

**CvA. No. 48 of 2001**

**IN THE COURT OF APPEAL**

**BETWEEN**

**CELESTINE ADOLPH  
(EXECUTRIX OF THE ESTATE OF MCDONALD TRIM, DECEASED)**

**DEFENDANT/APPELLANT**

**AND**

**OTRIS DICKSON**

**PLAINTIFF/RESPONDENT**

**CORAM:**

**R. Hamel-Smith, J.A.  
M. Warner, J.A.  
A. Lucky, J.A.**

**APPEARANCES:**

**Mr. K. Harrikissoon for the Appellant  
Ms. C. Gobin for the Respondent**

**DATE OF DELIVERY: 28<sup>th</sup> May 2002**

***I have read in draft the Judgment of Warner J.A. I agree with it and do not wish to add anything.***

***R. Hamel-Smith,  
Justice of Appeal***

***I also agree.***

***A. Lucky,  
Justice of Appeal***

**Delivered by Warner, J.A.**

## **JUDGMENT**

The appellant Celestine Adolph was the cousin of McDonald Trim, (also called Donald Trim) the deceased, who died on the 5<sup>th</sup> May 1983. Otris Dickson (the respondent) was the daughter of the deceased. She challenged the validity of an alleged Will of the deceased dated 18<sup>th</sup> April 1983.

A court at first instance pronounced against the force and validity of the alleged Will; and ordered that probate of the Will be revoked; that letters of administration be granted to the respondent and that the appellant pay the respondent's costs.

This appeal raises the following issues:

- (1) whether the alleged will was duly executed in accordance with the Wills and Probate Ordinance Chap. 8 No. 2.
- (2) whether the deceased approved of its contents and/or was of sound mind and memory or incapable by reason of his infirmity.

### **Background**

The deceased was 67 years old at the date of his death. He spent the last 18 months of his life at the appellant's home at St. Mary's Village, Moruga, where he was cared for by the appellant, her '**common-law**' husband

James Vidale and her son Hollis Adolph. The respondent also lived at Moruga, but it appears that because of her limited resources, the size of her living quarters and her large family of ten children, she was not able to accommodate the deceased. She did however, visit him at the appellant's home, though, not regularly. What is clear from the evidence was that the deceased's health deteriorated over the period that he lived with the appellant. Nonetheless, certain receipts for rent were admitted in evidence which, it was alleged, the deceased signed by affixing his signature - the last receipt was dated 21<sup>st</sup> March 1983.

### **The appellant's testimony**

It was the appellant's case that it was at the deceased's request that she began to care for him. Although he was then, able to read newspapers, he was **'suffering with heart problems and could not write clearly.'**

As he grew weaker, he had to be fed, cleaned and washed. His mind was **'clear'** and he was able to speak. He told the appellant that he had asked James Vidale to **'make a Will to share what he had'** between herself and the respondent. James Vidale died before the trial began.

### **The contents of the impugned Will**

The holograph Will was prepared by James Vidale, and according to the appellant, she was not present when the **'Will was made.'** On that day she had come to Port of Spain. On her return home the deceased told her that he had got Mr. Vidale to make a Will. About a week before he died,

the deceased gave it to her and told her to get it '**registered.**' In the Will, the appellant was named executrix and the estate was divided in the following manner -

One acre to the appellant; one acre to the respondent, and three lots to Hollis Adolph.

The trial judge described the signature and mark at the foot of the Will as '**curious.**' There was an inscription '**X James S. Vidale**' and under that, the following endorsement appeared –

***“Testator signature or his mark. This Will was requested by Mc Donald Trim to signed or his mark in the present or presence of the under-mentioned three (3) names.”***

There was also a thumbprint, and I shall refer to it later in this judgment.

Apart from questions as to whether the deceased had testamentary capacity, or approved of the contents of the Will, Counsel for the appellant agreed that the form of signature was irregular. In that regard, the trial judge summarised his conclusions this way –

***“It is therefore not clear from the face of the Will, since it is clearly not signed by the testator, whether it was signed on his behalf by Vidale and that was acknowledged by the testator, whether the testator placed his mark ‘X’ in the presence of the witnesses or whether it was placed on his behalf, or indeed whether the thumbprint was intended to serve as his mark.”***

The persons who allegedly witnessed the Will were one Peter Blackman, Irma Walters (she was Hollis' common-law wife) and Sylvia Bardouille, the appellant's daughter. All signatures appeared on a separate page.

Peter Blackman was not called to testify, nor was Irma Walters. Sylvia Bardouille, did however testify. Her testimony is of importance for the reason that she was the only person who testified about the circumstances surrounding the preparation and execution of the Will.

Her evidence in chief was as follows –

***“In May 1983 I lived at 33 Third Company Road across the street from my mother. At that time, McDonald Trim lived with my mother. I know James Vidale. I was a witness to the preparation of McDonald’s Will. He was sitting on his bed; himself and Mr. Vidale. Mr. Vidale called me over. When I got there, there were two other persons. I can remember Blackman and Irma Walters. There was a table there and Vidale was standing next to Trim with a paper and a pen in his hand.***

***Vidale said you have to do something for me. He left to get Irma and I peeped at the paper. The writing was not completed. Irma came up the road. They finished what they had to write. Mr. Vidale did the writing. He read it out aloud when he finished. He said ‘Mr. Trim, this what you want? Mr. Trim said ‘yes.’***

***He read it a second time. He said ‘Mr. Trim, you sure this is what you want?’ Mr. Trim said ‘Yes.’***

***He said, ‘Then you will have to sign it.’***

***He hand him the pen, he took the pen and held it then said he cannot sign properly because his finger is stiff. So he said you will have to put the thumbprint. He gave him the paper to put the thumbprint and he did.***

***I and other witnesses signed. Blackman continued his work because he was there to wire the house. I left and went home.”***

This witness was saying that the deceased executed the Will in her presence by placing his thumbprint.

The respondent's testimony was that she last spoke with the deceased before April 1983. After that he was only able to mumble and make motions; he could not move around. She was only told about the Will forty day after the deceased's death.

The other person who testified on the respondent's behalf was Alexander de Gannes, a Valuer and Pastor. He testified that the deceased had no understanding whatsoever from about two months before he died. The trial judge placed little weight on his evidence because he had applied to bring the land under the provisions of Real Property Ordinance. The trial judge was clearly of the view that he had an interest to serve.

The trial judge underscored certain features of the evidence which related to execution and the deceased's testamentary capacity:

that all the signatures of the attesting witnesses were on a separate page; above the line labeled '**Testator's Signature**' or his mark the name '**James Vidale**' appeared; the dispositions were to immediate members of the appellant's family - two of the witnesses were the appellant's relatives; he also referred to the deceased's state of health - the fact that he died some two weeks after it was alleged

that he executed the Will; and also, that the addresses of the witnesses were inaccurate.

The thumbprint was a feature of the form of signature which must be mentioned - this print appeared on the left side of the Will at the foot or end. When the appellant applied to the Registrar for probate in common form on the 19<sup>th</sup> September 1986, Sylvia Bardouille swore to an affidavit in which no mention was made of the thumbprint. She (Bardouille) in fact deposed that the deceased had made his 'X' mark in her presence and in the presence of the other witnesses. She deposed to a second affidavit on the 21<sup>st</sup> May 1987, in response to a query from the Registrar, that the thumbprint was affixed **'as a form of identification.'** There was no indication as to whether the thumbprint was affixed in the presence of other witnesses, present at the same time.

There was also admitted in evidence a note of evidence taken in previous proceedings in the High Court between these same parties where the witness Bardouille had testified that the very Will was not signed by McDonald Trim ..... She also said -

***"he could have written it but asked me to sign it."***

In short, there can be no doubt that the trial judge was of the view that the preparation and execution of the Will were **'attended by circumstances of suspicion which its propounder had failed to remove.'** The relevant principles were firmly established in the case of **Davis v Mayhew [1927 P. 264]**. (See also **Moonan v Moonan [1965] 7 WIR 420**).

In **Barry v Butlin [1838] 2 Moo PCC 480 at 481**, another notable case, Parke B. said –

***“The rules of law according to which cases of this nature are to be decided do not admit of any dispute, so far as they are necessary to the determination of the present appeal: and they have been acquiesced in on both sides: These rules are two: the first that the onus probandi lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The second is that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased.”***

In **Tyrell v Painton [1894] p.151**, it was established that the rule in **Barry v Butlin** was not confined to cases where a preparer of Will takes a benefit, but according to Davey L.J. –

***“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.”***

I turn now to the principal arguments of the appellant advanced in support of the validity of the Will –

- (1) the presumption of regularity
- (2) the presumption of due execution

(3) that the deceased approved of contents of the Will

The appellant has argued that if a Will appears to be duly executed, the principle of '*omnia praesumuntur rite esse acta*' applies - that witnesses need not know of the details of the Will. Counsel for the appellant agreed however, that where the document is irregular the presumption cannot apply with the same force. (See the *Estate of Bercovitz Canning & Another v Enerver & Another [1961] 2 All E.R. 481*). This was therefore the first hurdle that the appellant had to overcome – the form of signature was irregular and no explanation was proffered in these proceedings for the inconsistency in the evidence of the witness Sylvia Bardouille. See also the case of *Guardhouse and Others v Blackburn and Another [1866] LR 1 P&D 109 at 116*. It was explained that 'except where suspicion attaches to the document the fact of execution is sufficient proof.' (Emphasis added).

The case of *Battan Singh and Others v Amirchand and Others [1947] A.C. 161* is also of some relevance - It was held there, that before a court makes any presumption in favour of validity, it ought to be strictly satisfied that there is no ground for suspicion.

In the present case, I agree with the trial judge's findings that the document excited suspicion.

The evidence in this case was that the deceased was '*growing weaker,*' during the last of his life. The appellant strongly relied on the evidence of Sylvia Bardouille to establish that the deceased placed his thumbprint

after acknowledging the contents. That feature of her evidence, cannot however be examined in isolation. The trial judge, as he was entitled to do, in assessing her credibility, had to pay regard to a number of other factors: all her evidence including her admissions; the impact on all the other evidence adduced; her demeanour and contemporary documents.

The trial judge's approach was to consider the matter, *'in the round,'* bearing in mind where the onus probandi lay. That approach was illustrated in *Headlie v Arneaud*. (See *Julien Reports Vol. XIX – [1966-69] at page 212*). In that case, events which combined to excite the gravest suspicion on a full consideration of the evidence were –

***“a gravely ill and weakening testatrix; the unusual circumstances surrounding execution.”***

Finally, the appellant also argued that the trial judge had failed to make a specific finding as to whether or not the deceased signed the document at all. While that might have been so, it was not all, in this case, fatal to the respondent's case, because the appellant had not discharged the onus of removing, the suspicion attending the preparation and execution of the Will. (See Moonan above).

In these premises, I would confirm the order of the trial judge and dismiss this appeal with costs.

Margot Warner,  
Justice of Appeal