

IN THE COURT OF APPEAL OF THE SUPREME COURT OF
JUDICATURE

APPELLATE JURISDICTION

CIVIL APPEAL NO. 71/2002

BETWEEN:

GEORGE CHEE a/k GEORGE MIN CHEE
represented herein by **FLORET RAMSARAN**
his duly constituted Attorney in Guyana by virtue
of Power of Attorney registered in the Deeds
Registry, Georgetown, on the 20th day of November,
1998 and numbered 6059/98.

Appellant/Plaintiff

- and -

1. **CAO MIN WEI**
2. **LUI ZHI SEN**

Respondents/Defendants

BEFORE:

Hon. Madam Justice Desiree P. Bernard	- Chancellor
Hon. Madam Justice Claudette M.C. Singh	- Justice of Appeal
Hon. Mr. Justice Nandram Kissoon	- Justice of Appeal

Mr. L.M. Caesar for Appellant
Mr. O.M. Valz, S.C. for Respondent

2004: January 22, 23
May //

JUDGMENT

BERNARD, C.:

On 14th September, 1998 one CHUEN SING CHUI also called CHEE SING CHOON, died at his residence situate at Lot H D'Urban Street and Vlissengen Road, Georgetown, at the age of 87 years leaving the Appellant, his nephew, as his sole surviving relative. The deceased had executed a will dated 27th May, 1987 in which the Appellant was named as executor and sole beneficiary of his estate. However, unknown to the Appellant, his uncle had allegedly executed a later will dated 8th September, 1998 in which he appointed

as executors the Respondents who were not his relatives, and to whom he bequeathed jointly his undivided half ~~and~~ interest in the property situate at Lot H D'Urban Street & Vlissengen Road, Georgetown, as well as any residue of his estate. Probate of this will was granted on 29th January, 1999 to the first-named Respondent.

The Appellant filed proceedings against the Respondents seeking a revocation of the grant of probate and an order pronouncing against the validity of the will on the grounds that at the time of its execution the deceased was not of sound mind, memory and understanding and did not know and approve of the contents of the said will by reason of his advanced age and state of health.

After a hearing a trial judge pronounced in favour of the validity of the will. The Appellant being dissatisfied with this decision has appealed to this Court on the grounds, inter alia, that the trial judge had misdirected herself on the issue of testamentary capacity and suspicious circumstances surrounding the preparation and execution of the will, and shifted the burden of proof to the Appellant to prove testamentary capacity. The trial judge also erred when she pronounced in favour of the validity of the will which was not executed in accordance with the Wills Act, Cap. 12:02.

It is trite law that in seeking to propound a will the burden of proving due execution and that it reflects the wishes of a testator of sound mind, memory and understanding who knew and approved of its contents rests at all times on the party propounding it. This has been established over the years by a litany of cases emanating from both the English and Caribbean courts as well as our own courts.

The first fact to be established in propounding a will is that it was executed in accordance with statutory provisions. In our jurisdiction it must be established that it was executed in accordance with Section 4 of the Wills Act,

Cap. 12:02. The principle “omnia praesumuntur rite esse acta” applies where the will is regular on the fact of it, i.e. with an attestation clause and the signature of the testator and witnesses. If these are in place there is a presumption that the will was duly executed.

As in the case of due execution the burden of proving that the testator had the required testamentary capacity to make the will, i.e. that he was of sound mind, memory and understanding, rests on the person propounding it. **Wooding, C.J.** in **Moonan v. Moonan (1965) 7 WIR, 420 at p. 422** upheld this contention.

The question whether a testator knew and approved of the contents is an essential element in propounding a will. **Parke, B.** in **Barry v. Butlin (1838) 2 Moo. P.C.C., 482** enunciated the rules of law on this aspect in this way:

“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”

In order to satisfy the conscience of the court evidence must be led by the person propounding the will indicating that the testator was capable and was not coerced into signing the will. In this appeal evidence was led through Errol Choo-Kang who signed as a witness. He testified that he visited the deceased regularly, and never noticed that he seemed to have lost his memory or mind. He admitted that the deceased was partially blind and hard of hearing, but he moved around on his own and prepared his own meals. Choo-Kang said that when he, the deceased, signed the will he seemed to know what he was doing, and knew what property he was disposing of. Of significance Choo-Kang under cross-examination admitted that the Respondents were his relatives, and they had requested that he be a witness to the will.

Another witness, Chen Jian Bin, testified that he knew the deceased who could hear "a little bit", could read, but not "good", and he knew this to be so because he, Chen, checked the paper when he read. He did not say what paper he meant. He also said that the deceased "got sick", but he did not know how long this was before he died. He knew that the Respondents looked after the deceased up to his death.

The other witness to the will was Jean Sahai, a Justice of the Peace, who testified that on the day the will was executed she was asked by one Mrs. Agard (who was not called as a witness) to accompany four Chinese nationals to the home of the deceased to have the will executed. The will had already been prepared, and on arrival at the home of the deceased he asked the Chinese nationals whether they had brought the will. She said she offered to read it, but the deceased said he would read it. He took a considerably long time (about one hour) to do so, and then signed his name in her presence and that of Mr. Choo-Kang and the others. She signed and then Choo Kang. She said that she asked the deceased if he understood the contents of the will, and she placed her "read over" stamp on the will and signed the stamp. She stated further that she made sure that the will was properly executed, and if she had any reason to believe that the deceased had not understood what was being done she would not have signed the will.

Under cross-examination Ms. Sahai's evidence departed significantly from what she had said earlier, and is to this effect:

"When I got there the will was already typed and signed." (emphasis mine)

This stands in stark contrast and contradicts her earlier testimony that the deceased had signed the will in her presence and that of the other witness Choo Kang. This contradiction in Sahai's evidence completely escaped the learned

