IN THE SUPREME COURT OF BELIZE, A.D. 2011

CLAIM NO. 206 OF 2013

BETWEEN:

ISIAS FRANCO MORALES **Claimant**

AND

IRMA CHAN **Defendant**

BEFORE: Hon. Chief Justice Kenneth Benjamin.

Appearances: Mr. Oswald Twist for the Claimant
Mrs. Cynthia Pitts for the Defendant

JUDGMENT

[1] This case involved competing claims in respect of two separate wills purported to have been executed by Camila Franco. The Claimant is the husband of the deceased who died on June 4, 2012 and the Defendant is her sister. Both parties are seeking the pronouncement of the Court in respect of these separate wills alleged to have been made by the deceased appointing each of them as the Executor of the will he or she seeks to propound. The Claimant seeks an order pronouncing that the alleged will dated June 1, 2012 in which he is named as executor, supersedes the earlier will dated May 13, 2012 to be the only valid will. Each party also seeks an order granting probate of the alleged will upon which he or she seeks the pronouncement of the Court as to its validity.

[2] On September 18, 2012 Probate of the Estate of the deceased was granted to the Claimant as the person named as Executor in the purported will of Camila Anselma Franco dated June 1, 2012. Such Probate was recalled on October 5, 2012 by subpoena after it was discovered that an official error was made in its issuance. The grant of Probate was subsequently returned to the Probate side of the Supreme Court.

[3] The Defendant by her Attorney-at-Law caused a caveat to be entered against the Grant of Probate to the Claimant and notice of the caveat was given to the Claimant's Attorney-at-Law. A warning to the caveat was issued by the Deputy Registrar at the instance of the Claimant and the Defendant entered an appearance to the warning.

[4] There followed the filling of the Fixed Date Claim Form with Statement of Claim in the present proceedings. In the Statement of Claim, the Claimant pleaded that he is the named executor and a beneficiary under the will dated June 1, 2012 of the deceased of whom he is the lawful husband and who died testate on June 4, 2012. He asserted that he is entitled to probate of the said will, which is the only valid will and he knew of no other will of the deceased. It was stated that the will was duly executed in the presence of credible witnesses and at the time the deceased was of sound mind and not subjected to undue influence or fraud. The following relief was sought:

"1. An order or declaration pronouncing that the Claimant is the only person entitled to Grant of Probate of the will of the deceased Camila Anselma Franco of Bullet Tree Falls, Cayo District, Belize dated June 1, 2012.

2. An order or Declaration pronouncing that the will dated June 1, 2012 made by the deceased Camila Anselma Franco of Bullet Tree Falls, Cayo District in favour of the Claimant appointing him executor and beneficiary is the only valid will.

3. An Order or Declaration granting probate of the will dated June 1, 2012 made by the deceased Camila Anselma Franco of Bullet Tree Falls, Cayo District to the Claimant.

4. An Order of Declaration pronouncing that the will dated June 1, 2012 made by the deceased Camila Anselma Franco of Bullet Tree Falls, Cayo District was duly executed
5. An Order or Declaration pronouncing that the will dated 1st June 2012 made by the deceased Anselma Franco of Bullet Tree Falls, Cayo District is valid since at the time of the will the deceased was of sound mind, memory and understanding.
6. An Order or Declaration pronouncing that the will dated 1st June 2012 made or obtained by undue influence or fraud perpetuated by the Claimant or any other person.
7. That the Claimant be granted such further and or relief as the Honourable Court deem just.
8. Cost (sic)".

[5] The Defendant filed a Defence and Counterclaim. In the Defence, it was contended that the alleged will June 1, 2012 was not a valid will nor was it a testamentary document as it did not make any disposition of property. It was further averred that the said alleged will was not duly executed in accordance with the Wills Act Chapter 203 of the Law of Belize. The Defendant asserted that the will dated May 13, 2012 is the only valid will and that the Claimant was present at the execution of such will.

[6] The Defence averred that the deceased was not of sound mind, memory and understanding at the time the will was alleged to have been made on June 1, 2012 because of her illness and deteriorating condition or alternatively she was not aware of and did not approve of the contents of the will. As regards, the daughter of the Claimant and the deceased, who purportedly signed the alleged will on behalf of the deceased, it was said that she did so on the instructions of the Claimant and not on the instructions of the deceased. As an alternative, in the event that the alleged will was declared to be a will, the Defendant contended that the circumstances surrounding the preparation and execution of the will coupled with the actions of the Claimant raised the suspicion that

the Claimant was acting improperly and fraudulently. The entitlement of the Claimant to the Grant of Probate of the will dated June 1, 2012 was challenged.

[7] The Counterclaim relied upon the matters pleaded in the Defence and sought the following orders:

> "1. An Order or Declaration pronouncing that the purported will dated 1st June, 2012 allegedly made by the deceased is not a valid will.
> 2. An Order or Declaration pronouncing that the will dated 13th May 2012 made by the deceased is the only valid will.
> 3. An Order or Declaration granting probate of the will dated 13th May 2012 to the Defendant.
> 4. An Order or Declaration pronouncing that any monies paid to the Claimant as a result of the grant of probate of the will dated 1st June 2012 which was subsequently revoked be paid into the estate of the deceased".

[8] In the Defence to the Counterclaim, the Claimant in general rejected the Counterclaim and specifically repeated the assertion that the will of May 13, 2012 is not a valid will. It was alleged that the signature appearing on that will was not that of the deceased.

[9] The will of June 1, 2012 purports to revoke all previous wills and testaments and states as follows:

> *"I hereby authorize my husband, Isaias Franco Morales to serve as executor of all my properties and benefits. In addition, I further authorize my husband to conduct any banking transaction on my behalf".*

The will does not dispose of any property. It bears the signed name of Camila Franco above the typed name 'Camila Anselma Franco'. There follows in someone's handwriting the following words:

"Mrs. Camilla Franco was unable to sign her full name but on behalf of the two witness (sic) she agreed to have her daughter Amili Franco to sign her names"

[10] Each party sought to obtain a declaration or order of the court as to the validity of the will in which he or she is named as the executor or executors. The Claim Form asserted the validity of the second will of June 1, 2012 and as a consequence the revocation of the first will of May 13, 2012. It is common ground that if the 2nd will is propounded as valid, the 1st will is of no moment. Although the Claimant pleaded in the Defence to counterclaim that the 1st Will dated May 13, 2012 was not a valid will and that the signature was not that of the testatrix, this was not pursued at trial nor challenged by way of evidence.

Issues for Determination

[11] Accordingly, the issues for the determination of the Court are as follows:

1. Was the will of June 1, 2012 validly executed in accordance with the Wills Act, Chapter 203 of the Laws of Belize?
2. Is the will of June 1, 2012 a valid testamentary document?
3. Did the testator have the necessity testamentary capacity when the said will was executed; and was there any undue influence exerted upon the testator at the time of the execution of the said will;
4. Did the testator know and approve of the contents of the said will?

Was the will of June 1, 2012 validly executed?

[12]. The Claimant submitted that the will dated June 1, 2012("Will No. 2) was duly executed in accordance with the Wills Act Chapter 203 of the Laws of Belize. Further, since that will is later in time than the will of May 13, 2012("Will No. 1"), Will No. 2 is valid and effectual. Learned Counsel for the Claimant made reference to the testimony

of the Claimant and his witnesses, Amili Franco, Consuel Tzib, Mark Myvett and Santos Tesecum.

[13]. The formalities required by law for the execution of a will are set out in Section 7(1) of the Wills Act which provides:

> *"7. (1) No will shall be valid unless it is in writing and executed in manner hereinafter mentioned, that is to say :-*
> *(a) 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*
> *(b) Such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and*
> *(c) such witnesses shall attest and subscribe the will in the presence of the testator."*

These statutory requirements are cumulative and must be fulfilled if the will is to be deemed duly executed.

[14]. The evidence led was that the deceased was at the home of her mother-in-law (the mother of the Claimant-her husband) at 39 Joseph Andrews St., San Ignacio (See: Evidence of Mark Myvett, Transcript 106. Evidence of Consuelo Tzib, Transcript p. 116 evidence of Santos Tesecum, Transcript p. 95) when Will No. 2 was executed. Her name was signed by her daughter, Amili Franco, at her direction in the presence of Consuelo Tzib, Mark Myvette and Antonio Pacheco. Consuelo Tzib and Mark Myvette signed as witnesses and their signatures were followed by the stamps and signatures of Consuelo Tzib and Antonio D. Pacheco in their capacities as Justices of the Peace.

[15]. The Defence averred that the Will No. 2 was not executed in accordance with the Wills Act "as the provisions relating to the directions given by the Testator and the acknowledgement by the Testator were not in accordance with the Act." This was, rejected by the Claimant in the Defence to Counterclaim. However, this averment was

not pursued by Learned Counsel for the Defence in either her written or oral submissions and Learned Counsel for the Claimant were silent on the point.

[16]. Accordingly, I hold the Will No. 2 to have been validly executed by the deceased on June 1, 2012 in accordance with the provisions of the Wills Act, Chapter 203.

IS THE WILL OF JUNE 1, 2017 A VALID TESTAMENTARY DOCUMENT?

[17]. In paragraph 3 of the Defence and Counterclaim, it was pleaded that Will No. 2 is not a testamentary document because it does not dispose of any property. This repeated what was stated in the appearance entered by the Defendant to the warning issued by the Registrar General. It was rejected by the Claimant in the Defence to counterclaim.

[18]. In Will No. 2, the document named the Claimant as executor but it did not make provision for the disposition of any property. The second paragraph of Will No. 2 reads:

> *"I am married to Isaias Franco Morales and I have four children, namely, Melissa Judith Franco, Amili Ninfa Franco, Christopher Isaias Franco and Nasson Yasser Franco."*

The fourth paragraph goes on to appoint Christopher Isaias and Amili Ninfa Franco "as executors upon reaching the age of eighteen" in the event that the testator's husband failed to survive" No mention was made of any property far less to make any devise thereof.

[19]. Learned Counsel for the Claimant addressed the issue by reference to Halsbury's Laws of England, 5th ed. Volume 102 at paragraph 2 where it is stated that a will may be made solely for the purpose of appointing executors. The foot note mentions that before the Land Transfer Act 1897 [UK], a will would not have been

admitted to probate where it did not dispose of personality and contained no appointment of executors. This represented a change to the common law which was embraced as the law of Belize by virtue of the Imperial Laws (Extension) Act, Chapter 2 which provides at:

Section 2(1) –

> *"Subject to the provisions of this or any other Act, the common law of England and all Acts in abrogation or derogation or in any way declaratory of the common law passed prior to 1st January 1899, shall extend to Belize".*

In as much as the point was raised by the Defendant, Learned Counsel for the Defendant did not present any written or oral submissions to support her objection and she must therefore be taken to have conceded the point. Accordingly, I hold that Will No. 2 is a valid testamentary document notwithstanding that it only names an executor but does not purport to dispose of any property.

DID THE TESTATOR HAVE THE NECESSARY CAPACITY WHEN WILL NO. 2 WAS EXECUTED?

[20]. The law presumes that a duly executed will is that of a person of sound mind, memory and understanding unless the contrary is proved (see: **Sutton v Sadler (1887) 3 C.B. (N.S. 87) Burrows v Burrows [1827] 1 Hagg. 109**). The Defendant submitted that the deceased did not have proper testamentary capacity when she signed the purported will. The onus of proving that the testator was possessed of testamentary capacity rests upon the Claimant as the person seeking to propound Will No. 2 (**Barry v Butlin (1858) 2 Moo. PCC 480 at pp. 485-3**). In the case of **Hoff v Atherton [2004] EWCA Cir. 1554** Peter Gibson, LJ explained the requirement of testamentary capacity in this way:

> "33. It is a general requirement of the law that for a juristic act to be valid,

the person performing it should have the mental capacity (with the assistance of such explanation as he may have been given) to understand the nature and effect of that particular act (see: for example, Re K (Enduring Powers of Attorney [1982] Ch. 310 at o. 313 per Hoffmann, J.) To make a valid will the law requires what is always referred to as testamentary capacity and, as a separate requirement, knowledge and approval. The latter requires proof of actual knowledge and approval of the contents of the Will. The two requirements should not be conflated. The former requires proof of the capacity to understand certain important matters relating to the Will. What those matters are were stated by Cockburn, CJ in **Banks v Goodfellow (1870) LR5 Q.B. 549 at page 565:**

> *"It is essential.... that a testator shall understand the nature of his act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he might give effect..."*

[21]. In the case of **Moonan v. Moonan (1963) 7 WIR 420** Wooding, CJ also recognized the distinction between testamentary capacity on the one hand and knowledge and approval of the contents of the Will on the other. His Lordship cautioned that these are separate defences and are to be considered separately as "they are different in intent and meaning. One goes to testamentary capacity, and the other assumes testamentary capacity." (Ibid. Pg. 422)

[22]. It has been judicially accepted that for a testator to be of sound mind, memory and understanding he or she must have a sound disposing mind of sufficient capacity to grapple with and understand what property he was disposing of by signing the will (**Hastilon v Stobie 1865) LR 1 P. & P. 64 at p. 68**). As to the meaning of "sound disposing mind" Halsbury's Laws of England, 5th edition Volume 102, at p. 45 states:

" 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 his claims of others whom by his will he is excluding from participation in that property."

In **Tristram v Coote's Probate Practice** (21st edn.) at page 654, the learned authors list four classes of persons incapacitated from making a Will by reason of mental unsoundness: The present case involves a testator who was mentally unsound from sickness. Wooding, CJ. In **Moonan** (at p. 423) set out the options open to the court is resolving the issue of testamentary capacity when he said:-

"The resolution of that issue may be in one of three ways: either that the court is affirmatively satisfied that Joseph Moonan was sound in mind, memory and understanding, or that the court is satisfied that he was not sound in any of these respects or that the court is left in doubt, with the result that the issue has to be resolved against the appellants who, as I said, were propounding the will."

[23]. Neither side led any evidence as to the medical condition of the deceased at the time when Will. No. 2 was alleged to have been made on June 1, 2012. The circumstances and the deceased's condition are to be gleaned from the evidence of the Claimant and his witnesses and from the observations of the Defendant and her witnesses prior to and subsequent to the execution of Will No. 2 on June 1, 2012. The Claimant told the Court in cross-examination that the deceased was diagnosed with cervical cancer for which she sought treatment at a facility in Guatemala. In May 2012 she was hospitalized in Belmopan. In his witness statement, he stated that she was of sound mind, memory and understanding on June 1, 2012 even though she was very weak due to cancer. He told the Court that the doctor had given up on her treatment as there was no remedy for her but that she was 'in good condition'. When asked what he meant by 'in good condition' he said: "She could speak to me, talk to me and tell me

what she wanted'... she lasted three weeks and she was talking up to the time her death."

[24]. The deceased's young daughter, who was 16 years of age when her mother died, stated that in her witness statement of September 30, 2013, that her mother was diagnosed with cancer in 2009 and that from around the end of May, 2012 up to her death she was at a terminal stage. She was then weak, her condition steadily deteriorating and she was not responsive to what was going on around her. She signed to a statement that described her mother as being in a very weak condition when she was sent home from the Hospital two weeks before her death. In a later statement of October 3, 2013, she wrote something vastly different. She conceded that her mother was extremely ill with cervical cancer and was weak, she nevertheless was "fully alert and conscious and fully aware of everyone in presence and her surroundings". Amili went on to state:

> "8. I read the content of the Will loudly to my mother the deceased and asked her if she understood what she was doing and if what I read to her she agreed with. She said yes quite clearly.
> "9. My mother the deceased then told me she felt kind of weak and if I could sign her name to the Will."

[25]. In response to Learned Counsel for the Defendant when cross examined, she told the court that she was assisting in her mother's care in the week or two weeks close to her passing. She was then staying in her mother's house at Bullet Tree Falls. She observed that her mother was getting weaker.

[26]. Amili was asked to explain the divergence between her two witness statements. She told the Court that she did not want any problem with both families so she signed both statements. She, however, insisted that what she said in court was the truth. This did nothing to reconcile the opposing statements as to the responsiveness or lack thereof of her mother prior to her death. In Court, she said that her mother wanted to go to her grandmother's house where the will was signed and that her mother handed her

the pen to sign Will No. 2. She recalled a conversation between her mother and the Claimant in the following terms:

> *"My father just asked my mom if she wanted to make a new Will, because the first Will was read to her and she said it was bogus, something like that. And then he asked her if she was willing to make a new Will. She was asked like two times and then she said yes."*

[27]. Amili was plainly under the influence of her father. Even if she was not, the variance between her two statements is not satisfactorily explained. This rendered her testimony not reliable. In the same vein, the Claimant's testimony was self-serving.

[28]. The older daughter of the deceased, Melissa Franco, confirmed in her witness statement that her mother was diagnosed with cancer in 2009 and that by 2012 it was at stage 4. She last saw her mother on May 30, 2012 after she was sent home from the Belmopan Hospital. She stated that her mother was steadily losing her mental capacity to think clearly. She added: *"I say this because she would call me to tell me something and would not remember what she wanted to say. In frustration she would then hit her head with her fists."* This witness was forthright and believable but her evidence does not assist in describing her mother's condition on June 1, 2012.

[29]. Santos Tesecum was the author and typist of Will No. 2. She said she took instructions from both the Claimant and the deceased at his Mother's house as the deceased asked her to write a Will. This took place some days before the date of execution of June 1, 2012. In her words *"she asked me if I would be willing to write her Will, and I said yes, I can but two of you need to tell me what you want me to put in the Will."* The impression conveyed by her oral testimony was that the deceased was fully lucid and in charge of her faculties when the instructions were given for the drafting of the Will. For example, she told the Court: *"She was sickly, very weak, but I can recall that she was very conscious of what she was saying. She was okay. Well, of course,*

you know she was weak. Very weak." She continued:..." She was speaking not much but she said what she wanted to."

[30]. Mark Myvett stated that he was present and witnessed Will No. 2 on June 1, 2017 as did Consuelo Tzib. Their respective witness statements are in almost identical terms. Both signed to the following:

> *"Santos Tesecum read the Will to the deceased who indicated she understood the content and the content reflected her wishes. At that time the deceased appeared of sound memory and understanding and was fully alert although she appeared weak and fragile from her illness which was cancer of the cervix. After the Will was read to the deceased she asked her daughter Amili Franco to sign her name as she was too weak to sign."*

Mr. Myvette said the deceased sent a little boy to call him and after he reluctantly went to her mother-in-law's yard he saw her sitting in a chair. She told him in the presence of her husband, her mother-in-law, her daughter and Mrs. Tzib that she was asking a big favour of him. She asked him to sign her "final will". He was asked what state the deceased was in when he was speaking to her and he responded in the affirmative that he could see that she was ill and though strong enough to speak she was not strong enough to write anything.

[31]. Consuelo Tzib was cross-examined by Learned Counsel for the Defendant. She said that as a Justice of the Peace she wanted the deceased to sign the Will in her presence but was unable to do so as she was weak. She asked her questions and she told her that she wanted to leave what she had for her children as she didn't want them on the street. From the answers she got, this witness concluded that the deceased was "in her senses". In the closing stage of her cross-examination, she admitted that she was not aware as to whether the deceased was being pressured to sign the will in surroundings away from other family members.

[32]. The Defendant and the other witnesses who were presented in support of her case were of little assistance in the assessment of the deceased's condition at 6:30 p.m. on June 1, 2012 when Will No. 2 was executed. The Defendant herself had last seen her sister on the day before, May 31, 2012 and she did not see her on June 1, 2012. She admitted that she was unable to tell what was the state of health of the deceased on June 1, 2012 because she was not present.

[33]. The sister of the deceased Evarista Balan, visited her on June 2, 2012, the day following the execution of Will No. 2. She observed her to be non-responsive and she opined that this was the worst she had ever seen her sister. When she visited on the following day, her condition remained in the same non-responsive state. She recalled speaking to the Claimant about the deceased's condition and his reply was that her condition would remain like that until she died. She went on to relate a conversation with the Claimant about morphine being administered to her sister. She had stated in her witness statement that she saw empty vials of morphine on the bureau beside their sister's bed. At first, he told her he gave her morphine and when she expressed surprise he said that it was administered by the family doctor – Dr. Pacheco. This witness has also seen her sister at around 5:00 am on June 1, 2012.

[34]. The Claimant was asked in cross-examination whether he recalled such a conversation with Evarista Balan when she visited the house. His response was that he did not recall any conversation about morphine. He did admit that Dr. Pacheco visited the deceased as a professional doctor but he said he was not aware of the doctor giving her morphine. Indeed, he said that what Evarista said was untrue. Having regard to the noticeable evasiveness of the Claimant when he was cross-examined, I have every reason to believe the testimony of Evarista Balan who exhibited a photograph of her sister's unresponsive countenance.

[35]. The submission by Learned Counsel for the Claimant was to the effect that neither the Defendant or any of the witnesses adduced in support of her case were present on June 1, 2012 at or about the time when Will No. 2 was being executed.

Melissa Franco, the deceased's daughter testified as to her mother progressively losing her mental capacity and her forgetfulness. This evidence in some measure suggested that the deceased was at that stage prone to not remember what she was thinking from one moment to the next. However, this was not sufficient in degree to be elevated to tip the scales in favour of a finding of absence of unsoundness of mind so as to positively impair testamentary capacity. This was so even when coupled with the evidence of Evarista Balan as to the non-responsiveness of the deceased and the presence of empty morphine vials.

[36]. In sum, taking the evidence as a whole, it was not satisfactorily established that the testator was not sound in mind memory and understanding. It is not a case of the court being in doubt about it but rather that the evidence was on the balance in favour of the testator being capable of making a Will.

DID THE TESTATOR KNOW AND APPROVED OF THE CONTENTS OF THE WILL?

[37]. The issue proceeds from the assumption that the deceased was capable of and had the capacity to make a will. The entire circumstances surrounding the preparation and execution of Will No. 2 must be analyzed. The relevant law emanates from the rule in **Barry v Butlin** (Supra) in the dictum of Parke B (at p. 482-3):-

> *"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 established that the paper propounded does express the true will of the deceased."

The second rule has since been judicially expanded beginning with the case of **Tyrrel v Painton [1894] p. 151** Davey LJ. Put it thus 9 at p. 159):-

*" It must not be supposed that the principle in **Barry v Butlin** is confined to cases where a person who prepared the will is the person who takes the benefit under it – that is one state of things which raises a suspicion; but the principle is that whenever a will is prepared under circumstances which raise a well-grounded suspicion that does not express the mind of the testator, the court ought not to pronounce in favour of it unless that suspicion is removed".*

The principle envisages that if there is evidence of suspicious circumstances surrounding the execution of a will, then the presumption of knowledge and approval by the testator is rebutted and the burden is cast on the person seeking to propound the will to remove the suspicion and prove knowledge and approval in so doing. The cases have largely been concerned with suspicious circumstances where the person actively involved in the preparation of the will is a beneficiary but the principle is no longer so limited.

[38]. More recently, in **Fuller v. Strum [2001] EWCA Cir 1879** Peter Gibson, LJ encapsulated the task of the Court in the following paragraphs:

"32. Probate proceedings peculiarly pose problems for the court because the protagonist the testator, is dead and those who wish to challenge the will are often not able to give evidence of the circumstances of the will. The doctrine of "the righteousness of the transaction" whereby the law placed a burden on the

propounder of the will, in circumstances where the suspicion of the court is aroused, to prove affirmatively that the deceased knew and approved of the will which he was executing, is a salutary one which enables the court in an appropriate case properly to hold that the burden has been discharged.

"33. But "the righteousness of the transaction" is perhaps an unfortunate term, suggestive as it is that some moral judgment by the court is required. What is involved is simply the satisfaction of the test of knowledge and approval, but the Court insists that, given that suspicion, it must be the more clearly shown that the deceased knew and approved the contents of the will so that the suspicion is dispelled. Suspicion may be aroused in varying degrees, depending on the circumstances, and what is needed to dispel the suspicion will vary accordingly. In the ordinary probate case knowledge and approval are established by the propounder of the will proving the testamentary capacity of the deceased and the due execution of the will, from the court will infer that knowledge and approval. But in a case where the circumstances are such as to arouse the suspicion of the court the propounder must prove affirmatively that knowledge and approval so as to satisfy the court that the will represents the wishes of the deceased. All the relevant circumstances will be scrutinised by the court which will be "vigilant and jealous" in examing the evidence in support of the will (Barry v. Butlin (1838) 11 Moo PC 480 at p. 483 at Parke, B)

[39]. Learned Counsel for the Claimant asserted that there is no evidence of undue influence or pressure adduced by the Defendants and therefore the Court ought to apply the presumption that the will is valid. In response to the court, it was said that there are no suspicious circumstances. Contrarily, the Defendant urged the court to find that the facts surrounding the preparation and execution of Will No. 2 were suspicious and that the suspicion has not been removed by the Claimant.

[40]. It stands uncontroverted that the testator was very ill and very weak on June 1, 2012 when Will No. 2 was executed. Prior to that she had already executed a will previously on May 13, 2012. The evidence of Ivan Roberts who drafted the will was that

instructions were first taken on May 2, 2012 at her home. The handwritten notes of the witness were exhibited. The final version of the will which was executed demonstrated that much thought went into the devises and bequests made by the testator. There is no demur that Will no. 1 was properly executed with Manuel Pot and Vicky Chan, the brother and niece of the testator respectively as witnesses.

[41]. The Claimant stated in his witness statement of October 3, 2013, that the Will No. 1 was complicated and could not have been proposed by the deceased nor could she have understood it. Having seen the notes of Ivan Roberto this belied the assertion. He went on to challenge the signature on Will No. 1 which he stated that he saw for the first time when he received the Defence and Counterclaim. He purported to compare the signature with that on the deceased's passport. These objections dissipated when the Claimant was cross-examined by Learned Counsel for the Defendant. The Claimant admitted that he was present at the Hospital when the deceased signed the will dated May 13, 2012. He was reminded that he had brought to the deceased's attention that she had not made provision for certain land on lease. He admitted mentioning the land to his wife although at first he said he did not remember. This illustrated that the deceased was sufficiently cognizant to have relayed instructions to Ivan Roberts.

[42]. Melissa Franco referred in her witness statement to a disagreement between herself and her father, the Claimant, over a bank card that was entrusted to her by the deceased, her mother. When he demanded the bank card from her and she refused he ordered her to leave the house. This must be juxta-posed with the evidence of the Claimant when asked whether he had any discussion with the deceased at the Hospital. He stated that he only remembered that in the presence of the Defendant he wanted the deceased to sign at the bank for a loan. This served to demonstrate that he Claimant was concerned with taking control of the financial affairs of the deceased.

[43]. Melissa also stated that there was a second occasion when the Claimant told her to leave the house at Bullet Tree Falls and that was because she told him that if he did

not want any family members to come to the house he should remain in the house to take care of her mother. She explained that family members were taking care of her mother when he was seldom present. This provided some possible insight as to why Will No. 2 was executed at his mother's at San Ignacio.

[44]. Of even greater significance was Melissa saying that in her presence the Claimant urged her mother to make a new will because the deceased's brother wanted to take property away from the children, but she did not hear her mother respond. This was put to the Claimant in cross-examination and he denied it.

[45]. Turning to the circumstances surrounding the making of will No. 2, the Claimant solicited the aid of Santos Tesecum, who is the wife of his uncle. He solicited the assistance of individuals he knew in the person of Mark Myvette and Consuel Tzib. As ill as the deceased was at the time, he took her out of her house and transported her some distance away to the home of his own mother for the purpose of executing the will – A will that she was too weak to sign and which she was unable to read for herself. Ms. Tesecum admitted that the instructions came from both the Claimant and the deceased.

[46]. It seems to me that something must have been amiss for the young Amili to have been persuaded to sign two conflicting witness statements. As earlier iterated she must have been under the influence of the Claimant with whom she lived while caring for her mother and upon whom she relied for financial support.

[47]. As to the credibility of the Claimant, his credibility was affected by his demeanour. His testimony was replete with evasive answers necessitating the intervention of the court and at times the admonition of his own lawyer to answer the questions asked.

[48]. It was plain to the Court that the Claimant was bent on taking control of the deceased's assets. To this extent, he was prepared to have orchestrated the

preparation of a second will which did not dispose of any property. Such a Will would have the effect of allowing him to take on intestacy which was not the purport of the earlier Will No. 1 which did not leave anything to him.

[49]. Of great significance to the making of Will No. 2 was the fact that the Claimant by his own admission did not reveal to the deceased's family that she had made a second will until after her death. This was against the background of Evarista Balan visiting her sister on a daily basis.

[50]. In addition, there was testimony from Santos Tesecum, who drafted Will No. 2, and from the witnesses to the said Will, Mark Myvette and Consuelo Tzib, that they were never told that the deceased had already made a previous will. It seems to me that if Mrs Tesecum had known of the earlier will, questions would have been asked about the purpose of having a new will prepared. The Claimant has not offered to this Court any explanation as to why this vital information was withheld from these persons who were integral to the preparation and execution of Will No.2.

[51]. In his witness statement, Ivan Roberts wrote that the deceased was adamant that the Claimant was not to be even mentioned by name in Will No. 1. For her to have decided to make a new will appointing him as the executor, she must be taken to have significantly changed her mind. Had she done so, she would have intimated this to the Claimant who made all the arrangements for the preparation and execution of Will No. 2. The evidence led on behalf of the Claimant was devoid of any reason for the change of heart. This matter has caused the Court some pause as it pondered the rationale for the later will. This was all the more baffling when one considering that Will No.1 was meticulously prepared with precise expressions of the testator's wishes compared to Will No.2 which was comparatively scant and did no more than recite the names of her children and appoint the Claimant as executor.

[52]. Taken all together, these circumstances excited suspicion warranting the court to be vigilant and jealous. The suspicion was not removed by the evidence led on behalf of the Claimant and accordingly, the court declines to pronounce in favour of Will No. 2 which shall not be admitted to probate.

COUNTERCLAIM

[53]. As stipulated earlier in this judgment, there has been no challenge to the validity of the earlier Will No. 1 which was accepted to be properly executed with the full knowledge and approval of the deceased. Nothing further needs to be said on the counter-claim save to say that it has been established.

ORDER

[54]. It is ordered that the orders of declarations sought by the Claimant in the Fixed Date Claim be refused and the Claim accordingly dismissed. On the counterclaim it is ordered that probate of the Will dated May 13, 2012 be granted to the defendant. It is further ordered that any monies paid to the Claimant pursuant to the grant of probate of the Will dated June 1, 2012 be paid into the estate of Camila Anselma Franco, deceased.

COSTS

[55]. The Defendant shall be entitled to her costs which shall be paid out of the estate of the deceased.

KENNETH A. BENJAMIN
Chief Justice