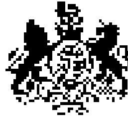

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2010: No. 70

BETWEEN:

KHOMEINI TAALIB-DIN

Plaintiff

-v-

HANIFAH RUKAN SMITH

Defendant

JUDGMENT

(In Court)

Date of Trial: April 9-13, 2012
Date of Judgment: May 4, 2012

Mr. Craig Rothwell, Cox Hallett Wilkinson, for the Plaintiff

Mr. Paul Harshaw, Canterbury Law, for the Defendant

Introductory

1. The Plaintiff issued his Specially Indorsed Writ on March 2, 2010 against the Defendant who is his sister. From the outset he has sought a 50% interest in the family homestead ("the Property") which was purportedly devised to his sister alone under a handwritten

will dated December 10, 2006 ("the Will") made by their father, Mustafah Taalib-Din ("the Testator"), prior to his death on December 25, 2006.

2. It is common ground that on November 6, 2007 the Will was admitted to probate and that the Property conveyed to the Defendant under a Vesting Deed.

3. The Plaintiff initially sought to challenge the sole ownership thus acquired by the Defendant through the following claims:

   (a) the Defendant acquired her interest by fraudulently misrepresenting the Testator's true wishes;

   (b) the Plaintiff was entitled to a 50% share in the Property under the doctrine of proprietary estoppel because he had detrimentally relied on the Testator's representations that he would acquire such an interest;

   (c) the Property was held on trust for the Plaintiff because there was a common intention between he and his father that the Plaintiff would acquire a 50% interest in the Property;

   (d) the Testator removed the Plaintiff from his previous will due to the actual and/or presumed undue influence of the Defendant.

4. On April 5, 2012 by Consent, the Plaintiff re-amended the Specially Indorsed Writ to add a claim for revocation of the probate of the Will granted on November 6, 2007 and pronouncement against the validity of the Will "*by reason of the actual undue influence of the Defendant*". At the commencement of the trial the Defendant's counsel made it clear that he wished to challenge the legal entitlement of the Plaintiff to seek this relief at the present time.

5. In her Amended Defence and Counterclaim, it was denied that the Testator ever promised to give the Plaintiff a share of the Property. It was averred that the Testator when he made the Will at the Hospital told the Defendant in the presence of the parties' two uncles that he did not want the Plaintiff to have an ownership interest in the Property. This was because the Testator feared that the Plaintiff would sell the Property to buy drugs. However, the Testator also said that he wished the Plaintiff to be able to live in the Property provided that he (a) did not use drugs, and (b) contributed to the upkeep of the Property.

6. The Defendant's Counterclaim asserts that any interest the Plaintiff acquired in the Property is subject to equities or charges operating in favour of the Defendant as a result of her investing through a loan some $270,000 in the Property by way of renovations.

Legal findings

<u>Scope of relief Plaintiff can seek in present action</u>

7. The Defendant consented to the Specially Indorsed Writ being amended to add a claim for setting aside the Will yet contended at trial, in effect, that the relevant pleas were liable to be struck out as they could only be brought in a probate action against the Testator's estate. Ordinarily if proposed amendments are liable to be struck-out as unsustainable in legal terms, an objection is made on the application for leave to amend and if the objection is valid the amendment sought will be refused.

8. Mr. Harshaw complained that the procedural requirements of Order 76 of the Rules of the Supreme Court had not been complied with, but was unable to identify any substantial prejudice which flowed from this. One of the most important substantive requirements is found in Order 76 rule 3, which provides:

> "***76/3 Parties to action for revocation of grant***
> *3 Every person who is entitled or claims to be entitled to administer the estate of a deceased person under or by virtue of an unrevoked grant of probate of his will or letters of administration of his grant shall be made a party to any action for revocation of the grant."*

9. The Defendant was the sole executor to the Will and so no question of her not being a party arises. As Mr. Rothwell pointed out, this Court has in substance no separate Probate Division, so the distinction between the Writ being headed up "Probate Jurisdiction" rather than "Civil Jurisdiction" is meaningless, more so since the Plaintiff has from the outset asserted mixed claims. The original undue influence claim, seeking to set aside the transfer by the Estate pursuant to the Will to the Defendant as the sole beneficiary is a claim which ought logically to be construed as one brought against the Defendant both in her capacity as sole Executor (as transferor) and in her personal capacity (as transferee). Curiously, no point was taken in respect of this aspect of the Plaintiff's claim. The fraud, constructive trust and proprietary estoppel claims are not probate claims at all.

10. However, most significantly, the fraud claim essentially alleges that the Will was not actually approved by the Testator with knowledge of its contents. So the "knowledge and approval" claim is not an entirely new attack on the validity of the Will. It is simply

formulating an alternative legal basis for the broad assertion made at the commencement of the present proceedings that the Will did not represent the Testator's true wishes and should be set aside.

11. While there is no prejudice to the substance of a fair trial which flows from the re-amendment, it is obvious (based on the legal findings set out below on the onus of proof) that the alternative legal basis for challenging the validity of the Will, advanced for the first time on the eve of the trial, has a material impact on the merits of case as a whole. But this is the sort of prejudice that can be remedied in costs, not by shutting out the legal argument altogether.

12. As regards the point now taken about the re-amendment involving a claim which could only be asserted against the Defendant in her capacity as Executor under the Will, I would primarily reject it on the ground that the re-amendment was consented to on the implicit basis that the Defendant was being sued in her dual capacities as sole executor and sole beneficiary under the handwritten Will.

13. To the extent that it is still open to the Defendant to advance this point explicitly for the first time in closing submissions at the end of the trial[1], I would if necessary re-re-amend the Writ to add the following words beneath the Defendant's name in the action heading: "(sued both personally and in her capacity as Executor under the purported December 10, 2006 Will)". The substance of such order would be to join on the Court's own motion a party who ought to be joined to allow all issues in controversy to be determined pursuant to Order 15 rule 6(2)(b)(i).

14. It is also a matter of record that although the Will was admitted to Probate on November 6, 2007 on an administrative basis at a time when the Plaintiff was acting in person and failed to jump through the requisite procedural hoops to trigger a contested hearing, he did on October 10, 2007 write the Registrar contesting the Will on the express basis that it was not the same document signed in front of the witnesses. No question of waiver, estoppel or laches arises to prevent the pursuit of the present claim. No limitation period applies to such claims, as the Plaintiff's counsel submitted in reliance upon a case where proceedings were commenced almost six years from the date of the grant of probate: *Re Flynn (deceased)* [1982] 1 All ER 882 at 886e-f.

15. The present proceedings involving a wholesale attack on the validity of the Will were commenced in March 2010, just under 30 months after the grant of probate. The re-amendment asserting a claim to revoke the will on the grounds of an absence of

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[1] At the commencement of the trial, Mr. Harshaw revealed his intention of objecting to the re-amended claim in general terms with reference to the requirements of Order 76 not being met.

knowledge and approval was made by way of refinement of the previously pleaded claims (rather than by way of radical departure from them) less than 4 ½ years after the grant of probate in terms consistent with objections to the validity of the Will which were raised by the Plaintiff before the Will was administratively approved on a non-contested basis.

16. For these reasons I find that the Plaintiff's claim to revoke the Will can be adjudicated in the context of the present action.

<u>Burden of proof in relation to the issue of knowledge and approval of the Will</u>

17. Notwithstanding the fact that the Will has already been 'proved' on what amounts to a default basis, I find that the burden lies on the Defendant to satisfy the Court that the Testator knew the contents of and approved the Will. Mr. Harshaw's submission that the reversal of onus of proof does not apply to wills at all cannot be supported having regard to the authorities extensively cited by Mr. Rothwell, in circumstances where:

    (a) the Plaintiff has been able to raise real doubts about the Testator's capacity some two weeks before he died from a terminal illness;

    (b) the Plaintiff has been able to raise real doubts about whether or not the Testator actually executed the Will;

    (c) the Defendant admittedly wrote the Will; and

    (d) the Defendant admittedly became the sole beneficiary under the Will, acquiring the Plaintiff's 50% interest under the Testator's last formally drawn will made after his diagnosis only 9 months previously.

18. The Defendant's counsel sought to support his submission that the onus of proof never shifted to a defendant in relation to a will by reference to an extract from Michael Mello QC's '*The Law of Wills and Estates in Bermuda*', 6th edition, at page 8. The relevant passage did not support the broad proposition contended for. Mr. Harshaw quite properly placed before the Court the entire section in which the passage he relied upon was found. At page 4, Mello opines as follows in a passage which I find accurately reflects the legal position under Bermuda law:

> "*The burden of proving testamentary capacity lies with the person who seeks to uphold the Will, usually the executor or primary beneficiary; rather than the one who challenges the will, usually the disappointed or disinherited beneficiary. For example where the circumstances surrounding a last Will were such as to excite the suspicion of the Court as to whether the testatrix knew and approved its contents and as to her testamentary capacity, it ruled that the purported beneficiary had failed to discharge the burden of satisfying the Court as to the righteousness of the Last Will or proving the testatrix had testamentary capacity when she executed it. Therefore, the Court held that the Last Will would be set aside and probate could be granted to the earlier Will. The suspicious circumstances in this case being that one of the testatrix's four children had a new Will prepared leaving the bulk of her assets to him and which was executed four days before her death.*"

19. The position is entirely different when a will has been prepared by a lawyer and read over and signed in circumstances where no doubts about testamentary capacity exist. Of the numerous cases cited on behalf of the Plaintiff on the issue of burden of proof in relation to knowledge and approval in circumstances where fraud and undue influence are also alleged to have occurred, I found the following passages in the judgment of Lord Neuberger (MR) in *Gill-v-Woodall e al* [2010]EWCA Civ 1430 most helpful:

> *"[13]. Mrs Talbot Rice QC, who appeared on behalf of the RSPCA, contended that it was logical first to consider the question of undue influence, and only then turn to the issue of knowledge and approval. However, I agree with Ms Angus, who appears for Dr Gill, that the Judge was at least entitled, and, at any rate in this case, right to consider knowledge and approval first, and only then to turn to undue influence. That approach seems to me to be consistent with what was said by Lindley LJ in Tyrrell v. Painton [1894] P 151, 157. After referring to Barry v Butlin (1838) 2 Moo PC 480, where Parke B discussed "circumstances that ought generally to excite the suspicion of the Court", Lindley LJ went on to say:*
>
> > *'[W]herever 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 else they rely on to displace the case made for proving the will."*
>
> *[14] Knowing and approving of the contents of one's will is traditional language for saying that the will "represented [one's] testamentary intentions" – see per Chadwick LJ in Fuller v. Strum [2002] 1 WLR 1097, para 59. The proposition*

that Mrs Gill knew and approved of the contents of the Will appears, at first sight, very hard indeed to resist. As a matter of common sense and authority, the fact that a will has been properly executed, after being prepared by a solicitor and read over to the testatrix, raises a very strong presumption that it represents the testatrix's intentions at the relevant time, namely the moment she executes the will.

[15] In Fulton v. Andrew (1875) LR 7 HL 448, 469, Lord Hatherley said that

> *'When you are once satisfied that a testator of a competent mind has had his will read over to him, and has thereupon executed it, ... those circumstances afford very grave and strong presumption that the will has been duly and properly executed by the testator'.*

This view was effectively repeated and followed by Hill J in Gregson v. Taylor [1917] P 256, 261, whose approach was referred to with approval by Latey J in In re Morris deceased [1971] P 62, 77F-78B Hill J said that "when it is proved that a will has been read over to or by a capable testator, and he then executes it", the "grave and strong presumption" of knowledge and approval "can be rebutted only by the clearest evidence." This approach was adopted in this court in Fuller [2002] 1 WLR 1097, para 33 and in Perrins v Holland [2010] EWCA Civ 840, para 28….

[21] The Judge approached the issue of knowledge and approval on a two stage basis. He first asked whether Dr Gill had established sufficient facts to "excite the suspicion of the court", which really amounts to establishing a prima facie case that Mrs Gill did not in fact know of and approve the contents of the Will. Secondly, having held that Dr Gill had excited the suspicion of the court, he then turned to consider whether or not those suspicions were allayed by the RSPCA, who were of course supporting the Will. This approach accords with Parke B's analysis in Butlin 2 Moo PC 480, quoted by Lindley LJ in Tyrrell [1894] P 151, 156-7, referred to above, and it is reflected in the approach in a number of other cases.

[22] Where a judge has heard evidence of fact and expert opinion over a period of many days relating to the character and state of mind and likely desires of the testatrix and the circumstances in which the will was drafted and executed, and other relevant matters, the value of such a two-stage approach to deciding the issue of the testatrix's knowledge and approval appears to me to be questionable. In my view, the approach which it would, at least generally, be better to adopt is that summarised by Sachs J in the unreported case of Crerar v. Crerar, cited and followed by Latey J in Morris [1971] P 62, 78E-G, namely that the court should:

> *'consider all the relevant evidence available and then, drawing such inferences as it can from the totality of that material, it has to come to a conclusion whether or not those propounding the will have discharged the burden of establishing that the testatrix knew and approved the contents of the document which is put forward as a valid testamentary disposition. The fact that the testatrix read the document, and the fact that she executed it, must be given the full weight apposite in the circumstances, but in law those facts are not conclusive, nor do they raise a presumption.'*"

20. In summary, when a will is challenged as not representing the true wishes of the testator, it is always for the party seeking to uphold the will to prove that the testator was competent when he signed the will and signed it knowing what its contents were. This burden will be easier to discharge when competency is proved or not in issue and a professionally drafted will has been signed after being read over to the testator by his lawyer. Where suspicious circumstances are present, it will be more difficult for this burden to be discharged.

Undue influence

21. Mr. Harshaw rightly submitted that no presumption of undue influence arose in respect of testamentary dispositions. He relied on the first three sub-paragraphs of the following passage in the judgment of Lewison J in *Re Edwards* [2007]EWHC (Ch) 1119:

> "*47.There is no serious dispute about the law. The approach that I should adopt may be summarised as follows:*
>
> *i)In a case of a testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence;*
>
> *ii)Whether undue influence has procured the execution of a will is therefore a question of fact;*
>
> *iii)The burden of proving it lies on the person who asserts it. It is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis. In the modern law this is, perhaps no more than a reminder of the high burden, even on the civil standard, that a claimant bears in proving undue influence as vitiating a testamentary disposition;*
>
> *iv)In this context undue influence means influence exercised either by coercion, in the sense that the testator's will must be overborne, or by fraud.*

> *v)Coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment discretion or wishes, is enough to amount to coercion in this sense;*
>
> *vi)The physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will. The will of a weak and ill person may be more easily overborne than that of a hale and hearty one. As was said in one case simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be induced for quietness' sake to do anything. A "drip drip" approach may be highly effective in sapping the will…"*

22. The passage is reproduced in full, because it helpfully summarises the principal elements of undue influence.

<u>Fraud</u>

23. As far as burden of proof is concerned, Mr. Harshaw pointed out the higher standard of proof required for proof of serious allegations. However he accepted that fraud would be made out if the Plaintiff was able to prove:

    (a) that the Will was not the same document signed and witnessed on December 10, 2006;

    (b) that the Defendant altered the document with an intent to deceive.

24. I accept this analysis. However, the fraud claim becomes somewhat academic once the claim to revoke the Will on the grounds of a lack of knowledge comes into play. Because if the Plaintiff is not able to establish the latter claim based on the same facts and in relation to which the onus of proof shifts to the Defendant, it is difficult to see how his case on fraud can possibly be made out to the high standard of proof the law requires.

Factual findings: the Plaintiff's case

<u>The Plaintiff</u>

25. The Plaintiff is the only son of the Testator. Although he was in general terms a credible witness, I approached the crucial controversial parts of his evidence with considerable care having regard to the powerful emotions which clearly underpin the present claim. Despite being raised by parents who had drug addiction problems and himself

succumbing to addiction from which he now seems to have recovered, the Plaintiff appeared to me to be an articulate, intelligent, determined yet sensitive young man who was only 25 when his father died on Christmas Day 2006. He is now employed in the insurance sector. His evidence was generally given in a fair and straightforward manner; however, it was occasionally and understandably apparent that he found it difficult to avoid insisting on advocating the truth as he wished it to be as opposed to recounting events in objective terms.

26. Most his evidence related to background rather than central issues; the family history; his relationship with his father; his relationship with his sister (the Defendant); his contributions to the Property. By his own admission after his father was diagnosed with terminal cancer in or about February, 2006, he was unable to cope and his pre-existing addiction problems intensified. Based on this, I find that the Plaintiff either understated or was unable to appreciate the extent to which he likely behaved in an unacceptable manner to the Defendant, a young but comparatively more responsible mother who was not herself using hard drugs. The Plaintiff also likely exaggerated the extent of his financial contributions to the Property, overlooking the period from 2004 to 2006 when- by his own account- he was afflicted by addiction problems which worsened after his father's diagnosis and was likely behaving generally in a less than consistently responsible manner.

27. On the issue of whether the Testator communicated any decision to disinherit the Plaintiff altogether to his son prior to his death, I find that the Plaintiff was never told of any such decision by his father. Further I find that no major incident or incidents occurred after the Testator made his March 1, 2006 Will which damaged the relationship between father and son to any significant extent. I reach this conclusion having regard to the evidence of all other family members who testified, including the Defendant.

Hammad Taalib-Din

28. The parties' Uncle Hammad was generally a credible witness, who initially gave his oral evidence in a balanced manner. However, after a break in the proceedings for lunch on the second day of the trial, he became an unabashedly partisan witness/advocate for his nephew, the Plaintiff. Accordingly despite the fact that he has no commercial interest in the dispute, I approach his evidence cautiously looking for independent support for the most important and contentious aspects of his testimony.

29. The crucial aspects of his evidence may be summarised as follows. His brother, the Testator, invited him to a family meeting at the Hospital on the afternoon of December 10, 2006. The Defendant arrived after him and had a handwritten note which she had prepared. She read out the document and the Testator instructed her to make certain

changes. He said that the Defendant was to be the executor and in charge and the house was not to be sold. The Defendant read out that the Property was to go to both children "50/50" and the Testator did not give contrary instructions. Uncle Hammad did not read the handwritten document in detail before affixing his signature to the signature page, but he did look at the substantive pages and they had handwriting with some words crossed out. The Defendant told those in attendance that she would give the papers to a lawyer and have a proper will drawn up in the next week or so.

30. Uncle Hammad also testified that he saw his brother regularly until his death and was never told by his brother that he had decided to give the Plaintiff nothing or that he had a physical meeting with a lawyer from Appleby. He also testified that at a September 20, 2007 meeting at Appleby, attorneys for the Estate, he challenged lawyer Ms. Leah Scott on whether she had visited the Testator on December 12, 2006 at the Hospital and also asserted that the first two pages of the Will were not part of the document he signed on December 10, 2006. Ms. Scott's File Note records Uncle Hammad as having said the following at that meeting (which the Plaintiff was seemingly not permitted to attend due his previous hostile behaviour):

> "*Mr. Taalibdin* [sic] *advised that Hanifah came to the hospital with a document, his brother Mustafa asked for some things to be deleted from the document they saw at the hospital. Mr. Taalibdin* [sic] *says the that document that is the handwritten Will is not the same document he signed…his brother Mustafa had stated he did not want the property to be sold but that was not contained in the document that bears his signature…He said that his niece Hanifah, will meet her abode with Her Lord that she lied to her brothers and her uncles and deceived her father, that she has done an even* [sic] *act and that he wants the matter to go all the way to court so that she can look him and her other uncle and her brother in the eye and see that she has done wrong….Mustafa had said that he had not met with a lawyer and that a lawyer was supposed to come down to the hospital and when the lawyer came he was in the bathroom and didn't meet with the lawyer.*"

31. I accept Mr. Hammad Taalib-Din's evidence that (a) the Testator had previously planned to give the property to both his children in equal shares, and (b) that the Testator did not tell his brother after December 10, 2006 in explicit terms that he had decided to exclude the Plaintiff from the Property altogether. However I do not accept the contention that the Testator denied meeting the lawyer at all as the fine distinctions between a telephone meeting and a meeting in person would not have been sufficiently important in December 2006 before the dispute arose for Uncle Hammad to focus on and specifically remember. His evidence on this issue is unreliable.

32. As all the Testator is said to have done is to confirm his previous December 10, 2006 instructions, it is entirely plausible that he would not have mentioned the meeting with Leah Scott to his brother at all. What is more likely to have been of concern to the Testator was the return of the lawyer with a formal typed will, which it is essentially common ground all concerned expected to be prepared. I find that Mr. Hammad Taalib-Din was honestly mistaken as to precisely what his brother told him about the lawyer in his last days.

33. For the reasons set out below, I accept the evidence of Ms. Leah Scott (indirectly supported by her supervising colleague Mr. Randall Krebs) that she did in fact have a face to face meeting with the Testator. Under the heading of Findings in relation to the December 10, 2006 Meeting below, I set my findings on the most contentious aspects of Uncle Hammad's evidence.

Murad Taalib-Din

34. The parties' Uncle Murad appeared to be the younger brother of Uncle Hammad. He was also credible in general terms although it was clear that he was decisively on his nephew's side in the present dispute.

35. He supported the key aspects of his brother's evidence as to what transpired at the Hospital on December 10, 2006, admitting in his Witness Statement that he did not "follow everything the document said" but asserting that he did "recall that the document named Khomeini and Hanifah as sharing the house 50/50 and that the house was not going to be sold".

36. Murad Taalib-Din gave his oral evidence in far more calm manner than his brother. However, he was most emphatic in asserting that it was "an outright lie" that the Will was the document he signed at the Hospital.

37. I set out below my findings on this witnesses' evidence on the central question of what happened at the December 10, 2006 meeting.

Belterre Swan

38. Ms. Swan was a neighbour and close friend of the Taalib-Din family for 30 years, especially the Testator. She was credible in general terms but clearly partisan as well.

39. She described the closeness of the Testator's relationship with his son and said that in late November when she visited him in Hospital he mentioned his plans of giving the Property to the parties in equal shares.

40. I found no reason to reject any of her evidence which, so far as is relevant to the central issues in controversy, simply confirmed what seems obvious from the March 1, 2006 Will: that the Testator originally planned to leave the Property to both of the parties to the present action. I was also struck by her recalling that in his last weeks in the Hospital, the Testator expressed regret for his own contribution to his son's addiction problems.

Shaheeda Umrani

41. The parties' mother was also a generally credible witness, whose evidence was also mostly concerned with background matters. She also gave her oral evidence in an intelligent and balanced manner, showing no inclination to argue with counsel. On the other hand she was clearly bitter about being "thrown out" of the Property by her daughter in 2007 in an unpleasant manner which the Defendant did not dispute.

42. She most significantly testified that when she divorced the Testator she gave up any interest in the Property based on the understanding that it would be left to her two children. Despite the divorce she remained close to the Testator and visited him in Hospital until the end.

43. Ms. Umrani did not attend the December 10, 2006 meeting, but insisted that at no time before or after was she told by the Testator that he had decided to exclude the Plaintiff from any interest in the Property. Although she supported the Plaintiff's account that the meeting was called in response to his complaints about his sister, under cross-examination she stated that the Testator later observed that he wished his son had attended the meeting so he could have lectured him about his treatment of his sister. She also agreed that the Testator indicated he wanted his daughter "in charge of" the Property, which she understood to be as the executor. He told her that the changes to his will had been taken to a lawyer.

44. I found no reason to reject the evidence of the parties' mother in general terms. The most significant aspect of her evidence in my judgment was her indication, under cross-examination, that the Testator was concerned (contrary to the Plaintiff's case and her own Witness Statement on this issue) about the Plaintiff's treatment of the Defendant and wanted to lecture him about it. I accept this evidence because it is consistent with all the other evidence pointing to the fact that the Testator was concerned about the Plaintiff's

irresponsibility and/or instability and felt that the Defendant was the more reliable child to place in control of the Property.

Hanifah Rukan Smith

45. The Defendant is the Testator's only daughter by the mother of the parties to the present case and would have been around 23 years old at the date of her father's death. As the sole beneficiary under the Will who is accused of having obtained the main asset of her father's estate by fraudulent means, her evidence clearly fell to be considered with great care. I found the Defendant in general terms to be a credible witness. The Defendant gave her oral evidence in a very calm and controlled manner, and appeared to me to have a combination of charm and intelligence together with the steely determination which gave her the strength to defend the present proceedings against her older brother despite the strong disapproval of her mother and paternal uncles. She is currently self-employed in the health and beauty sector. She graduated from Berkeley Institute in 2000 and has been steadily employed, often working two jobs, since then.

46. The Defendant was clearly not a wilting flower and by her own admission was capable of taking aggressive action when she considered herself to be under attack. In or about 2005, she complained to her father about what might be described as bullying by her brother, as a result of which her father asked the Plaintiff to leave home. The precipitant incident seemingly ended with the Defendant chasing the Plaintiff onto the Railway Trail with a broomstick. In early 2007, not long after her father's death, she ejected her mother from the Property in an extremely unpleasant manner, by her own account, due to emotional provocation. It was common ground that she was the only member of the family not to become involved with the highly addictive crack cocaine to which other family members succumbed. This suggested to me that the Defendant has remarkable strength of character which was likely motivated by a strong desire to achieve a 'better' and more functional mainstream lifestyle than the rest of her family. Other parts of her evidence which I accepted supported the same conclusion.

47. To demonstrate that the Defendant's relationship with her father also had its ups and downs, the Plaintiff made reference to their father's ire at his daughter changing her name without consulting him first. Her case was that she did consult her father first but he disagreed. I make no finding on this irrelevant contentious issue. However, I did find to be credible her oral explanation as to why she changed her surname from a Muslim name to a 'British' name (this may have been her father's original family name). This was because she was not a Muslim and did not want people associating "Taalib-Din" with the "Taliban". While the Defendant testified that she did not consider her name change to be such a "big deal" at the time (she was possibly still only in her teens), it required

considerable determination to forge a separate identity from her own family and create economic opportunities to take such a step at an early age.

48. The extent to which the Defendant had emotionally separated herself from her family is also demonstrated by the "no holds barred" approach adopted in her Witness Statement to describing the behaviour of, in particular, her brother and her mother. While her brother accused her of consorting with a drug dealer and so it is unsurprising that she should have no qualms about impugning his character, the Defendant's characterisation of her mother in her written evidence is brutally unequivocal in its condemnation of her maternal role. She described the home as being a "crack house" from which she managed to escape for her latter teenage years. These background matters were not challenged. Somewhat more controversially, she suggested that her father was far more functional and financially productive than her brother implied.

49. In summary, I find that the Defendant had strong and understandable motivations in the weeks leading up to her father's death to acquire sole ownership of the Property free with a view to securing an economically and socially stable home for herself and her children and escaping the emotionally abusive and dysfunctional influences which she quite rationally associated her brother and mother with.

50. I also accept the Defendant's evidence that the Testator told her on several occasions before the December 10, 2006 meeting that he was concerned about her brother forcing the property to be sold. The most impressive concession made by the Defendant under cross-examination was to retract the assertion in her Witness Statement that her father had told the Plaintiff numerous times in December 2006 that he intended to remove his name from ownership. She explained that in fact all he had threatened to do was to put her in charge of the Property. This concession did not assist her case and illustrated the Defendant's attempts to avoid giving any positively inaccurate oral evidence.

51. Nevertheless the most unimpressive aspects of the Defendant's oral evidence were her responses to questioning about what happened at the December 10, 2006 meeting and how the Will came to be drafted. Firstly, she denied any private discussions with her father in which she complained about her brother or discussions about her father's testamentary intentions prior to the December 10, 2006 meeting. She implied that she was willing to abide by whatever disposition her father might choose to make. It seems to me inherently improbable that if her father was intending to not only put her in charge by making her sole executor but also devising to her sole legal and beneficial ownership of the Property, that he would not have wanted to discuss his wishes with her privately first. It also seems to me inherently improbable, in light of the "hell" that being left in the Property after the Testator's death as joint owner with her elder addicted brother would

by her own account represent, that the Defendant would during those fateful December days have been completely disinterested in her father's testamentary plans. Less than a year later she would summarily remove both her mother and brother from the Property.

52. During the Plaintiff's cross-examination, he was advised by the Bench that where he was unable to answer definitively it was always an option to say that he was not sure. The Defendant followed this advice to a fault when questioned about crucial aspects of the December 10, 2006 meeting and the drafting of the Will. Nevertheless she insisted that she came to the Hospital with a blank notepad and wrote the entire Will during the meeting and in the presence of her two uncles without making a single correction. Her Witness Statement dealt with this central part of the case quite briefly:

> "*46...Our dad asked me to bring a notebook and pen. He kept his will in the hospital room with him while he was there....*
>
> *47. It was a Sunday and I was working at Pompano Beach Club, I finished work at 12pm and made my way to the hospital...I got to the hospital and both our uncles were there., and of course our dad. Khomeini was not there and we sat and waited for him for several hours until our dad instructed me to rewrite the will in front of him and our uncles. Our dad was very disappointed that Khomeini did not show up.*
>
> *48. Our dad had his will there in the hospital already. Our uncles witnessed me write the entire will in the notebook at the foot of our dad's bed. Once I finished our dad read it and signed it then passed it to both our uncles to read and sign, which they did....Our dad wanted the change to his will to be handwritten to save money. He said he already had a bill at Appleby and did not want to add to it...*"

53. Two comments can conveniently be made about this account at this stage. Firstly, it is completely silent as to the process by which the Defendant ascertained what the contents of the Will should be. An oblique reference is made to what one presumes to be the March 1, 2006 will being in the room already, but the Defendant says nothing about any oral pronouncements being made by her father at all. Secondly, it is suggested that it was intended at this stage on December 10, 2006 that the Will would be the final document to avoid incurring legal fees with Appleby. No explanation is given as to why the Defendant herself the very next day took the Will to Appleby who in turn promptly took instructions with a view to possibly drafting a new will two days after the family meeting.

54. This cloudiness about the most central events in the present dispute was not greatly illuminated by the Defendant's oral evidence. Firstly, however, she agreed that Uncle Hammad was there when she arrived and Uncle Murad followed. She explained that in writing the Will she borrowed wording from the March 1, 2006 will but was unable to explain where she got other wording from, in particular the enduring power of attorney wording. The Defendant stated that although her father never before that day discussed changing the ownership of the house, he expressed concerns about his son's addiction and made it very clear that he wished her to have the house and for the Plaintiff to be permitted to live there if he behaved. She could not remember her father mentioning a power of attorney and was unsure if she asked whether her father wanted her to copy everything she copied. Where the power of attorney wording on page 1 or the "signed sealed and delivered" wording on the signature page were taken from was unexplained.

55. The Defendant denied ever having a document with crossings out on it and that she wrote out pages 1-2 of the Will later. Her father read through every page before signing. Contrary to her Witness Statement, she says her father asked her to take the document to Appleby to be processed. She stated that she considered the document to be more like instructions than a formal will. This seemed odd having regard to the formality of the Will upon which the Defendant relies and her denial that the document she left the Hospital with was a draft working document only.

56. I set out below my findings as to the December 10, 2006 meeting and the signing of the Will.

<u>Randall Krebs</u>

57. Randall Krebs was the Appleby lawyer who was in charge of the Testator's file. Mr. Krebs was clearly an independent witness whose credibility was not in question.

58. He confirmed that he instructed Ms. Leah Scott to visit the Testator in Hospital to confirm his instructions after the Will was received by his then firm in December 2006. He was also present at the September 20, 2007 meeting with the parties' two uncles and their then attorney in respect of which Leah Scott prepared a File Note and confirmed its accuracy. Under cross-examination he also indicated that there was an outstanding invoice for the Testator's account in respect of the March 1, 2006 Will, resulting in some question as to his firm would act in the matter. He thought a new will was being drafted by Ms. Scott at the time of the Testator's death. He also confirmed that Hammad Taalib-Din was quite adamant at the September 20, 2007 meeting that he did not sign the Will.

Leah Scott

59. Leah Scott was at all material times a newly qualified Appleby lawyer for whom the assignment of attending the Hospital on December 12, 2006 to confirm that the Will reflected the Testator's wishes was her first probate matter. She was clearly an independent witness whose credibility was not in question.

60. In her examination-in-chief, she explained that she spent around 2 hours with the Testator, not all of which was taken up with formal business matters. She also stated that she prepared handwritten notes of the meeting shortly thereafter, which ought to be on the Appleby file. Counsel indicated that Appleby failed to disclose these notes for reasons that are unclear. Accordingly the witness explained that her Witness Statement signed on March 8, 2012 was not based on those contemporaneous notes but on the other documents attached to her Witness Statement. The oldest of these documents was the September 20, 2007 File Note; none of the documents upon which her recollection was based pre-date the challenges raised to the authenticity of the Will.

61. Ms. Scott under cross-examination was quite firm that she was not mistaken about the central aspects of her evidence. "Rookie lawyer", perhaps, as Mr. Rothwell chided in his closing submissions, her mission was to confirm that the December 10, 2006 Will delivered to Appleby's offices by his daughter, the proposed sole beneficiary and executrix, reflected his wishes. The most important change from the March 1, 2006 Will was the elimination of the Plaintiff's 50% interest in the Property. It is impossible to believe that Ms. Scott did not obtain the Testator's confirmation that this change was what he wanted.

62. Ms. Scott was not asked whether the Testator confirmed that the Will that was delivered to Appleby was the same document as he signed on December 10, 2006, and she did not volunteer that he confirmed that it was. It is impossible to see why any such question should have arisen on December 12, 2006. There are two possible scenarios. Either the document was the same document as the Defendant contends, in which case no doubts about its veracity would have arisen. Alternatively, as the parties' uncles suggest, the Defendant left the meeting trusted by the Testator and all concerned to prepare a more formal document later in consultation with the Testator's lawyers. Having decided by common accord to "put Hanifah in charge", it is difficult to see why (if the rough notes had been written up by his daughter more neatly and attached to the signature page), this would raise any concerns at this stage on the Testator's part.

63. At the meeting Ms. Scott said that the apparently lucid Testator was speaking of going home for Christmas and she envisaged at some later point drafting a formal new will.

They met in a meeting room in Perry Ward and sat next to a table on which she placed the Will next to the March 1, 2006 Will. She discussed the various changes. The Testator was extremely concerned about the Plaintiff selling the Property due to his addiction problems, and she explained that under the Will he would not have any legal interest in the Property and so would be unable to sell it. She agreed that she did not discuss any other options such as creating a trust or a life interest with the Testator although such options were discussed briefly with Mr. Krebs back at the office later. But she stated the Testator seemed to believe that the Defendant would allow the Plaintiff to live on the Property if he behaved.

64. Ms. Scott agreed that the Plaintiff might have called her office about the Will in April 2007 and could not explain why he was not told that he was not a beneficiary until May, 2007. She also agreed that a copy of the Will may well have been first made available to the Plaintiff as late as August 2007. In answer to the Bench she stated she had no recollection as to why Appleby Trust Company Ltd. had been removed as co-executor in the Will.

65. Based on Leah Scott's evidence, I find that:

(a) on December 12, 2006, the Testator confirmed in general terms that the Will reflected his wishes. Her mission in visiting the Testator was to confirm his instructions with a view to drafting a new will, not to confirm whether the handwritten Will delivered to Appleby by the Defendant had been executed by the Testator as his last will;

(b) the Testator was <u>not</u> asked to confirm whether the first two pages of the Will were attached to the signature page <u>when he signed it</u> two days earlier in the Hospital;

(c) the Testator was <u>not</u> asked whether he had signed the document understanding it to be his last will and testament as opposed to instructions to be confirmed in a subsequent formal will;

(d) the Testator hoped to be able to go home before Christmas and expected that a more formal will would be drawn up after the December 12, 2006 meeting. This was a further factor mitigating against any deliberate efforts on Ms. Scott's part to explicitly confirm that the Testator had knowingly approved the handwritten Will <u>as a will</u>;

(e) the Testator did confirm that he wished to exclude the Plaintiff from any ownership interest in the Property as an effective means of ensuring that the Plaintiff would not be able to force the Property to be sold at a time when the Testator believed that the Plaintiff's capacities were severely impaired by drug addiction. However, he also stated that he wished the Plaintiff to be able to live in the Property if he recovered from this addiction;

(f) the Testator did not state that he wished to disinherit his son altogether;

(g) in confirming his wishes on December 12, 2006 the Testator was not legally advised of alternative options of protecting the Property for future generations without disinheriting the Plaintiff altogether;

(h) Uncles Hammad and Murad on the Plaintiff's behalf challenged the authenticity of the Will within weeks of the Will being provided to the Plaintiff by Appleby in or about August 2007.

Summary of Findings: the December 10, 2006 Meeting

66. There are two important controversies about the family meeting, firstly did the Testator state his intentions of leaving the Property solely to his daughter and secondly was the Will the document he and the witnesses actually signed.

<u>The Meeting</u>

67. Precisely what was said in a hospital room over 5 years ago cannot be determined with any great precision, particularly bearing in mind the animosity between the only living witnesses to the relevant events. However, if one puts aside any attempt to resolve controversies on fine points of detail and seeks to ascertain the big picture, the task is far easier with reference to independent circumstantial evidence. I am unable to accept either side's version of what was said by the Testator on December 10, 2006 as regard the Testator's articulated wishes as to what legal interest in the Property the Plaintiff was to acquire.

68. The parties' uncles were quite adamant in their trial testimony that the Testator wanted the children to have the Property "50/50". This is contradicted not just by the evidence of the Defendant and Leah Scott to the effect that the Testator confirmed a contrary intention only two days later. The best available evidence as to what the uncles really

recalled is in the September 20, 2007 Appleby File Note which records Mr. Hammad Taalib-Din as contending that "*his brother wanted Hanifah to be in charge and Khomeini to be able to live in the house for life if he straightened out his life....he did not want the property to be sold...*". On November 6, 2008 Wakefield Quin on behalf of the Plaintiff wrote Appleby to discuss a life interest for him on the basis of his recovery.

69. This non-legalistic account of what the Testator articulated as his wishes given by the parties' uncle less than a year after the meeting and only a matter of weeks after they first had sight of the Will and is in my judgment far more credible than recollections dredged up for the purposes of litigation 4 ½ years later. Moreover, it is consistent with what the Defendant herself agrees was said at some juncture during the meeting in question.

70. The Defendant's recollection, not even mentioned in her Witness Statement, that her father actually said that she was to get the Property outright, is not believable. I find it impossible to believe that her two uncles would have responded so quickly and vigorously to challenge the contents of the Will after it was supplied to the Plaintiff in August 2007 if the Will merely reflected their brother's stated intentions. The delay in telling the Plaintiff that he was not a beneficiary is completely inexplicable if the Will merely reflected the clear instructions articulated by the Testator to his brothers who witnessed his signing of the Will.

71. If the Testator said no more than that he did not want the Property to be sold, he wanted his daughter to be in charge and he wanted his son to be able to live in the Property (for life) if he "straightened out his life" at the December 10, 2006 meeting, this would be broadly consistent with the instructions he confirmed to Ms. Leah Scott two days later. He confirmed that he wished his daughter to be the sole executor and sole owner of the Property, having been advised that such a testamentary disposition would satisfy his primary goal of preventing the Property from being sold. However he also made mention of his desire that his son be allowed to stay in the house if he behaved himself. (It is impossible to be sure so many years later whether he said-as Ms. Scott recalled without reference to her contemporaneous notes-that he hoped that his daughter would allow his son to stay or, alternatively, if he actually said that he wanted his son to be able to stay).

72. Accordingly, I find that the Testator did not in any terms announce at the December 10, 2006 meeting that he wished to disinherit his son. He merely stated in somewhat practical terms the result he wanted to achieve, which essentially entailed avoiding any possibility of a then addicted son from selling the Property which he wanted to stay in the family for generations to come and giving control of the Property to his daughter whom he trusted would protect the Property in the long-term. I am satisfied that he never said that his daughter was to be given sole ownership in the Property and his son no interest

whatsoever. The Testator would have likely repeated that he wanted the Defendant to be solely "in charge" and for the Plaintiff to be allowed to stay "if he behaved". The legal formalities he would have expected to be worked out by his lawyers.

73. On balance I find that the Testator must have made it clear in some way that he intended his daughter to become the dominant owner of the Property. It must have been at least implicitly understood by the Testator's brothers that the likely outcome would be that the Property would be owned by the Defendant subject to some lesser interest in favour of the Plaintiff. Because when they first complained that the Will was not the document they signed, they made no complaint about the fact that the Defendant had a greater interest than the Plaintiff; rather, the complaint was that the Plaintiff's right to reside in the Property and their brother's wish that the Property not be sold had been omitted.

74. It is obvious that either before or after the December 10 meeting the Testator formed the view that the legal mechanism best suited to achieve these ends was to exclude his son from legal ownership, with his son being granted a conditional right to occupy the Property if he "straightened his life out". What is something of a mystery is precisely how he reached and why he reached this view, as neither his brothers nor his daughter recalled discussing with him otherwise than at the December 10, 2006 meeting the legal ownership issue. On March 1, 2006, by which time the Defendant concedes her brother was already heavily into hard drugs and at which point her father had already been diagnosed with terminal cancer, the Testator was quite happy to leave the Property to the parties jointly with the Defendant and Appleby's trust company as joint executors.

75. The most obvious change in circumstances by December 10, 2006 which was identified through direct evidence was a worsening of the relationship between the Testator's two children, with the unpaid legal bill from March 1, 2006 affording possible grounds for anxiety about the costs of retaining a professional trustee, not to mention the costs of obtaining a professionally drafted new will. However, the Plaintiff himself admitted that his own condition worsened during the period in question due to his inability to cope with his father's worsening condition and this may well have been a factor in the breakdown of the siblings' relationship.

76. In summary, the evidence points inevitably to the view that the Testator did decide on or about December 10, 2006 to give his daughter sole legal ownership, with some residual more limited (and less clearly defined) rights over the property being conferred on his son.

The Will

77. Did the Testator sign the Will in its probated form in the presence of his witnesses, Uncle Hammad and Murad? The Will requires careful scrutiny as both witnesses to its execution at the earliest possible opportunity vigorously challenged the authenticity of the document to which the signature page admittedly bearing their signatures is attached. The fact that the operative parts of the Will (and enduring power of attorney) are written on entirely separate pieces of paper, something which is always avoided in professionally drafted deeds, makes it far easier to raise suspicions about precisely what was attached to the signature page when it was signed.

78. The first of the two operative pages of the Will the witnesses deny were attached to the signature page which they and the Testator signed on December 10, 2006 were written in the Defendant's impressively neat handwriting without a single correction provided as follows:

> " *December 10, 2006*
>
> *ATTN:*
> *Appleby Spurling Hunter*
>
> *Re:*
> *Mustafa Khalid Taalibdin*
> *Last Will and Testament/enduring Power of Attorney*
> *(adjustments)*
>
> *Dear Sirs,*
>
> *I MUSTAFA KHALID TAALIBDIN of 5 Riviera Estate, Southampton SN 03, Bermuda (in anticipation of my being unable by reason of physical incapacity to manage my property and affairs) HEREBY APPOINT my daughter HANIFAH RUKAN SMITH (formerly TAALIBDIN) of 5 Riviera Estate aforesaid to be my attorney ("my attorney") and in my name and on my behalf to do and execute all or any of certain acts deeds and things hereinafter set forth.*
>
> *THIS WILL dated December 10, 2006 is made by me MUSTAFA KHALID TAALIBDIN of 5 Riviera Estate, Southampton SN 03, Bermuda.*
>
> *1. REVOCATION OF PRIOR WILLS*

I REVOKE my former appointment of my son KHOMEINI BEHSHTI TAALIBDIN as (jointly) my attorney ("my attorney") of my estate and acts deeds."

79. This page contains what appears to be an incomplete enduring power of attorney which purports to authorise the Defendant to act as the Testator's attorney in fact in respect of matters to be specified but fails to specify the matters in respect of which authority is conferred. The final paragraph purports to revoke a previous power of attorney granted to the Plaintiff on a joint basis, without specifying when (if at all) such document came into existence. The final heading refers to a revocation of prior wills but the body of the text does not in fact revoke prior wills at all. Curiously the Defendant's written and oral evidence sheds no light on either why the provisions were drafted or upon what precedent they were based.

80. Neither the Defendant nor her uncles recall any discussion on December 10 about the power of attorney. The Defendant testified that she must have "copied" this page from some other document which was with her father's papers, but (despite retaining possession of all such papers after his death) was unable to suggest what such prior document may have been. This page had a circled number 1 in the bottom right hand corner. Despite these evidential gaps, it seems completely consistent with the Testator's apparent desire to resolve the conflict between his two children while he was absent from the home by "putting Hanifah in charge" that he would have wanted to execute an enduring power of attorney in her favour.

81. The second handwritten page, also written in the Defendant's neat handwriting with not a single correction, appeared to be a self-contained document:

" December 10, 2006

I MUSTAFA KHALID TAALIBDIN of 5 Riviera Estate, Southampton SN 03, Bermuda confirm this letter as my last and final WILL and ENDURING POWER OF ATTORNEY.
I confirm

1. *SOLE APPOINTMENT of my daughter HANIFAH RUKAN SMITH as my attorney ("my attorney")*

2. *SOLE APPOINTMENT of my daughter HANIFAH RUKAN SMITH, aforesaid ("my daughter HANIFAH RUKAN SMITH (formerly TAALIBDIN)") to be executors and trustees of my Will;*[2]

   "My trustees shall mean any of the persons serving from time to time as executor and trustee of my Will.

   I revoke

   My appointment of *KHOMEINI BEHSHTI TAALIBDIN (Aforesaid "my son) as my attorney ("my attorney")*

   I GIVE free of duty all my interest and share in my property situate a [sic] *5 Riviera Estate, aforesaid to my daughter Hanifah Rukan Smith.*"

82. As the Defendant testified, it is clear that the crucial gift provision is based on clause 7 of the March 1, 2006 Will save that all references to a joint interest in the Property for the Plaintiff have been omitted. The definition of "my trustees" is also the same as that in clause 4.2 of the March 1, 2006 Will. However the introduction to page 2 of the Will is not simply "copied" from the previous will but drafted in a distinctive style using legalistic language. Most notably:

    (a) The March 1, 2006 Will begins with the words "THIS WILL is dated… and is made by me…" Clause 1 then states under a heading "*REVOCATION OF PRIOR WILLS*"): "*I REVOKE all my former Wills and testamentary dispositions and declare this to my last Will…*";

    (b) the introduction to page 2 the handwritten Will adopts an entirely different style and form of words from the March 1 Will and adds in the additional feature of an enduring power of attorney;

    (c) clause 1 of the handwritten Will is entirely new wording, also not derived from the March 1, 2006 Will;

    (d) clause 2 of the handwritten Will also adopts a different style of opening wording in referring to "*SOLE APPOINTMENT of*" the Defendant. Clause 4.1 of the March 1, 2006 Will begins with the words "I APPOINT".

[2] The punctuation appears to have originally been a colon which was changed to a semi-colon without deleting the second ".".

83. The contents of pages 1 and 2 of the handwritten Will must indeed have been copied by the Defendant from some other source as this is clearly not a hastily written draft document. But in my judgment it is impossible to believe that the Defendant simply copied the relevant wording from the March 1, 2006 Will as she initially testified. Nor is it possible to believe that she was able at the first attempt to weave together without any errors of wording in her father's Hospital room a blend of two different legal documents. Bearing in mind that the authenticity of the Will has been hotly disputed since September 2007 and is the centrepiece of the present proceedings, the Defendant's vagueness about the details of its preparation is simply incomprehensible.

84. It may well be that the Defendant had access at some point to an Enduring Power of Attorney ("EPOA") prepared by Appleby; the firm's December 8, 2009 letter to Cox Hallett Wilkinson (attached to Ms. Scott's Witness Statement) referred to the Testator's attempts in early December 2006 to arrange a meeting with a lawyer to amend such a document together with the March 1, 2006 Will. If such a document exists it was not produced in evidence. This letter provides significant independent support for the proposition that, contrary to the expectations of his brothers and his ex-wife, the Testator was contemplating changing his will before the December 10, 2006 meeting. However it contradicts the Defendant's assertion in her Witness Statement which was retracted in her oral evidence that her father did not want to incur the expense of having a lawyer prepare a revised will. The same December 8, 2006 Appleby letter records the Testator as having called Leah Scott on December 15, 2006 to request that the revised will be brought for his signature.

85. This very significant piece of evidence further reduces the likelihood that the document signed by the Testator on December 10, 2006 was either written in the form of or regarded by the Testator and his witnesses as constituting a last will and testament at all. If the Testator signed a document understanding it to be his last will which would take effect irrespective of whether a more formal document was drawn up, it is difficult to see why he would have been so keen to sign a more formal will just 10 days before he died and only three days after he had supposedly confirmed the accuracy of the Will which was eventually admitted to Probate.

86. Mr. Rothwell submitted that the bulk of the Will consisted of power of attorney provisions and the one operative clause giving the Property solely to the Defendant may have been slipped in by sleight of hand. Any such conclusion would be speculative. The fact that the preponderance of the Will in fact confers a power of attorney on the Defendant (which would only subsist so long as the Testator was alive) does however demonstrate that an important part of the Testator's focus in mid-December was giving

his daughter control of the Property during his own lifetime at a time when his two conflicted children were sharing the premises he was absent from and the length of his life was somewhat uncertain. Bearing in mind the clarity (but legal complexity) of the Testator's wishes expressed to both his brothers and Ms. Scott to the effect that, after his death, he wanted his daughter to be in charge of the Property but for his son to be able to stay there if he "behaved"/"straightened his life out", it seems inherently improbable that on December 10, 2006 he knowingly signed any document simply giving the Property to his daughter outright and disinheriting his son in an unqualified manner. Indeed the Defendant herself in her evidence on more than one occasion referred to the document as her father's "instructions".

87. A final oddity is the fact that even the signature page's recitals follow an entirely different style to that adopted in the March 1, 2006 Will. The Appleby Will's signature page is printed on the back of the final page of the document and begins as follows: "*I acknowledge this to be my Will and I have signed it before these two witnesses*". Such wording is clearly designed to signify to both the testator and his/her witnesses the nature of the document they are signing. On the other hand the signature page of the handwritten Will is dated and uses the following introductory words more commonly used in various types of other deeds: " *In witness whereof I have hereunto set my hand the day and year first above written (pages 1-3)…SIGNED SEALED AND DELIVERED….by the said….in the presence of*:…."

88. The signature page itself is accordingly not simply based on copying from the March 1, 2006 Will. It is more consistent with the Testator and his witnesses confirming what his testamentary "instructions" were, to use the Defendant's own phrase, rather than his signing what he knew to be his last will. Having regard to the lengths to which the Defendant went to give detailed accounts of various peripheral matters, her inability to explain how she prepared the central document in this case and her demeanour when questioned about it was highly suggestive of guilt on her part.

89. The Defendant admitted that her Uncle Hammad left a voicemail message on her phone accusing her of deceit in connection with the handwritten Will at some point in 2007. Shortly after being shown a copy of the Will in the summer of 2007, Mr. Hammad Taalib-Din in the presence of his brother who also witnessed the signing insisted that this was not the document he signed. I find that the righteous indignation he manifested in 2007 and at trial was genuine, although his recollection as to precisely what the Testator said on December 10, 2006 is not reliable. The Defendant's account as to how she prepared the Will was in large part simply unbelievable, having regard to the contents of the Will and all the surrounding evidence, including her demeanour when cross-examined about the crucial aspects of her account. I am satisfied that operative parts of the

handwritten Will were attached to the signature page after the signature page was signed by the Testator and his brothers on December 10, 2006.

Findings: knowledge and approval claim

90. The due execution of the Will and the competence of the Testator when allegedly executing it having been disputed on plausible grounds, the Defendant has failed to prove:

    (a) that the Testator was competent on December 10, 2006;

    (b) that the Will, admittedly written by the Defendant and which made her the sole beneficiary while disinheriting her brother altogether was the same document the signature page of which was signed by the Testator on December 10, 2006 in the presence of two witnesses;

    (c) that the Testator knowingly approved the Will as his last will and testament.

91. While this Court can make no positive findings about the competence of the Testator, it is in any event clear on a balance of probabilities that the handwritten Will upon which the Defendant relies was not the same document which the Testator executed in the presence of his witnesses and that whatever documents he did sign he signed by way of instructions as opposed to as his last will and testament.

92. The Plaintiff is accordingly entitled to an Order revoking the December 10, 2006 handwritten Will and setting aside all transactions made pursuant to it and the March 1, 2006 Will is restored as the Testator's last will and testament.

Undue influence claim

93. If I were required to find instead that the handwritten Will was validly executed by the Testator with the requisite knowledge and approval, I would not find in the alternative that the Plaintiff had proved that the December 10, 2006 Will was liable to be set aside on the grounds that it was procured by the Defendant's undue influence.

94. Although on any view of the facts it is obvious that the Defendant must have encouraged the Testator to feel that she required the protection of being made the dominant owner of the property after his death, it is far from clear such persuasion had the effect of sapping his will. Despite his vulnerabilities by this stage, if (contrary to my primary findings) the Testator duly executed the handwritten Will knowing that it would disinherit his son

altogether in circumstances where he was (a) competent, (b) knew the document was to be his last will and testament and (c) acted in the presence of his brothers (whom the Defendant was not capable of intimidating), I would be unable to make any positive finding that the relevant gift was vitiated by undue influence.

Fraud

95. I see no need to make findings on the fraud claim for the reasons articulated above. If the Will was duly executed and not vitiated by undue influence, it would not be open to me to find that the Defendant acted fraudulently.

Proprietary estoppel/constructive trust claims

96. There was no or no material dispute as to the legal elements of these claims.

97. I accept the submissions of Mr. Harshaw to the effect that the Plaintiff has failed to make out the requisite element of detrimental reliance to support a proprietary estoppel and/or constructive trust claim. It is clear that he made contributions to the home he lived in, but not that those exceeded the value of the accommodation that he received. There was no credible evidence that, but for the representations made by his father, the Plaintiff might have purchased property elsewhere. Having regard to the questionable source of an unspecified element of his earnings (in light of admissions freely made which reflected well on the Plaintiff's present honesty and integrity), the equitable position is considerably unclear. The proprietary estoppel and constructive trust claims are dismissed.

Conclusion

98. The Plaintiff's claim that the handwritten December 10, 2006 Will was not executed with the Testator's knowledge and authority succeeds. No separate findings are made as regards the remaining claims. However, if the Court was unable to find in favour of the Plaintiff in respect of the knowledge and approval claim, it would logically follow that the remaining claims would also be dismissed. I will hear counsel as to costs and the precise form of Order which should be drawn up to give effect to this Judgment.

99. As a result of my primary finding, the Plaintiff is entitled to an Order revoking the December 10, 2006 Will with the effect that the professionally drawn March 1, 2006 Will is restored and the Plaintiff and the Defendant are entitled to an equal share in the Property. I feel compelled to add that I firmly reject the suggestions made that the Defendant's actions were motivated purely by greed and spite in any traditional sense.

Her motivations were in my judgment primarily designed to create an opportunity for herself and her children to live in a home free from the scourge of chronic addiction to hard drugs. These aspirations should be commended, not condemned. The parties' father, in his last days, undoubtedly wished to ensure a better life for his daughter than he had been able to provide in his lifetime while demonstrating his love for his son in a remarkably tough yet powerful manner: by excluding his son from any interest in the property unless he was able to "straighten his life out" and giving him the strongest possible motivation to overcome his considerable challenges.

100. Time was not sufficient for these wishes, legally difficult to express, to be incorporated into a professionally drawn will which could be properly executed. But the actions of the Defendant, legally invalid as they have been found to be, have in a roundabout manner undoubtedly contributed to an apparently remarkable transformation of the Plaintiff into responsible and productive citizen. The reference in her Witness Statement to the Defendant's "unconditional love" for her brother is perhaps not so surprising after all. Despite the bitterness with which the present litigation was begun, the parties could do no better now than to forgive and forget and commit to honouring their father's memory in the years ahead.

Dated this 4th day of May, 2012 ___________________________

IAN R. C. KAWALEY, CJ