2005 No. 605/W DEMERARA

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

PROBATE AND ADMINISTRATION

In the matter of the Estate of HELENA GERHARDINA HOPKINSON-CUMMINGS, Deceased

-and-

In the matter of the Wills Act, Chapter 12:01

BETWEEN:

CHARLES G. DANIELS
Plaintiff

-and-

WILMA EVANS
Defendant

Mr. A. Chase, S.C., for the Plaintiff
Mr. E. Luckhoo, S.C., for the Defendant

DECISION

The Plaintiff's claim against the Defendant is for the following orders:-

(a) A Declaration that the document purporting to be made in April 2005 is not the true last will and testament of Helena Gerdhardina Hopkinson-Cummings, Deceased, who died on the 15th day of June 2005.

(b) A Declaration that the true and last will and testament of the aforesaid deceased is dated 4th day of January 1991.

(c) A Declaration that the Plaintiff is entitled to apply for Probate to the Estate of the aforesaid deceased.

(d) An order requiring the Defendant to forthwith furnish an account for her dealings and intromissions with the Estate of the aforesaid Deceased.

(e) An injunction or other order restraining the defendant, her servants and/or agents from dealing with the property of the aforesaid deceased .

(f) Such further and other Order and relief as to the Court seems just.

(g) Costs.

The Plaintiff's case is that the will of 14th April 2005 did not reflect the true intentions of the testatrix, and that the will of 4th January 1991 is the true will of the testatrix, and seeks to propound the will of 1991.

The plaintiff claims that the testatrix was mentally ill and incapable of making the will dated 14th April 2005: that there was undue influence exercised by the defendant on the testatrix to make a new will. In the previous will the plaintiff is the beneficiary but in the later will the defendant is the beneficiary.

The defendant on the other hand claims that the deceased made her last will and testament on the 14th April 2005 in which she revoked all former wills and codicils and appointed the defendant as executrix of her said last will and testament.

The defendant counterclaimed for the following:

(1) A declaration that the will dated 14th April 2005 is the true and last will and testament of Helena Gerhardina Hopkinson, deceased.
(2) That the will dated 14th April 2005 be admitted to probate in solemn form of law.
(3) A declaration or order that the defendant is entitled to apply for probate of the last will and testament of the deceased.
(4) Such other order and reliefs as the Court deems fit.
(5) Costs.

EVIDENCE

The evidence of **Dr. Ordonez** is that the testatrix was admitted to the hospital on 7th June 2005 and died on 15th June 2005. He said she was disoriented and that her mental condition started to deteriorate until she died.

Dr. Ordonez did not return for cross-examination and so was not cross-examined by counsel for the defendant.

The evidence of **Charles Daniels**, the plaintiff herein, is that the testatrix was his aunt and that they were very close, that he gave her money to pay her mortgage, that they communicated by letter and then by telephone after her sight became bad. He said she had made three wills in all, one on the 11th February 1983, one on the 6th August 1987 and one on the 4th January 1991, and that he was named as the executor in all three wills, but he never received the will dated 14th April 2005,

He said they remained close until her death and he paid for the services of a maid named Debra Ramphal who looked after the testatrix, and that he sent crates of food, visited Guyana regularly between 1987-1997, and helped maintain the properties, paid for taxi to take her to church and made arrangements with Dr. Wilson to visit the testatrix and paid him for these services, and that he also left all his belongings at the home of the testatrix.

In cross-examination, the plaintiff said he lived in Canada for 40 years, and he did all those things for the testatrix whether or not she left any property for him. He did not visit the testatrix after 1997 but came for the funeral in 2005.

He said they had a close relationship between 1987 – 1997 but he never saw her again from 1997 – 2005 but spoke to her and she was frail and emotional.

Ms. A Wong, Attorney-at-law, with whom the will was deposited, tendered the will of 1991 and the will of 2005 and testified that no one ever filed an affidavit to open the 1991 will.

The defendant, **Wilma Evans'** Evidence is that the testatrix is her aunt who died 15th June 2005 and she had a nephew named Elvas who she raised and was very close with, and she communicated with the testatrix by letters for donkey years – 1962 -1985, and in 1989 and by telephone. She sent money to her by postal order in the sum of £100 every month and by Western Union until she died.

She said she spoke to the testatrix in April 2005 and that she was alert and asked the defendant to keep up the fire insurance. She said she visited Guyana 1977 – 1984, 1985, 1987, 1989 and between 2001 – 2005 and stayed at Leopold Street with the testatrix. In April 2005 they had discussions about her affairs and she asked the defendant to look after her affairs. The defendant agreed to do so but under protest because of her work. She said there was a will dated 2002 amongst documents she gave defendant. The defendant said she made payment for medical expenses. She tendered a receipt from Davis Memorial and for a barrel for a birthday party.

Wilma Evans further testified that when the will was made in 2005 the testatrix was not suffering from senility and was not mentally ill nor was she handicapped. She said that they had many conversations about her experiences and Elvas who died in January 2005 and that she was very upset about Elvas' death.

The Defendant further stated that the testatrix sometimes signed her name as Cummings or Hopkinson. She identified her signature on page two of the will of 2005. The Defendant said she did not use duress on the testatrix to make the will. She said she first became aware of the contents of the will when she opened the packet. She said she did not ask the testatrix to leave anything for her but that she was named executrix of the 2005 will.

In cross-examination the defendant said she declared what she knew about in the statements of assets. She said the testatrix had several other sisters and nieces, and that it was not the first time her aunt asked her to look after her affairs. She said the testatrix said she was sure she wanted her to look after her business in 2005. Before 2005 Elvas was involved in her affairs.

The Defendant said she didn't think she was present when testatrix signed the will, but she was aware the will was made. She didn't know about testatrix's shares in Banks DIH or what else she possessed. She said she was not a beneficiary in previous wills. She said she was not surprised because in a letter the plaintiff told the testatrix that plaintiff had no interest in her affairs. She admitted that the plaintiff assisted testatrix financially after 1981. Repairs were done but she did not do them. That testatrix and plaintiff fell out in 1990's but defendant and the testatrix never fell out. Since 1990's testatrix was not seeing too well.

Joan Mann's evidence was that testatrix asked her to be a witness to the will of 1991 and she saw the testatrix sign in her presence at Leopold Street where she lived and that she knew testatrix for a number of years.

Terrence Bynoe's evidence was that he worked at Banks DIH and said testatrix had 20,741 shares at banks DIH and that there were no transfers to Wilma Evans, the defendant herein.

Duncan Clarke's evidence is that he knew testatrix and that he and Teddy i.e. Elvas were friends since boyhood days in 1950's. He said he used to visit the testatrix and chat and keep her company since 1996. Teddy asked him to look after his aunt about two to three years before she died. He said he went to live

at Leopold Street in 1995 – 1996. He said the Testatrix was able to communicate and was clear in her conversation. In April 2005 testatrix had tremendous clarity despite grieving for Teddy and read newspapers and magazines.

In April 2005 the testatrix told him she wanted to make a will and asked him to contact Jailall Kissoon, Attorney-at-law. He told the lawyer who visited the home and returned a week later accompanied by Ms. Troyer and he had a will. Clarke said he stayed outside the door. Ms. Troyer read the will aloud, then handed it to Helena (the testatrix) who read it silently, and then Jailall Kissoon read the will loudly and explained it. She agreed that the will was correct. He saw her sign the will. He and Ms. Troyer signed as witnesses. Ms. Hopkinson could see when they signed the will and they could see her sign it as well. Mr. Kissoon took the will and he and Ms. Troyer left.

Witness said he knew the defendant and that he met her about two weeks at testatrix's home before the will was made. The Defendant was inside the house when will was made but not where the will was signed. Deborah Ramphal looked after the testatrix until she died in June 2005, from 1995.

In witness opinion testatrix was not mentally ill or handicapped, they had many conversations about politics; every day he stopped to speak to her. He identified his signature on the will of 14th April 2005 and said he lodged the will in the presence of Ms. Troyer. He said he did not hear what Mr. Kissoon discussed with the testatrix when he came the first time. From 1995 -2005 clarity of thought and disposition of the testatrix did not deteriorate; she was as coherent in 2005 as in 1995 and fully alert, but can't say if her sight was seriously defective.

Jailall Kissoon's evidence was that he was the Attorney-at-law who prepared the will. According to his evidence he took instructions from the testatrix at her home. She was strong in her faculties and fluent in expression. She asked him to make a will and he took instructions in writing. He left, went back to his office and dictated the terms of the will to his secretary Ms. Troyer. She typed the will. He said he returned to the deceased home with his secretary, the said Ms. Troyer. Mr. Clarke was there and stood by the door. The Deceased and Ms. Ramphal (the maid) were in the house. Ms. Troyer read the will, the deceased read the will silently, and Mr. Kissoon read the will loudly. He asked her if that was what she wanted and she said yes. Mr. Clarke also read the will and Mr. Kissoon had two copies of the will and gave Mr. Clarke one copy. The Deceased signed the will, and in his presence and Clarke's and Lisa's (Ms. Troyer) presence Lisa signed as a witness and Clarke also signed as a witness in his presence. There was another lady outside where repairs were being done. He assumed this lady was from England because of the way she spoke. He also said the will had a date. Mr. Kissoon identified the will (exh. P).

<u>**I**ssues</u>:

(1) Whether the testatrix had the mental capacity to execute the will of 14th April 2005.

(2) Whether the will of 14th April 2005 was a forgery.

(3) Whether the testatrix was induced to make the will of 14th April 2005.

<u>The legal principles:</u>

There is a presumption of knowledge and approval of the will.

Halsbury's Laws Of England 4th ed, Vol. 17 at page 470 :-

Paragraph 895-"Persons of full age and sound mind: "

> "The burden of proving testamentary capacity falls on the person propounding the will, but this burden is satisfied prima facie in the case of a competent testator by proving that he executed it."

The testator must be of a sound disposing mind.

Paragraph 898 Meaning of "sound disposing mind."

> "In order to be of sound disposing mind a testator must not only be able to understand that he is by his will giving his property to one or more objects of his regard, but he must also have capacity to comprehend and to recollect the extent of his property and the nature of the claims of others whom by his will he is excluding form participation in that property. Mere forgetfulness to comprehend some property, or to recollect the claims of those excluded, would not seem sufficient to invalidate the will, unless such forgetfulness establishes incapacity to remember sufficient facts to displace illusory notions and beliefs."

The Plaintiff's case is that he made certain gifts to the testatrix and took care of her and therefore the testatrix has a moral obligation to bequeath a devise to him. There is no evidence that the defendant was instrumental in procuring the testatrix to execute the will of 2005. Elvas also known as Teddy died in January 2005, so it is logical that the deceased would make a new will and the defendant was the person the deceased entrusted with her business affairs and who assisted her financially in her later years. The plaintiff last visited in 1997 and made no remittances after 1997 so it is only logical that testatrix would make the will in favour of the defendant.

AS regards moral rights or claims to the testatrix's property the testatrix is not obligated to leave something for everyone of her relatives. The defendant who

gave her financial assistance and who she asked to look after her affairs prior to her death has an equal moral claim as anyone else.

Paragraph 899 Time at which capacity must exist.

> "The sound disposing mind and memory must exist at the actual moment of execution of the will, but the measure of testamentary capacity need not be as complete at the time of execution as it was at the time of giving instructions for the will, and it would seem that when a will has been drawn in accordance with the instructions of the testator, whilst of sound disposing mind, a perfect understanding of all the terms of the will at the time of execution may not be necessary."

Paragraph 903 General burden of proof.

> "Generally speaking, the law presumes capacity, and no evidence is required to prove the testator's sanity, if it is not impeached. A will, rational on the face of it and shown to have been signed and attested in the manner prescribed by law, is presumed, in the absence of any evidence to the contrary, to have been made by a person of competent understanding. However it is the duty of the executors or any other person setting up a will to show that it is the act of a competent testator, and therefore, where nay dispute or doubt exists as to the capacity of the testator, his testamentary capacity must be established and proved affirmatively.

According to Mr. Kissoon the will was executed in accordance with the Wills Act Cap. 12:01. According to his evidence he took instructions from the testatrix at her home. She was strong in her faculties and fluent in expression. She asked him to make a will and he took instructions in writing.

Paragraph 906 Presumption of knowledge and approval.

> "In the absence of fraud it may be laid down as 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."

Ms. Troyer read the will, the deceased read the will silently, and Mr. Kissoon read the will loudly. He asked her if that was what she wanted and she said yes.

Paragraph 891 Medical Evidence.

> "the personal medical knowledge of the testator's own doctor, or of a psychiatrist who has had the opportunity of examining the testator at the time of his will, must normally carry great weight. On the other hand little weight may be attached to the conclusions of an expert drawn from the evidence of others, especially if these conflict with the views of reliable laymen who knew the testator well."

Dr. Ordonez's evidence is not relevant to the time the testatrix made the will. She became ill after the will was made.

The onus of proof of testatrix's capacity to make the will shifts to the party alleging that the will was not executed in accordance with the testatrix's wishes, or that undue influence was exerted.

The plaintiff is the party saying that the will was not properly executed therefore the plaintiff has to prove that the testatrix did not make the said will freely and voluntarily.

THEOBALD ON WILLS 13TH ED, 1971

Page 43 "Whenever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the true will of a free and capable testator, it is for those who propound the will to remove such suspicion."

Page 44 "When once it is proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence rests on the party who alleges this. To establish a case of undue influence, it must be shown that fraud or coercion has been practiced on the testator in relation to the will itself, not merely in relation to other matters or transactions."

There must be actual proof of the exercise of undue influence. Fraud and coercion must be exercised in relation to the will itself.

Halsbury's Laws of England (Supra)

Paragraph 911 What constitutes undue influence.

"A will or part of a will may be set aside as having been obtained by undue influence. If the execution of the will is not in dispute the party alleging undue influence has the right to begin, and must discharge the burden of proof by clear evidence that the influence was in fact exercised. To constitute undue influence there must be coercion: 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."

There are no suspicious circumstances surrounding the making of the will. In any event on the evidence presented, the plaintiff has not proven that there was anything suspicious. The defendant on the other hand has disproved any such suspicion, if there was any, by the evidence of Mr. Clarke and Mr. Kissoon.

The plaintiff was nowhere around when the testatrix became aged. Elvas had died and the defendant was the only one who was with her in her old age and took care of her at that time, so it is not unreasonable she would make a new will in favour of the defendant.

The witnesses had not been discredited in any material aspect in cross-examination; all have testified and have established that at the time of execution of the will the testatrix was possessed of testamentary capacity.

Signature of testatrix:

Plaintiff says it is not the testatrix 's signature because she signed as Hopkinson and not Cummings which was her last married name, or she would have signed Hopkinosn-Cummings, but not Hopkinson alone.

The submission of "custom" relied on by the plaintiff's Attorney does not have merit. He submitted that the testatrix should have signed her name as Cummings since the custom is for a woman to retain her last husband's married name.

The law on this point is discussed in **The Digest** 17 (1) 1994 2nd issue "Custom and Usage" page 28. Where a custom is relied on, its existence must be proved by evidence in each particular case.

> "The question as to existence of a custom is a question of fact, and it is necessary to prove the custom in each case, until eventually it becomes so well understood that the courts take judicial notice of it."

No evidence was lead as to such a custom and in any event the testatrix used her previous husband's married name. The testatrix is entitled to use which ever previous husband's name she chooses.

Age of testatrix.

The age of the Testartrix (94 years) is not sufficient by itself to say that the testatrix did not have testamentary capacity. No evidence was given that the testatrix was mentally incapacitated at the time of the making of the will.

The Guyana Court of Appeal in **re : Hollygan's Estate,** 1983 35 WIR p. 224 is relevant.

In that case the elderly testatrix was seriously ill and requested her attorney to draw up her will. She died two days after the execution of the will. The Court's approval of the trial judge is set out at page 226 a-b and at page 226 J – 227 A. It was stated as follows:

> "The principles to be borne in mind by a court when considering such a case are well settled and should not admit of any doubt. They have been extracted over the years from the well known cases, **Barry v Butlin** (1838) 2 Moo PCC 480, **Tulton v Andrew** (1875) LR 7 HL 448, **Brown v Fisher** (1890) 63 LT 465, **Tyrell v Painton** (1894) P 151 and **Re Musgrove, David v Mayhew** (1927) P 264. They have also been adverted to in more recent cases….The Onus was on the respondent to satisfy the court that the will was properly executed, and that when the testatrix did so she was of sound and disposing mind and memory, and had full knowledge and appreciation of its contents."

At page 227 f-g

"In **Jack, Jack and Supersad v Supersad** (1954) LRBG 38, the West Indian Court of Appeal applied the principles enunciated by Lindley LJ in **Tyrell v Painton** (1894) P 151 at page 157 to the effect that in

> "all cases in which circumstances exist which excite the suspicion of the Court, and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever they rely on, to displace the case made for proving the will."

The evidence of the witnesses is sufficient to dispel any suspicion that because of the testatrix age she did not have full knowledge of and approved the contents of the will.

The fact that it is the defendant who is propounding the will takes a benefit under the will without any other circumstances relating to the preparation of the will was not a circumstance of suspicion.

The evidence of Mr. Kissoon is most relevant to dispel any allegation of testamentary incapacity. The allegations of undue influence and fraud have not been proven. There is no evidence of any person exercising undue influence over the testatrix nor any circumstance that suggests that undue influence was exercised over the testatrix.

The removal of any suspicion which may be contended to exist is provided by the evidence of Jailall Kissoon, an independent witness, who did not know the

testatrix or beneficiaries, who states that the testatrix gave specific instructions to him at the time when her mind was strong in faculty and fluent in expression, which he caused to be reduced into the form of a typed will which was read to her and explained before execution.

There is no evidence of the existence of any person or circumstances capable of giving rise to undue influence over the testatrix, or evidence of the actual existence of undue influence.

The will dated 14th April 2005 specifically revokes all former wills and codicils, and no evidence was given that the will of 4th January 1991 was validly executed. The plaintiff seeks to prove a will dated 4th January 1991 yet another will of the testatrix dated 13th march 2002 was tendered in evidence. The plaintiff therefore cannot obtain the declaration that he is entitled to apply for probate of a will dated 4th January 1991 without setting aside the will dated 13th March 2002. Further and additionally the evidence of Joan Mann (a witness to the will dated 4th January 1991) does not state that the testatrix signed in the presence of the other witnesses as required by Section 4 of the Wills Act.

There is no evidence that the defendant had anything to do with the preparation and Execution of the will. Even if the plaintiff is claiming that the estate is indebted to him because of his financial contributions, his cause of action would be against the estate and not a right to be left property in the will as a beneficiary.

With regard to the signature of the testatrix there was no allegation that it was forged, but if this was intended to be deduced from the plaintiff's evidence, then one has to take into account that no two signatures of the same person are exactly the same, and furthermore the signature of a person varies over time

due to age, sickness, mental and physical condition. There are three signatures, one on the authority to deposit the will, two on the wills.

There is no evidence to suggest that the testatrix did not sign all three documents. Even though she may have used different names the names are all her names.

Expert evidence was not called in respect of handwriting on “manufactured will”. Only evidence was given from the bar table.

In order to determine whether the signatures are those of the testatrix the following were referred to.

SUSPECT DOCUMENTS BY WILSON HARRISON PAGE 378 “Other characteristics of Genuine signatures”

> “The signatures of a good writer are certain to bear a strong resemblance to each other, but experience has shown that no matter how many are examined, no two will be found to be perfect replicas of each other, always provided that the signatures are of reasonable length and do not consist of but two or three letters. This should not be an unexpected finding because human beings cannot be expected to function with the precision of machines. The extent of the divergence is, however, much greater than might be expected. Even when a careful selection has been made from a large number of the signatures of a skilled penman, any two of which are chosen for their close resemblance will be found to differ in many respects when they are compared by being superimposed before a strong light. This plays any important part in the detection of traced forgeries.”

Page 379 “Letter design and Range Variation”

> “As no two signatures are identical, it follows that in signature, as with handwriting in general, a certain amount of natural variation in letter design must be expected and consequently allowed for, whenever signatures are being compared to determine whether or not they are of common authorship. Occasionally, as with other handwriting, accidentals may occur in genuine signatures, but it is fortunate that this is a comparatively rare occurrence because their presence is often wrongly regarded as definite indication that any signature so modified cannot be considered genuine. The existence of natural variation means that, as with other handwriting, a reasonable amount of standard material in the form of genuine signatures must be available for comparison, because it is essential that the range of variation in letter design which might be expected in a genuine signature should be determined before any comparisons are attempted with signatures of unknown authorship.”

> “Nothing is more calculated to bring the comparison of handwriting into contempt than the attitude of the witness who declares a genuine signature to be a forgery because it departs in some detail of letter design from either of the two genuine specimens he has used as the basis of his comparison. This kind of folly has happened within the experience of the author.

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> “The third is that no two genuine signatures of any length are replicas of each other. The existence of natural variation and the occasional occurrence of accidentals already referred to ensure that there will always be some variation in letter design and general structure among a group of genuine signatures.”

> "In view of the foregoing facts, it is more than unscientific, it is puerile, to attack any signature as a forgery simply by stating that it exhibits some obvious feature of letter design which cannot be matched in any of the genuine signatures which have been made available for examination."

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> "The second type of error is the reverse of the first in that genuine signatures are declared to be forgeries, or that handwriting is not that of the actual writer.

The reason for falling into this type of error may be summarized as follows:

(a) Failing to take into account the effect on handwriting of differences in age, mental and physical condition and the conditions under which it was written:

(b) Misinterpreting differences which are due to natural variation or accidental formation and treating them as evidence of different authorship."

After examining the three signatures of the testatrix, the one on the authority and the two wills, I find that there is similarity in the signatures on the will of 1991 and of 2005 and on the authority to deposit same. After comparing the signatures of the testatrix I am satisfied that it is her signature on the will of 14th April 2005. Even though she signed as Hopkinson instead of Cummings or Hopkinson-Cummings, in my opinion does not show a lack of testamentary capacity. They were all her names and the individual letters are similarly formed.

The circumstances suggested as suspicious circumstances are speculative, not supported by evidence, irrelevant or do not relate to circumstances surrounding the execution of the will.

In **Re Hollygan's Estate** 1983 35 WIR 224 at page 231 h-j the court stated as follows:-

"Notwithstanding the misdescription by the testatrix of the names of the two legatees referred to, she had indicated with sufficient certainty that the legacies were intended for Celeste Hollies and for the appellant Wilfred Adolphus Reid. It was manifest from the context that she had misdescribed those legatees. The court being clear about the true intention must give effect to that intention. I am of the view that the evidence as to the circumstances under which the will was prepared and signed was not such as to cause suspicion that the will did not express the mind of the testatrix."

I am of the view that the evidence as to the circumstances under which the will was prepared and signed was not such as to cause suspicion that the will did not express the mind of the testatrix.

Whether or not the defendant was told of the will cannot be a suspicious circumstance relating to the preparation or execution of the will. Whether or not Ramphal was there could also not be a suspicious circumstance. Whether or not the defendant was present when instructions were given is also not a suspicious circumstance and all the evidence is that she was not there.

That Clarke paid for the preparation of the will is not a reason to say that the will was not made by the tetstarix.

All other wills and testamentary deposits were revoked so there was no need to uplift the other will that was deposited.

That in the probate it was stated that the deceased was once married cannot affect the testatrix's ability to make will. That the affidavit signed by Ms. Troyer to probate the will did not state Clarke's name as other witness cannot mean that the testatrix lacked testamentary capacity. His name was on the will as a witness. That Mr. Kissoon did not probate the will cannot affect the testatrix ability to make will and cannot be seen as a reason for saying that the will was a forgery and that undue influence was exercised at the same time.

Disposition of shares in Bank to Barbara Hopkinson cannot affect the preparation and execution of the will.

Re Hollygan's Estate

Suspicious circumstances must attend to the preparation and execution of the will.

The testimony of Mr. Kissoon and Mr. Clarke as to the testamentary capacity of the testatrix at the time when the will was executed and as to the due and proper execution of the will are enough to remove any suspicious circumstances and to establish that the testatrix knew and approved of the contents of the will.

The plaintiff also claimed that the fact that Ms. Troyer was not called as a witness would have exposed the false will. Reasons were given for Ms. Troyer's non availability. Only one witness to a will needs to be called. Witness to a will is a witness of the court. Plaintiff could have called Troyer and cross-examined her if she would have exposed the forging of the will. He did not do so.

JONES V JONES 24 TLR 1970 Annual Practice 38/1/3.

Evidence of one witness is sufficient – Halsbury 4th edition vo. 17 paragraph 892.

The practice is stated in Phipson on Evidence 10th ed, at para 1542:-

> "Notice to witness: omission to cross-examine. As a rule a party should put to each of his opponent's witness in turn so much of his own case as concerns that particular witness, or in which he had a share eg. If the witness had deposed to a conversation, the opposing counsel should indicate how much he accepts of such version, or suggest to the witness a different one. If he asks no question he will in England, though not perhaps in Ireland, generally be taken to accept the witness's account."

A case cited by Phipson…… the passage quoted in **Brown v. Dunn** (1893) 6 R 67 (H.L.). There Lord Herschell L.C. said at pp 70-1:-

> "Now, my Lord, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross – examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses."

A number of these “speculations” were not even suggested to the witnesses as part of the plaintiff’s case. It was never suggested to Clarke or Mr. Kissoon that the signature on the will was forged and that therefore their evidence as to execution was false.

The necessity to cross-examine on material issues that are relied on was discussed in **Marston Exclusion Ltd v Arbuckle Smith & Co. Ltd** 1971 Vol. 2 Lloyd Law Reports p. 306.

In the circumstances the plaintiff’s case is dismissed and judgment is granted for the defendant on the counterclaim as follows:

(1) A declaration that the will dated 14the April 2005 is the true and last will and testament of Helena Gerhardina Hopkinson, deceased.
(2) That the will dated 14th April 2005 be admitted to probate in solemn form.
(3) A declaration that the defendant is entitled to apply for probate of the will dated 14th April 2005.

Costs $50,000.

……
Diana F. Insanally

Dated 22nd November 2012.