanced on a formal basis. It followed that the Association's costs of investigating the Claimant's claim would be paid out of the estate, at least down to the stage where a realistic assessment of the merits of the claim could first properly be made.

[131] These principles have been said to be neither exhaustive nor rigidly prescriptive. Rather, they are guidelines, not straitjackets, and their application will depend on the facts of the particular case'[41]. The first exception could include a case where the testator may caused the litigation because of the state in which he leaves his testamentary papers (for example where a will cannot be found, or where there is a question whether a will has been revoked), or because his knowledge and approval or capacity to make a will is doubtful. The second exception will apply where the court considers that opposition to a will which is eventually admitted to probate was reasonable. In that

[40] [2007] EWHC 2909 (Ch), [2007] ALL ER (D) 119 per. Henderson J)
[41] Ibid at paragraph 21

case, no adverse costs order would be made and the costs would lie where they fall.[42] Where a defendant gives notice in his defence that he does not raise any positive case, but insists on the will being proved in solemn form and, for that purpose, elects to cross-examine the witnesses who attested the will, the court will not make an order for costs against such a defendant unless it considers that there was no reasonable ground for opposing the will.

[132] The case at bar falls squarely within these latter perimeters and in the Court's judgment warrants an order that costs be borne out of the Estate.

[133] It is therefore ordered as follows:

i. Judgment is entered for the Claimant and the Will dated 22nd March, 1996 is pronounced in solemn form.

ii. Letters of Administration granted to the Defendants on 18th December 2014 is revoked.

iii. The Defendants are to provide a report on their administration of the Estate from the date of the Deceased's death until the date of this Judgment setting out the current legal and beneficial interest in all real and personal property which comprised the Estate.

iv. The Defendants are to present an account of the proceeds of Sydney's Peace and Love Restaurant from the date of this Claim to date of this Judgment.

v. The costs this claim is to be borne by the Estate.

Vicki Ann Ellis
High Court Judge

By the Court

Registrar

[42] Re Wylde, Wylde v Culver [2006] EWHC 923 (Ch)