

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA NO. 3703/86

BETWEEN

RALPH WALKER AND LLOYD WALKER

Plaintiffs

AND

STEPHANIE WALKER

Defendant

Before: The Hon. Justice Nolan Breaux

Appearances: Mr C Soogrim for Plaintiffs
Ms. J James-Sebastien for Defendant

JUDGMENT

The first plaintiff, now 94 years old, seeks to have propounded in solemn form, a will dated 18th March, 1985 purportedly made by Mr James Adolphus Walker who died on 21st March, 1985 (“the deceased”). The first plaintiff is the brother of the deceased.

The defendant by her amended defence challenges the validity of this will on four grounds:

- (1) It was not duly executed by the testator nor was it duly executed according to law.
- (2) At the time of execution the deceased was not of sound mind and understanding. He was 75 years of age and physically ill and was not in such a condition of mind and memory as to be able to understand the nature of his act and the extent of the property he was disposing.
- (3) The will was obtained by undue influence.
- (4) He did not know and approve of the contents of the will.

The contention at item 3 was not pursued.

The defendant counterclaims for a pronouncement in favour of a will purported to have been executed by the deceased on 8th January, 1985 at the offices of Mr Parillon, but which is itself undated. The validity of that will is disputed by the plaintiffs.

The Law

The law may be stated thus:

- (1) The onus lies on a party seeking to propound the will. He must satisfy the court that the instrument so propounded is the last will of a free and capable testator per Wooding C J in **Moonan v Moonan** (1965) 7 W.I.R. 420.
- (2) In absence of evidence to the contrary a will which is shown to have been executed and attested in the manner prescribed by law and which appears to be rational on

the face of it, is presumed to be that of a person of competent understanding. See **Moonan v Moonan** (supra).

- (3) Once there is evidence before the court which casts doubt upon the validity of that presumption in any case, its conscience cannot or should not be satisfied without some affirmative proof. See the judgment of Wooding C J in **Alvarez v Chandler** (1962) 5 W.I.R. 226.

Both parties seek to establish the validity of their respective wills. Once a party has established prima facie that the will was that of a free and capable testator and that it is validity executed, the onus shifts to the opposing party to show otherwise.

In this case however, the first plaintiff's will of 18th March, 1985 is later in time and once he has established prima facie that the will was validly executed by the testator who was mentally competent and capable, it will be for the defendant to prove the allegations she makes against its validity and then seek to assert the validity of the January 1985 will.

The March 18th will is on its face a rational will. The first plaintiff and Ms Sybil Alexander testified as to the mental competence of the deceased at the time of execution of the will. Ms Alexander testified that she was requested by the deceased to attend his residence on the morning of 18th March, 1985. There she met the deceased and Ms Majorie Philip who was the sister of the deceased's common law wife. Ms Alexander said she did not see the deceased read the will. When she met him he was seated with his hands over a typewriter grasping the will.

She knew him to have been a teacher of business subjects and that he was able to type. She said the deceased signed the will in her and Ms Philip's presence

and that they both then signed in each other's presence. The first plaintiff also testified as to the mental competence of the deceased and to his knowledge of business subjects including typing. The first plaintiff stated that he did not witness the execution of the will but was handed the will by his brother after he (the deceased) had read it to him. The defendant and her common-law husband, Mr Joseph Archie, stated that the deceased, after his retirement from teaching had disposed of his typewriter and was not in possession of any typewriter on 18th March, 1985. Both contended that he was partially blind and could not type a will of that nature.

Mr Parillon, attorney at law, also testified for the defendant. He prepared the January 1985 will. He could not recall whether at the time of preparation the deceased was partially blind but added that since he had included it in the attestation he must have been so satisfied.

Admitted into evidence pursuant to Order 38 was an unsworn statement of one Gracelyn Olivierrie whom the defendant testified had attended to the deceased the week prior to his death. This statement was put into evidence for three reasons:

- (1) In support of the defendant's contention that the deceased was partially blind.
- (2) To show that the deceased was suffering from depression and not of proper testamentary capacity.
- (3) To show that no execution of the March 18th will took place at the home of the testator.

Ms Olivierrie in her statement expressed the view that the deceased was very depressed. She knew Ms Philip but did not know Ms Alexander. She never

saw anyone visit the deceased during the week prior to his death. She contends that if anyone came to see him she would have known. Ms Alexander's evidence was that on the morning of 18th March, 1985 there was someone else in the bedroom area but she did not see who it was.

Both the defendant and Mr Archie testified that they accompanied the deceased to Mr Parillon's office on 8th January, 1985 for preparation of the January 8th will. The first plaintiff also accompanied them. Both she and Mr Archie remained in the visiting area of Mr Parillon's office while both Walker brothers attended the inner chamber with Mr Parrillon. They emerged one and a half hours later. The deceased returned the next day with Mr Archie to Mr Parillon's office. When the defendant came home from work she was handed the will, a receipt for a fixed deposit and a deed for the property on which they lived, all of which were tendered into evidence.

After her father's death it came to light that the March 18th will had been made. The defendant testified that the first plaintiff had earlier sought a copy of the January 8th will after it had been given to her; the suggestion being that it was used as a basis for the making of the March 18th will.

Mr. Soogrim for the defendant submitted that there was no evidence that the will had been read out to the deceased. He submitted as well that Sybil Alexander's evidence was to be rejected because of discrepancies in the evidence as to where she lived at the time of execution of the will which was inconsistent with the affidavit evidence she gave in the probate proceedings. He also pointed to her denial of ever having sworn to an affidavit in probate application even though she admitted that the signature on the affidavit was hers.

I have had the benefit of seeing this witness under cross-examination and in chief. It is to be remembered that this action commenced more than sixteen

years ago. Indeed, the will was executed one year before the action was commenced. In those circumstances Ms Alexander's difficulty in recalling her address at the time of execution of the will is understandable likewise her failure to recall swearing to the affidavit. Her admissions as to her failings were honest and frank. I found her to be a truthful witness. She admitted to being related to the first plaintiff by marriage but, other than Mr Parillon, was the most disinterested witness to testify before me. I am satisfied that she was a witness of truth.

Mr Soogrim also submitted, with some force, that the first plaintiff gained a substantial benefit under the March 18th will but so does the defendant under the January 8th will. I am mindful that both parties have a benefit to obtain under the will. The first plaintiff however, was not present when the March 18th will was executed.

It is odd that the deceased chose to make another will some two months after signing the January 1985 will but having heard the evidence of the witnesses in this trial I am satisfied that there are no bases for suspicion as to the authenticity or otherwise of the March 18th will.

I accept the evidence of Ms Sybil Alexander and find that the will was validly executed by the testator. While I agree with Mr Soogrim that there is no evidence of the will having been read over to the deceased, on the facts and circumstances of this case, it does not debar me from finding that the deceased had knowledge and approval of the contents of the will. The deceased was a teacher and a man of some intelligence and knowledge. He had taught business related courses at his home and was able to type. I did closely question Ms Alexander as to the manner in which the execution took place. Her evidence was that the deceased was seated with the will in his hands on the typewriter. There were only three persons including the testator there

when it was executed. I am satisfied that the will was composed and typed by the deceased himself.

The first plaintiff having established due execution and testamentary capacity, it was thus for the defendant to prove allegations as to lack of knowledge, and lack of testamentary capacity. In my judgment the evidence produced was not of sufficient quality. Halsbury's Laws of England vol. 17, 4th ed. para 906 states as follows:

“In the absence of fraud it may be laid down as a general rule that the fact that his will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should when coupled with his execution of the will be held conclusive evidence that he knew and approves of its contents. There is, however, no conclusive presumption that a testator who executes his will after having it read to him must be held to have known and approved of the contents; it is open to the tribunal before which the question arises to find as a fact that the will had not been read to him in such a way as to convey to his mind a due appreciation of its contents. However, the presumption of knowledge and approval stated above must be rebutted by the clearest evidence.”

No medical evidence was tendered by the defendant to show that the deceased had such a visual disability as to be unable to read. Mr Parillon could not recall clearly whether he was unable to. Even if it were true, a partial disability of sight does not preclude the deceased being able to type and execute the will. But I accept Ms Alexander's evidence and that of the first plaintiff that the deceased had no such disability. As to the unsworn statement

of Ms Olivierre's it is noteworthy (as Ms James-Sebastien pointed out) that she never stated that the deceased was blind merely that she had been told so. Her evidence that he was depressed is also not supported by any medical evidence and was not sufficient to disapprove testamentary capacity in those circumstances.

Miss Olivierre's statement that no one came to see the deceased during the week of his death, is in direct conflict with both the plaintiff's and Ms Alexander's. Unlike the first plaintiff's evidence and that of Ms Alexander, her evidence was neither sworn nor subject to cross-examination. In those circumstances the evidence of Ms Alexander and the first plaintiff is to be preferred.

I pronounce for the validity of the will of 18th March, 1985 propounded by the first plaintiff. The defendant's counterclaim is dismissed.

I shall hear argument on the question of costs.

NOLAN P G BEREAX
Judge

1st February, 2002