

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CIVIL JURISDICTION

BETWEEN:

1. MOHAMMED YUSUF ZAFAR represented by his duly constituted attorney Mohammed Tabeeb Zafar by Power of Attorney No 7876/2011.

2. JOSEPH ZAFAR represented by his duly constituted attorney Mohammed Tabeeb Zafar by Power of Attorney No 7878/2011.

3. BIBI HALIMA MAHADEO nee ZAFAR represented by his duly constituted attorney Mohammed Tabeeb Zafar by Power of Attorney No 7877/2011.

4. MOHAMED TABEEB ZAFAR

Plaintiffs

-and-

MOHAMED NIZAM ZAFAR

Defendant

Mr. R. Poonai S.C. for the Plaintiffs

Ms. A. Lall & Mr. B. De Santos for the Defendant

Decision of the Honourable Madame Justice Priya Sewnarine-Beharry

1. The Plaintiffs and Defendant are the children of Jameeran Zafar.

2. Jameeran Zafar died on 25th day of June 2011 at the age of 91.
3. On 12 September 2007, she executed a Last Will and Testament in which she appointed the Second, Third and Fourth Plaintiffs, executors and left all her property movable and immovable to be shared equally among her children.
4. After Jameeran Zafar's death the Defendant produced an alleged Last Will and Testament dated 7th March 2011.
5. The will dated 7th March, 2011 was executed three months prior to Jameeran's death and appointed the Defendant executor. In this will, the Defendant was named the sole beneficiary of Jameeran Zafar's immovable property and his eight siblings were left \$1000 GYD each.
6. The Plaintiffs contended that their mother was in no physical condition or mental state to execute the will dated 7th March 2011. Further, the Defendant who kept their mother exercised undue influence over her in that he kept her away from her other children, was in control of her, kept her away from being treated for her illness and refused her medication notwithstanding her medical condition.
7. The Plaintiffs claimed further that the Defendant dissipated all the finances of their mother by unlawfully dealing with her bank accounts.
8. They filed this action seeking:
 - A declaration that the will dated 7th March 2011 was obtained by fraud, undue influence and duress committed by the defendant;
 - A declaration that the will dated 12 September 2007 is the true will of Jameeran Zafar;
 - An order that the Defendant do account for all his dealings in the Estate of Jameeran Zafar;
 - Damages in excess of \$50,000 for fraud committed by the Defendant in his intermeddling of the Estate of Jameeran Zafar;
 - Any such further or other orders as the Court deems just;
 - Costs
9. The Defendant contended that Jameeran Zafar's Last Will was executed on 7th March 2011 together with Memorandum No 154 of 2011 before an Assistant Sworn Clerk of the Supreme Court Registry and lodged for safe custody.
10. He denied exercising undue influence over his mother and unlawfully dealing with her bank accounts. He said that he was a

loving son who cared for his mother and as a result she executed a Memorandum of Deed of Gift on 7th March 2011 in his favour.

11. He counterclaimed for a declaration that the will dated 7th March 2011 was the true last will and a declaration that the purported will and testament dated 12 September 2007 was not the last will.

Evidence

12. Defendant commenced the matter to prove the will dated 7th March 2011 in solemn form. He testified together with Ms Z. Stepheney and Ms Thompson, the witnesses to the will dated 7th March 2011.
13. Ms. Zola-Ann Stepheney in her witness statement said that the Defendant and Jameeran Zafar came to the Law office of Ms. Gloria Stepheney where she was employed as a steno typist on 7th March 2011.
14. She said Jameeran Zafar went in to see Ms. Gloria Stepheney and the Defendant waited outside. A few minutes after Ms G. Stepheney, attorney-at-law called herself and Simone Thompson into the office for the execution of the will.
15. She stated that the will and Deed of Gift were prepared and read over by Ms. G. Stepheney to the deceased. Ms. Z. Stepheney and Ms. Thompson then read the will and the deceased affixed her right thumbprint in her presence, that of Ms Thompson and the defendant. Ms. Z. Stepheney and Ms. Thompson also affixed their signatures and addresses.
16. Jameeran Zafar was taken to the Deeds and Probate Registry where the will was registered and a Memorandum issued by the Registry while the Defendant waited at the office.
17. According to Ms. Z Stepheney, Jameeran Zafar and the defendant then left the office with the Memorandum of Deed of Gift to execute same before a Notary Public and shortly after returned. She said she observed on the executed Deed of Gift the left thumb print of the deceased and the stamp and signature of Ms. Bibi Shadick, Notary Public. She took the executed Memorandum of Deed of Gift and lodged it at the Deeds Registry as Deed of Gift No 337/2011 on 17th March 2011.
18. In cross-examination, Ms. Z. Stephaney denied being employed as a steno typist and said that she was employed as a Legal Clerk. She said both the will and Deed of Gift were prepared the same day and that the right thumb print of Jameeran Zafar was

placed on the will the day it was prepared but was unable to say whether the Deed was executed the same day. Notwithstanding, this contradiction to her witness statement she accepted that Jameeran Zafar and the Defendant left to execute the Deed of Gift and returned the same day.

19. Ms. Z. Stephaney in cross-examination further stated that Jameeran Zafar affixed her thumbprint to the will because she could not write at the time and she held Jameeran Zafar's hand to affix her thumbprint. Ms. Z. Stephaney further admitted that she did not mention this in her witness statement.
20. Ms. Thompson's witness statement mirrored Ms Z. Stepheney's witness statement except for paragraph 10. In paragraph 10 she claimed to have read the will before passing same to Ms Z. Stepheney. In her witness statement she said that Jameeran Zafar affixed her right thumbprint to the will and she observed the left thumb print of Jameeran Zafar on the Deed of Gift which was notarised by Ms Bibi Shadick. However, in cross-examination, she said she could not say which of Jameeran Zafar's thumbprints were used for either the will or Deed of Gift and she did not see any notarised document by Ms Shadick or know about Ms Shadick and any document.
21. According to the Defendant's witness statement Jameeran Zafar made two earlier wills dated 12 June 1992 and 12 September 2007.
22. He said that the Fourth named Plaintiff sponsored himself and their parents around 1975-1977 to migrate to Canada but their parents returned to Guyana and their papers subsequently expired.
23. He said after his father's death in 1992 his mother lived alone and was often depressed and sick. Further, all his siblings lived abroad. He said he begged the Fourth Named Defendant to sponsor their mother but he refused.
24. The Defendant said when he regularised his papers and gained citizenship in Canada he sponsored his mother to move with him to Canada. He said his mother lived with him from 1992 until her death during which time he cared and maintained her and bore all her expenses as she was neglected by her other children.
25. He said his mother lived with him in Florida at the time of her death but would frequent Guyana yearly and would visit the First Plaintiff from time to time and his sister who lived in the same neighbourhood as he.

26. He said that his mother on 26th May 2010 executed a Power of Attorney for Personal Care in his favour and she used her initials 'JZ' because she could not sign her name as her hands were shaking too much. He said by 2011 she stopped using her signature and used her thumbprint.
27. The Defendant said that a few days before his mother passed away he asked the Third named Plaintiff to receive his mother in Canada because she received medical benefits there but she refused. He said he took his mother to a hospital in Florida where she was admitted for heart surgery and removed to a hospice for three days before she died of heart failure, kidney failure and hypertension. He said he notified the First Plaintiff who said to tell her good luck. The Defendant said that he paid all funeral expenses and debts and the First and Second Plaintiff never attended their mother's funeral.
28. He said that prior to their mother's death, the First and Second Plaintiffs, stopped all communication with their mother because she stopped the First Plaintiff from managing her affairs in 2010 after he used her finances to pay for his house without her permission.
29. He said that the Plaintiffs upon discovering the will dated 7th March 2011 caused him to lose pension benefits in Canada and they are no longer on speaking terms.
30. The Defendant's evidence in his witness statement regarding the due execution of the will dated 7th March 2011 also mirrored Ms. Z Stepheney's and Ms. Thompson's witness statement.
31. The Defendant denied allegations that he exercised any control or influence over their mother; kept her away from her children as she visited another sister and the First Plaintiff frequently; kept her away from being treated for her illness as he made sure she visited the hospital frequently; refused her medication as three days prior to her death she was taken to hospital and admitted.
32. He said she willingly lived with him because his siblings did not care for her. He maintained that their mother had the mental state of mind to execute a valid will on 7th March 2011 as she had frequent telephone conversations with her children, had just travelled to Guyana alone and had sound disposing mind and memory.
33. He refuted the Bibi Zurida Hassan's (the Plaintiffs' witness) claims that she cared for his mother while in Guyana. He said

that she was a distant relative who would visit whenever his mother was in Guyana and that his mother would cook for herself and was not cared for by anyone while in Guyana. He said his mother and Bibi Zurida Hassan had a bank account for the latter to deposit the rent received for the rental of his mother's property. He said that prior to Jameeran Zafar's death Bibi Zurida Hassan stole from his mother and the matter was reported to the police. As a result of the accusations Bibi Zurida Hassan informed him she would not visit anymore and was not around. He admitted in cross-examination that that Bibi Zurida Hassan was authorised in matters relating to the tenant and was trusted by his mother. Further, she handed over a Republic Bank Book that had in excess of one million dollars to him. He admitted that he used this money to take care of his mother and that that he withdrew the money after she died and used it for her expenses. He said further that his mother was overseas spending and he took back what he spent by using her money. He admitted that the will and Deed of gift gave him back the money he spent on her.

34. The Defendant in cross-examination admitted further that Jameeran Zafar's US Dollar and Canadian dollar accounts were turned over to him with significant sums of money. He admitted that he used the money for her expenses but had no receipts to show how he used her money.
35. He said in April 2011 his mother visited Guyana but took ill before she left. He said she was admitted to the Best Hospital for pneumonia, received medication and was subsequently discharged.
36. In cross-examination, the defendant admitted that Jameeran Zafar was on medication for blood pressure and also drank water tablets. He admitted that his mother made four previous wills which left her property to be divided among her children equally and appointed the Fourth named Plaintiff and/or his siblings executors of the will. He admitted that the will dated 7th March 2011 left the property solely to him.
37. He said he took Jameeran to a hospital after she returned to Florida for medication and three days before she died. He denied informing his siblings of Jameeran's illness two days before she died. The Defendant said Jameeran visited his siblings over the years and would call them except for the First and Fourth Plaintiffs. He maintained that he cared and maintained his

mother solely as the other children neglected her. He said that his siblings were only named executors of the previous wills because they influenced her.

38. He admitted all the previous wills were signed by his mother and that the 2011 will was the only one bearing her thumbprint. He denied that the reason his mother could not sign the 2011 will was because her hand shook. He further denied that someone held her hand to affix her thumbprint.

The Law

39. A person seeking to propound a will must prove both its due execution in accordance with Section 4 of the Wills Act Cap 12:02 and the testamentary capacity of the testatrix.
40. In **George Chee vs. Cao Min Wei** et anor Civil Appeal No 71 of 2002, Bernard C postulated that 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.
41. As regards testamentary capacity, it must be proved that the testatrix at the time the will was executed had testamentary capacity, that is to say, the testatrix understood:
- the broad effect of her wishes being carried out;
 - the extent of the property she is disposing; and
 - the claims she ought to give effect;
42. The legal burden of proof of due execution and testamentary capacity always lies upon the person seeking to propound a will.
43. In **Alvarez vs. Chandler** (1962) 5 WIR at 226 the court noted that where a will is executed in a manner prescribed by law and on its face appears rational it is presumed that the testatrix had testamentary capacity. However, if there are circumstances surrounding the execution of the will which excite the suspicion of the court, those seeking to propound the will must adduce affirmative evidence of knowledge and approval. At page 229 the court opined:

“The onus which lies in every case upon a party propounding a will is one requiring him to satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator: *Barry v Butlin* ((1838)... This is generally recognised as a fundamental rule of probate law. It is quite true that, in the 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: *Symes v Green* ... but, 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: *Baker v Batt* ...”

44. In the case at bar the will dated 7th March 2011 on its face seems to have met the requirements of Section 4. However, the circumstances surrounding the execution of the will have caused the court to question whether the testatrix had testamentary capacity at the time the will dated 7th March 2011 was executed.
45. It is trite that if a party is instrumental in the preparation of a will under which he takes a benefit that is a circumstance which ought to generally 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 suspicion is removed, and, it is judicially satisfied that the paper propounded does express the true will of the deceased.
46. The learned authors of **Halsbury's Laws of England** 3rd ed Vol 39 p 859 speaking to the issue of want of knowledge and approval had this to say:
- “Still stricter proof is required where there is some weakness in the testator which, although it does not amount to incapacity, renders him liable to be made the instrument of those around him(u); or where the testator is of extreme age(a); or it is alleged that the will was prepared or obtained through a person benefitting thereby(b)...or where knowledge of the contents of the will is not brought home to him(d); or where the will was prepared on verbal instructions only(e); or where the will is at variance with the known affection of the testator(g) or previous declarations(h), or dispositions in former wills(i) or a general sense of propriety.”
47. The following the circumstances surrounding the execution of the will dated 7th March 2011 cast grave suspicion the testatrix’s knowledge and approval of the contents of the will.
- The Defendant was instrumental in taking Jameeran Zafar to Ms Gloria Stepheney, attorney-at-law, to prepare and execute the will;
 - Ms. Z. Stepheney in cross-examination admitted that she held Jameeran’s hand to affix her thumbprint, a material fact omitted from her witness statement.
 - A right thumbprint was used on the will and the left on the Deed;

- The Defendant in paragraph 35 of his witness statement stated in 2010 his mother could not sign her name because her hands shook too much and further by 2011 she stopped using her signature and began using her thumbprint as her hands were shaking too much. In cross-examination he denied that someone had to hold his mother's hand to put her thumbprint because her hand shook. He further denied that the reason why his mother could not sign was because her hands shook so much.
- Ms Thompson said in her witness statement that she witnessed the deceased affix her right thumbprint to the will but in cross-examination she admitted she could not say which of Jameeran's thumbprints were used on the will.
- Both Ms Stepheney and Ms Thompson gave inconsistent testimony regarding the execution of the Deed of Gift. They both said in their witness statements that Jameeran Zafar and the Defendant left to execute the Deed of Gift and returned shortly after. In their respective witness statements they each said that they observed Jameeran's left thumbprint on the Deed which was notarised by Ms Shadick. Ms Stepheney in cross-examination said that she could not recall if the Deed was executed the same day. Yet she later accepted Counsel's suggestion that the duo left and returned shortly. Ms Thompson in cross-examination said she was unsure which of Jameeran's thumbprints were used for the Deed Gift and further said she did not know anything about the document being notarised by Ms Shadick. In this regard, the Defendant in cross-examination denied that the Deed was executed the same day. He said the Will and Deed were read to Jameeran Zafar on 7th March however the will was executed on the 7th March while the Deed was executed on 17th March. He could not explain why the affidavits of Donor and Donee bore the date, 16th March.
- Why was it necessary to prepare a will if Jameeran intended to Gift the property to the Defendant? Was it to be doubly sure the property would pass to him?
- The property subject of Transport 2820 formerly belonged to Bookers Demerara Sugar Estates and Mohammed Tabeeb Zafar and was passed to Jameeran Zafar; The

Defendant despite claiming that Mohammed Tabeeb Zafar did not have the finances to purchase the property led no evidence to prove this. The Defendant did not lead any evidence that he played a part in its acquisition or any evidence or any tangible evidence that he maintained that property;

- Jameeran Zafar was 91 years old when she executed the will;
- She died a mere three months after the will was executed;
- She was hospitalised shortly before her departure to Florida with pneumonia.
- She was on medication for blood pressure and also drank water tablets.
- Jameeran Zafar made four previous wills which were signed; only the will dated 7th March 2011 bore her thumbprint.
- She named children other than the Defendant to be executor(s) of those wills despite the Defendant's claims that her other children did not care for her and neglected her. In this regard, I do not find any merit in this or the Defendant's allegation that his siblings influenced their mother to be named executors and or beneficiaries to the earlier wills because the Defendant did not mention this in his witness statement. Also, if his siblings had indeed neglected their mother it is doubtful that she would have named them executors and or beneficiaries to her earlier wills. It is noteworthy that the Defendant acknowledged that Jameeran visited her children including the first Plaintiff over the years. Also, notwithstanding the fact that she lived with the Defendant for numerous years Jameeran Zafar in her previous wills left her estate to be shared equally among her children.
- In the previous four wills Jameeran Zafar left her property to be distributed equally among her children; In the will dated 7th March 2011 the Defendant inherited the immovable property solely.
- The Defendant returned with his aged sick mother to the United States despite the fact that knew she had medical benefits in Canada. He must have known that her condition prior to leaving Guyana was serious as she required hospitalisation; Despite his claims that he took his mother

to the hospital upon his return to the USA for medication or otherwise, I do not believe him as he provided no tangible proof that he took her to the hospital. In fact apart from him saying so he provided no evidence that *he solely* cared for and maintained her over the years;

- From the evidence led Jameeran Zafar appeared to be financially capable of taking care of herself;
- From the Defendant's evidence he was in sole control of his mother's personal care since May 2010 and remained in control of her affairs during the time of the execution of the will and up until her death;
- Jameeran's Canadian and USD accounts with significant sums of money were handed over to the Defendant. He also took control of her local account also which held in excess of 1 M. He admittedly withdrew from these accounts to pay his mother's debts and expenses which he said she incurred here and overseas. This contradicts the Defendant's own evidence that he solely cared for, maintained and paid all expenses for his mother. The Defendants credibility is also questionable in light of his own admission that he was reaping medical benefits in Canada although he lived in the USA;

The words of Lindley LJ in Tyrell vs. Painton (1804) bear repeating. He said 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.***"

48. In my view the Defendant has been unable to remove the court's suspicious and prove affirmatively that the testatrix knew and approved of the contents of the will dated 7 March 2011.
49. It is to be noted that ***it is only when those propounding the will remove suspicion and prove affirmatively that the testator knew and approved of the contents of the will*** that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will": See **Tyrell vs. Painton** (1804) P 151 per Lindley LJ at 157. In Tyrell the court pointed out that it will not presume fraud or undue influence but ***where there are circumstances in connection with the preparation and execution of the will which excite the***

Court's suspicion and vigilance it may pronounce against the will, unless such suspicion is removed, even though no fraud or undue influence can be brought home to the person propounding the will.

48. It is therefore unnecessary to determine whether the Plaintiff proved undue influence, fraud or duress.

49. In the circumstances, this court orders that:

(1) The Last Will and Testament of Jameeran Zafar dated 7th March 2011 is pronounced against;

(2) The Defence and Counterclaim is dismissed;

(3) Judgement is entered for the Plaintiff in terms of paragraph (b) and (c) of the Plaintiff's prayer for relief set out in his Statement of Claim thus:

(b) A Declaration that the Will dated 12 day of September 2007 is the true will of Jameeran Zafar deceased;

(c) An order that the Defendant do account for all his dealings in the Estate of Jameeran Zafar deceased.

(4) Costs are awarded to the Plaintiff in the sum of 150,000.

Priya Sewnarine-Beharry

Puisne Judge

23rd March 2020