IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 00938/2004

BETWEEN	HUBERT MARTELLS	CLAIMANT
AND	ENA MCLARTY	1ST DEFENDANT
AND	MICHAEL KNIGHT (Executors of Estate Canute Martells)	2ND DEFENDANT

Mr. R. Codlin and Miss B. Anderson for the Claimant, instructed by Raphael Codlin and Co.

Miss A. Beckford for the Defendants

HEARD: 4th November, 3rd and 16th December 2004, and 25th January 2005

BROOKS J.

Canute Martells died on October 18, 2003. He is said to have executed his last will and testament on January 15, 1999; almost five years earlier.

The Claimant Mr. Hubert Martells claims an order that the Court pronounces against the validity of that will. For convenience, I shall refer to these persons as Canute and Hubert respectively. No disrespect is intended by the reference.

Hubert, who is ordinarily resident outside of Jamaica, claims that the will is null and void because it was procured by fraud by Canute's wife (now widow) Pearline Martells. Hubert further claims that Canute did not have the mental capacity to execute a will at the time that this one is said to have been signed.

The Defendants, who are the executors named under the will, and Mrs. Martells, deny Hubert's assertions. In fact Mrs. Martells says she was not even aware of the existence of the will until August 2003.

There were a number of procedural difficulties attending this application but the essential question for the Court is whether it is satisfied that the will was executed in accordance with the provisions of the Wills Act, and whether Canute had the necessary mental capacity at the time of execution.

The procedural difficulties mentioned above include the following:

a) The executors, having filed an acknowledgement of service, did not file a Defence to the Particulars of Claim, but rather filed Affidavits denying Hubert's claim and asserting their own position. Further, no counterclaim was filed as is required by Rule 68.58 of the Civil Procedure Rules. The result is that even If there is a finding in their favour, the will cannot be found to be proved in these proceedings.

b) Hubert filed Affidavits in response to those filed by and on behalf of the executors. His affidavits were executed in the presence of a Notary Public in New Jersey in the United States of America. They, however, were not accompanied by the certificate, which is required by Section 22 of the Judicature (Supreme Court) Act, to verify the Notary's signature and authority. In addition his affidavits were a strange combination of photocopies or facsimile copies of signatures and of original signatures.

These defects did not come to the attention of the Court while the parties were present before it and so the parties did not have an opportunity to address the issues. The court will therefore exercise its discretion to allow these documents to stand despite their defects.

Finally in this regard, it is to be noted that on November 4, 2004 an order was made that Mrs. Pearline Martells should file an affidavit disclosing the names and addresses of all doctors who had rendered treatment to Canute between 1998 and 2003, and that every such doctor should supply a report of his diagnosis and treatment. Mrs. Martells belatedly filed an affidavit in response to that order. In that affidavit she stated that Canute was treated as an in-patient at the University Hospital of the West Indies (UHWI) on various dates between July and October 2003.

The Defendant's Attorney-at-Law produced a medical report on 4th January 2005. It was dated December 3, 2004 and was signed by a Dr. Gayle of that Hospital. The production was well after the date set for closing submissions to have been tendered. The delay is of special note because the contents of the report would seem to support the Claimant's case. I shall give details of the contents later in this judgment. (Both parties were given the opportunity to, and did make submissions in respect of the report.)

The Claimant's case

The main thrust of Hubert's assertion is that in July 2003 when he went to see Canute, the latter did not recognize him, had to be assisted in what he was doing and had to be confined by a locked gate, to prevent him wandering off.

What is significant about his visit to Canute is that it was four and a half years after the date of the purported will. The only evidence proffered by Hubert as to Canute's state of mind in or about 1999 is contained in the testimony of Mr. Neville Mais.

Mr. Mais deposed that in late 1997 he took Canute to the United States Embassy, for the latter to attend an interview. He says that at the end of the interview, Canute didn't say anything about it, but just handed over to him the refusal document that had been issued. Mr. Mais points to this behaviour as being abnormal. Significantly however, Mr. Mais did not indicate that there was anything amiss with Canute's behaviour before the interview.

I find that there is nothing in that testimony which could lead to any question of Canute's mental capacity at that time. Mr. Mais' evidence however did go further. In cross-examination, he also gave the following testimony:

> "I am the nephew of Canute Martells ... I would see him once per week",

and,

> "In October 2003, he was just there; if you instruct him to sit he would just sit; to do this, he would probably do this,"

and,

> "He was just there in 1998"

I have referred to the answer relating to 2003 to provide the context for the answer in respect of 1998.

Despite that testimony however, Mr. Mais testified that Canute went to church up to 2001 or early 2002. He said in 1998 Canute might have then been working with some people named Anderson.

In the case of <u>Smee v Smee</u> (1879) 5 P.D. 84 at p.91 Sir James Hannen, P. stated that:

> "...anyone who questions the validity of a will is entitled to put the person who alleges that it was made by a capable testator upon proof that he was of sound mind at the time of its execution. The burden of proof rests upon those who set up the will, and, *a fortiori*, when it has already appeared that

> there was in some particular undoubtedly unsoundness of mind, that burden is considerably increased."

The *Smee* case and some others cited by the Claimant's Attorneys-at-Law, involved cases where there was clear evidence of some unsoundness of mind prior to the execution of the will. In the instant case however, unsoundness of mind prior to 1999 is at best hinted at in Mr. Mais' testimony. It is however sufficient to put the executors to strict proof that Canute did have the requisite testamentary capacity at the time he executed the will and that he knew and approved of the contents of the will.

The Defendants' Case

This testimony on behalf of the executors comes from four witnesses, Mrs. Pearline Martells, both of the executors and a Mrs. Joy Tame.

Mrs. Martells for her part denied Hubert's allegation that she had told him that Canute was suffering from Alzheimer's disease. She said that Canute participated in community events up to a few months before his death and said that it was he who gave her the key to a strong box in which the will was kept. It was then, she said, that she first became aware of the existence of the will.

The other important aspect of Mrs. Martell's testimony is her strong denial that Hubert and his father were "in good spirits" and "in regular communication," as Hubert alleges. She gave evidence of an acrimonious relationship between the two which, if believed, would leave the Court in no doubt why Hubert was not named as a beneficiary in Canute's will, and indeed, not made aware of it.

The testimony of Mrs. Tame was that she prepared the will on Canute's instructions, given to her by him in person. She said she sent the will to him with

instructions. The major thrust of her testimony in the context of this case is that Canute came to her home by himself and gave her the instructions. She says he appeared "to be in good health and not suffering from any debilitating disease."

There was also the testimony of the executors who were also the witnesses to the will. Both gave evidence that Canute asked each of them to be one of the executors of his will and some weeks later asked them to attend his house to sign it. Though Mrs. McLarty did not recall who first signed the will, both testified that Canute and themselves each signed in the presence of the others. Mr. Knight in cross-examination testified that Canute signed first.

The Medical Evidence

The medical report which was referred to above brings a significant twist to this case. It speaks to Canute being seen at the UHWI "on April 26, 2002 with an assessment of Respiratory Tract Infection and of possible Senile Dementia."

He was discharged from hospital but was re-presented in August 2003. The doctor states in his report that:

> "Relatives gave a history of Senile Dementia dating back two years with reported complaints of "Mumbled speech" with an inability to self care.
> His mental status diagnosis, on admission was that of Dementia with significant cognitive dysfunction and continued inability to self care." (Emphasis mine)

The report went on to describe tests which were done at that time. It is significant however that the report does not opine as to a period of time for which Canute must have been suffering from this disease. Nonetheless the Claimant's Attorneys-at-Law have submitted that the "presumption here, therefore, must be that at the time when the will is alleged to have been executed, the deceased

was suffering from the same mental incapacity as he was found to be suffering from two years afterwards. This statement has been supported by statements such as "(t)he evidence makes it abundantly clear that senile dementia is not something that descends upon us like a thief in the night. It travels like a tortoise not like a hare."

I find that there is no such evidence before the court. The significance of the report is that it seriously contradicted Mrs. Martells' (and indeed, Mr. Knight's) denials that Canute was so afflicted. Indeed it makes her testimony on the point incredulous. Mr. Knight was more diffident. I am inclined to believe Hubert as to what he saw and what was said to him in 2003, about Canute's condition.

How does that affect the situation in January of 1999? I find that it should make the court examine closely the evidence of the witnesses concerning the preparation and execution of the will.

Assessment of the evidence

In considering the whole body of evidence I am satisfied as to the veracity of the evidence provided by the Defendants. All four defence witnesses were cross-examined on their respective affidavits, all were unshaken in their testimony and all exhibited excellent demeanour under cross-examination. I was impressed with them and I accept their testimony for the most part as true.

In contrast I did not believe Hubert's testimony concerning his relationship with Canute. He testified to being in constant communication with his father, saying that he usually communicated with him by telephone and that his "cousin Mr. Mais would take (Canute to Papine Square) to speak to (him) over the

telephone." When Mr. Mais was quizzed about that aspect he testified that he had never taken Canute to Papine to make telephone calls. Although Canute could write, and is said by Hubert to have written a letter to him, Hubert says that he (Hubert) doesn't read well.

I therefore find that the Defendants have satisfied the burden of proof placed on them. I find that Canute did give the instructions to Mrs. Tame and that he did have the requisite testamentary capacity on January 15, 1999. I find that on that date he did execute, with full knowledge and acceptance of its contents, the will which has been marked "C" for identity in these proceedings.

I further find that the execution was in accordance with the requirements of Section 6 of the Wills Act and that there is nothing about Canute's signature on the will which betrays any feebleness of mind.

The medical report does not prevent me from finding as I do. Although (not unusually) in giving his history, it contains hearsay as to the time of the onset of Canute's condition, that time proves to be two years after the will was signed.

Mr. Codlin brought to my attention the cases of *Broughton v Knight* and *Banks v Goodfellow* at [1861- 1873] All E. R. Rep pages 40 and 47 respectively, in support of the proposition that the will ought to be set aside. These cases however involved testators who were both admittedly displaying symptoms of unsoundness of mind prior to the execution of the will. That is not so in Canute's case.

I find that Hubert should not have had any expectation that he would have been a beneficiary of Canute's will. This is because I am satisfied that the two

did not share a good relationship. I therefore find that the cases cited by Mr. Codlin namely, _Tyrell v Painton_ [1891-4] ALL ER Rep 1120, and _Wintle v Nye_ [1959] 1 All ER 552 concerned very different fact situations from the instant case.

In the _Tyrell_ case the testatrix had expressed disaffection with Mr. Painton, and had executed a will in which he was no longer her trustee or beneficiary. Two days later another will was executed by the testatrix. This will was in the handwriting of a son of Mr. Painton and it made Mr. Painton a substantial beneficiary of the estate. The witnesses to the later will included the said son of Mr. Painton.

Another case of the draftsman of the will being an exceptionally interested party is the _Wintle_ case, where the will was drawn up by the testator's solicitor, who proved to be the chief beneficiary therein named.

I find that the present case is unlike the situation in those cases. I find that the circumstances here do not signal any impropriety. It is more in keeping with the fact situation in _Re R_, [1950] 2 ALL ER 117, which was also cited by Mr. Codlin. The testator in that case was alleged to have been a chronic alcoholic with a weakened intellect and a defective memory. A further allegation was made of the existence of his homosexual relationship with the beneficiary of the will. The headnote of that case in part states as follows:

> "Held: (i) in dealing with a plea of want of knowledge and approval the circumstances held to excite the suspicion of the court must be circumstances attending, or, at least, relevant to, the preparation and execution of the will; the present will was drawn up by solicitors; in the absence of any evidence to show that (the beneficiary) or his parents were concerned in the preparation or execution of the will the allegation of scandalous conduct was not relevant to the

> question whether the deceased knew and approved of its contents; and, accordingly, it must be struck out."

What Hubert has alleged is that Mrs. Tame employed Canute's stepchildren. Secondly, he says that Canute would not have had either of the Defendants to be his executors, because, he alleges, Canute did not know them well. Thirdly he says that he was not told about the existence of the will before Canute's death. I find that none of these allegations have been supported by anything of any substance to excite the court's suspicion. Nothing therein would suggest that Mrs. Tame is a party with any exceptional interest.

Fraud

Finally, I turn to Hubert's pleadings which allege that Mrs. Martells procured the will by fraud, and have purported to support the allegation with particulars. However, none of the particulars support that allegation. Fraud must be specified and proved. Apart from this deficiency in his pleadings, Hubert has also failed to provide any evidence of fraud on the part of Mrs. Martells.

For the reasons stated above, the order of the Court therefore is:

1. The Claimant's application to pronounce against the will of Canute Martells which is dated January 15, 1999 is refused.
2. The said will was executed by the said Canute Martells and was witnessed in accordance with the provisions of the Wills Act.
3. The Defendants are entitled to apply to prove the said will in common form.
4. Costs to the Defendants to be taxed if not agreed.