

IN THE COURT OF APPEAL OF THE SUPREME COURT OF
JUDICATURE

APPELLATE JURISDICTION

CIVIL APPEAL NO. 71/2002

BETWEEN:

GEORGE CHEE a/k GEORGE MIN CHEE
represented herein by **FLORET RAMSARAN**
his duly constituted Attorney in Guyana by virtue
of Power of Attorney registered in the Deeds
Registry, Georgetown, on the 20th day of November,
1998 and numbered 6059/98.

Appellant/Plaintiff

- and -

1. **CAO MIN WEI**
2. **LUI ZHI SEN**

Respondents/Defendants

BEFORE:

Hon. Madam Justice Desiree P. Bernard	- Chancellor
Hon. Madam Justice Claudette M.C. Singh	- Justice of Appeal
Hon. Mr. Justice Nandram Kissoon	- Justice of Appeal

Mr. L.M. Caesar for Appellant
Mr. O.M. Valz, S.C. for Respondent

2004: January 22, 23
May //

JUDGMENT

BERNARD, C.:

On 14th September, 1998 one CHUEN SING CHUI also called CHEE SING CHOON, died at his residence situate at Lot H D'Urban Street and Vlissengen Road, Georgetown, at the age of 87 years leaving the Appellant, his nephew, as his sole surviving relative. The deceased had executed a will dated 27th May, 1987 in which the Appellant was named as executor and sole beneficiary of his estate. However, unknown to the Appellant, his uncle had allegedly executed a later will dated 8th September, 1998 in which he appointed

as executors the Respondents who were not his relatives, and to whom he bequeathed jointly his undivided half ~~and~~ interest in the property situate at Lot H D'Urban Street & Vlissengen Road, Georgetown, as well as any residue of his estate. Probate of this will was granted on 29th January, 1999 to the first-named Respondent.

The Appellant filed proceedings against the Respondents seeking a revocation of the grant of probate and an order pronouncing against the validity of the will on the grounds that at the time of its execution the deceased was not of sound mind, memory and understanding and did not know and approve of the contents of the said will by reason of his advanced age and state of health.

After a hearing a trial judge pronounced in favour of the validity of the will. The Appellant being dissatisfied with this decision has appealed to this Court on the grounds, inter alia, that the trial judge had misdirected herself on the issue of testamentary capacity and suspicious circumstances surrounding the preparation and execution of the will, and shifted the burden of proof to the Appellant to prove testamentary capacity. The trial judge also erred when she pronounced in favour of the validity of the will which was not executed in accordance with the Wills Act, Cap. 12:02.

It is trite law that in seeking to propound a will the burden of proving due execution and that it reflects the wishes of a testator of sound mind, memory and understanding who knew and approved of its contents rests at all times on the party propounding it. This has been established over the years by a litany of cases emanating from both the English and Caribbean courts as well as our own courts.

The first fact to be established in propounding a will is that it was executed in accordance with statutory provisions. In our jurisdiction it must be established that it was executed in accordance with Section 4 of the Wills Act,

Cap. 12:02. The principle “omnia praesumuntur rite esse acta” applies where the will is regular on the fact of it, i.e. with an attestation clause and the signature of the testator and witnesses. If these are in place there is a presumption that the will was duly executed.

As in the case of due execution the burden of proving that the testator had the required testamentary capacity to make the will, i.e. that he was of sound mind, memory and understanding, rests on the person propounding it. **Wooding, C.J.** in **Moonan v. Moonan (1965) 7 WIR, 420 at p. 422** upheld this contention.

The question whether a testator knew and approved of the contents is an essential element in propounding a will. **Parke, B.** in **Barry v. Butlin (1838) 2 Moo. P.C.C., 482** enunciated the rules of law on this aspect in this way:

“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”

In order to satisfy the conscience of the court evidence must be led by the person propounding the will indicating that the testator was capable and was not coerced into signing the will. In this appeal evidence was led through Errol Choo-Kang who signed as a witness. He testified that he visited the deceased regularly, and never noticed that he seemed to have lost his memory or mind. He admitted that the deceased was partially blind and hard of hearing, but he moved around on his own and prepared his own meals. Choo-Kang said that when he, the deceased, signed the will he seemed to know what he was doing, and knew what property he was disposing of. Of significance Choo-Kang under cross-examination admitted that the Respondents were his relatives, and they had requested that he be a witness to the will.

Another witness, Chen Jian Bin, testified that he knew the deceased who could hear "a little bit", could read, but not "good", and he knew this to be so because he, Chen, checked the paper when he read. He did not say what paper he meant. He also said that the deceased "got sick", but he did not know how long this was before he died. He knew that the Respondents looked after the deceased up to his death.

The other witness to the will was Jean Sahai, a Justice of the Peace, who testified that on the day the will was executed she was asked by one Mrs. Agard (who was not called as a witness) to accompany four Chinese nationals to the home of the deceased to have the will executed. The will had already been prepared, and on arrival at the home of the deceased he asked the Chinese nationals whether they had brought the will. She said she offered to read it, but the deceased said he would read it. He took a considerably long time (about one hour) to do so, and then signed his name in her presence and that of Mr. Choo-Kang and the others. She signed and then Choo Kang. She said that she asked the deceased if he understood the contents of the will, and she placed her "read over" stamp on the will and signed the stamp. She stated further that she made sure that the will was properly executed, and if she had any reason to believe that the deceased had not understood what was being done she would not have signed the will.

Under cross-examination Ms. Sahai's evidence departed significantly from what she had said earlier, and is to this effect:

"When I got there the will was already typed and signed." (emphasis mine)

This stands in stark contrast and contradicts her earlier testimony that the deceased had signed the will in her presence and that of the other witness Choo Kang. This contradiction in Sahai's evidence completely escaped the learned

trial judge's attention as no comment was made by her in relation to this part of Sahai's testimony. This strikes at the root of the requirement of due execution of a will. I shall, at this juncture, elaborate on this aspect of the matter. **Section 4 of the Wills Act, Cap. 12:02** is to this effect:

"No will made in Guyana shall be valid unless it is 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 the signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and those witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary". (emphasis mine)

If Jean Sahai's testimony is that when she arrived at the home of the deceased the will had been already signed, then it follows that she signed the will after the deceased or after the other witness Errol Choo Kang or after both of them. In all of these circumstances the execution would not have been in accordance with **Section 4 of the Wills Act, Cap. 12:02**. No explanation was given as to this apparent contradiction of her earlier testimony in chief when she gave a detailed chronology of the execution of the will with the deceased signing first, then she signing second, and Choo Kang last. There is no record that she was re-examined to clarify and explain her contradictory evidence.

Another aspect of her testimony which causes some concern is to this effect:

"I offered to read the will to the testator but he said that he would read the will. He was given the will and he took a considerable long time to read the will I asked testator if he understood the contents of will and I placed my "read over stamp" on the will and I signed the 'read over' stamp".

The "read over" stamp as she calls it, is to the effect that the will was read and explained by the Commissioner of Oaths to Affidavits to the deponent who seemed perfectly to understand the same and made his mark in his/her

presence. This stamp seems to be a requirement when the testator cannot read or write, and when the will is read over and explained to him/her. It requires the mark of the testator to be made in the presence of the Commissioner of Oaths.

There was no need for this stamp to be affixed to the will of the deceased in this case as evidence was led that he could read and write, and in fact read and signed the will himself.

Sahai's evidence therefore contradicts that of Choo Kang who said that both he and Sahai were present when the deceased signed the will. One is left to wonder who is speaking the truth. In propounding a will evidence of due execution must be straightforward and unimpeachable. Any contradictions in the testimony of those who witnessed a will give rise to suspicion and doubts as to its due execution.

Although this is sufficient to set aside the will I shall also comment on the trial judge's finding that the Respondents had discharged the burden of establishing that the testator knew and approved of the contents of the will.

The deceased was 87 years old, partially blind and deaf, and was cared for by the Respondents and other persons. Choo Kang's evidence was that he (the deceased) in spite of his age and incapacities could have still moved around unaided. He admitted that the physical condition of the deceased was "not so good", but his mind was good, and he was able to see to write his name on the will.

The witness Chen Jian Bin, on the other hand, said that the deceased could not read "good", and he knew he could not because he checked the paper when he read. A witness Elizabeth Leung said that just before his death the deceased was not seeing or hearing too well.

In this case the Court did not have the benefit of medical evidence as to the state of health of the deceased, and so a conclusive determination of his health could not be made. However, from the evidence of the witnesses it seems that the physical condition of the deceased had deteriorated even though his mind may not have suffered similar deterioration. In **Moonan v. Moonan (1963) 7 WIR, 420**, Wooding, C.J. in his judgment made reference to 39 Halsbury's Laws (3rd. Edn.), pp. 858-9, para. 1301, where it was said that stricter proof of knowledge and approval of the contents of a will is necessary where there was some weakness in the testator which, though not amounting to incapacity, renders him liable to be made the instrument of those around him, or when the will is at variance with the known affection of the testator or was prepared on verbal instructions only or is at variance with his previous declarations.

This gives rise to the question of whether any instructions about the contents of the will were given to anyone by the deceased in the instant appeal. No evidence at all was led about instructions for the preparation of the will being given by the deceased. Choo Kang made no mention of receiving instructions from the deceased about preparing a will or requesting that a will be made. Jean Sahai was not involved in the preparation of the will, and was only requested to see that it was executed. When she met the Respondents the will had already been prepared, and she was asked by one Mrs. Agard to accompany the Respondents to have it executed. Mrs. Agard to whom the instructions may have been presumably given and who may have prepared the will was not called as a witness, neither were the Respondents who were the beneficiaries under the will. The only evidence which suggests that the deceased wanted a will made was Jean Sahai's evidence that he asked a Chinese

national (presumably one of the Respondents) whether they had brought the will.

As was stated in Barry v. Butlin (supra) a person propounding a will “must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator”. One circumstance which may not satisfy the conscience of the court and which may give rise to suspicion is the fact that the Respondents took benefits under the will; in fact they inherited all of the property of the deceased. The trial judge herself found that this was a circumstance which gave cause for suspicion. She also commented that the fact that the Respondents had taken Jean Sahai to the home of the deceased to have the will executed suggested that they may have been instrumental in its preparation. The only factor which persuaded her that the suspicion had been removed was that she accepted the evidence of Jean Sahai that the deceased had inquired of the Respondents whether they had brought the will and that he had read it over and signed it unaided.

However, the whole basis of the trial judge’s satisfaction that the Respondents had discharged the burden of establishing that the deceased knew and approved of the contents of the will was destroyed by Jean Sahai’s evidence under cross-examination that the will had already been signed when she arrived at the home of the deceased. She could not know therefore whether the deceased had read the will or knew and approved of its contents. This aspect of the evidence seems to have escaped the trial judge’s attention.

As mentioned earlier the evidence required to propound a will and satisfy a Court of due execution must be unimpeachable and uncontradictory. This cannot be said to be so in this case. Had the trial judge appreciated the significance of the contradictory testimony and damning admission of Jean Sahai I am positive that she would not have come to the conclusion that the

Respondents had discharged the burden of proving due execution of the will of the deceased. It is the finding of this Court that they have not.

In the circumstances the appeal is hereby allowed and the order of the trial judge set aside. The matter is remitted to the High Court to be heard de novo.

.....*D. P. Bernard*.....
Desiree P. Bernard
Chancellor of the Judiciary.

Dated this 11th day of May, 2004.