ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

SUIT NO. 95 OF 1992

IN THE ESTATE OF ANTHONY JOSEPH CHAIA, deceased

BETWEEN:

EDWARD CHAIA
CAMELLA MICHAEL COCHRANE
JOSEPH BAHRI

Plaintiffs

and

DONNA MARY GRACE CHAIA

Defendant

Appearances:

Ms. Joyce A. Kentish with Charlesworth O.D. Brown
and Richard B. Lai Choy for the Plaintiffs
Mr. Justin L. Simon with Dane Hamilton and Monique Gordon-Francis
for Defendant

1998: June 23,24,25,26,29,30 July 1,7,8,9
1999: February 22,23,24,25,26
2000: September 18th

JUDGMENT

[1] **GEORGES J: (IN COURT)** About mid-afternoon on Monday 16th December, 1991 Anthony Joseph Chaia alias Tony, a merchant and citizen of Antigua and Barbuda by birth but of Lebanese origin, ("the testator") died aged 63 at Fort Hamilton Veterans' Hospital, Brooklyn, New York where he had been admitted to the Cardiac Care Unit on 24th October, 1991 complaining of shortness of breath and chest pains - a condition with which he had suffered for the past nine years but which had by then worsened.

[2] On 23rd October, 1991 he had flown from Antigua to the United States accompanied by his only child and daughter Donna ("the defendant") for medical treatment at the Mayo Clinic Rochester Minnesota but he took ill on arrival in New York and was hospitalized at the Veterans' Hospital in Brooklyn the following day, where he remained until his demise. The cause of death according to the certificate of death is stated as cardiorespiratory arrest due to congestive heart failure and aortic stenosis.

[3] During his lifetime the testator had allegedly made no fewer than four wills, the first of which dated 8th September, 1988 he had himself voided and the second, dated July 1991 remained unexecuted, This present action arises as a result of the testator's third and fourth wills dated 17th August, 1991 and 26th October, 1991 respectively.

[4] In these proceedings the plaintiffs, the executors named in the third will, by writ of summons filed 28th February, 1992 asks this court to pronounce against the validity of the fourth will by reason that its execution had been obtained by the defendant by undue influence and that the Court should instead pronounce in solemn form for the true last will of the testator, the third will dated 17th August, 1991.

[5] By order of the court dated 1st December, 1997 leave was granted to the plaintiffs'

solicitors to delete sub-paragraph 6 of paragraph 3 of the statement of claim and to add a new paragraph 4; the practical effect of which was to plead further and in the alternative that at the time of execution of the will, the testator did not know and approve of the contents of the alleged will. That allegation is supported by seven paragraphs of particulars.

[6] By notice dated 22nd June 1998, the plaintiffs' solicitors again applied for and were granted leave to amend particulars of paragraph 4 of the amended statement of claim by inserting a new paragraph 2(a) to the effect that at the time of execution of the said alleged will, and by reason of his illness, the testator lacked the requisite mental alertness and cognizance to appreciate fully or at all that the document executed by him was his last will and testament.

[7] On the very morning of the trial itself, the plaintiffs' solicitors, were again granted leave to further amend their statement of claim whereby the plea of undue influence as originally set out at paragraph 3 of the statement of claim was now wholly abandoned with reliance now being placed solely on the plea of want of knowledge and approval of the contents of the said alleged will by the testator at the time of execution.

[8] The plaintiffs' pleaded case as set out in the particulars of paragraph 3 of the statement of claim is that:

"1. (a) The Decedent had given no signed written instructions for the making of the said alleged Will (i.e. the fourth Will) and the Defendant failed to bring home to the Decedent knowledge of the said Will.

(b) Further at time of the execution of the said alleged Will, and by reason of his illness the Testator lacked the requisite mental alertness and cognisance to appreciate fully, or at all that the document executed by him was his last Will and Testament.

2. The said alleged Will is replete with alterations and interlineations such that the meaning of certain devises is ambiguous and/or uncertain and/or unclear.

3. The said Will is at variance with the Decedent's known affections and previous declarations in that:

(a) He made the general welfare and standard of living and care of his widow subject to the sole discretion of the Defendant who was at best indifferent as to her present or future condition.

(b) He made the Defendant, in whom he had no confidence in respect of business acumen, solely responsible for the control of his property interests and assets with power to dispose of whatever assets she deemed necessary thereby subjecting his said widow to much uncertainty as to her future well being.

(c) By provisions in the said Will the Defendant would be obliged to interact with the Decedent's widow and be concerned over her well being, a proposition which the Decedent knew was unnatural, highly unlikely and most improbable having regard to his declared intention to keep his widow independent and financially self reliant.

4. The said alleged Will is at further variance with the Decedent's general sense of propriety in that having regard to his previous preparations and precautions it was prepared by a person other than a Solicitor and was executed in a crude manuscript form and excluded a residuary clause.

5. The said alleged Will is at further variance with the Decedent's general sense of propriety in that he made the Defendant his principal beneficiary and, apart from providing for the care of his widow and devising to her a parcel of land situate at Coolidge, failed to recognize his widow's substantial contribution in cash and in kind towards acquisition of is several property,

interests and other assets.

6. The said alleged Will is at further variance with the Decedent's general sense of propriety in that he included his "pool tables" in his assets to be controlled by the Defendant with a power to sell the same when in fact he had concluded the sale of the said pool tables during his life."

[9] In response thereto, the defendant whilst admitting (at paragraph 6 of the defence) that the Decedent remained in the Cardiac Care Unit (CCU) of the hospital until his death, states that his condition was such that he was allowed visitors and was lucid and conversational until his death.

[10] The defendant further declared at paragraph 7 of her amended defence that the process of the execution of the will dated October 26, 1991 was conducted by a Notary Public who was one of the attesting witnesses and that the Decedent did know and approve of the contents of the same.

[11] And whilst admitting (at Paragraph 8 of her defence) that the Decedent gave no written instructions for the making of the will dated October 26, 1991 the defendant denied the other particulars of paragraphs 3 of the statement of claim and maintains that:

"(a) The Decedent was at the time of the making and execution of the will mentally alert and cognisant of the nature of the document and its contents;

(b) The Decedent's initials appear on the various pages of the will and were placed thereon in the presence of the attesting witnesses;

(c) The will was read to the Decedent by the Notary Public prior to the

witnessing of the decedent's signature;

(d) The will is not at variance with the Decedent's known affections or general sense of propriety and that the Defendant will inter alia refer to two earlier wills which were drawn up on the instructions of the Decedent;

(e) The Decedent at the date of his death was the owner of pool tables in respect of which there had been no inter vivos disposition;"

[12] Furthermore, whilst making no admission as to the widow's alleged substantial contribution in cash and/or kind towards the acquisition of the Decedent's property, the defendant put the plaintiffs to proof of that allegation.

The evidence shows that the testator had appointed his daughter Donna (the defendant) his cousin Edward Chaia and his niece-in-law Camella Michael Cochrane as the executors and trustees of his first and second wills. Donna was not appointed as an executor of the testator's third will; the third executor named therein besides Edward Chaia and Camella Michael Cochrane being Joseph Bahri, the testator's nephew.

[13] In the fourth manuscript will written by the testator's daughter Donna and executed by him two days after his admission to the Veterans' Hospital in Brooklyn, the testator appointed his only child, the said Donna Mary Grace Chaia the defendant, sole executrix and charged her to be responsible for the care and provision of his wife Rose Simon Chaia and granddaughters Reina Chaia, Wolete Chaia and Tchir Chaia; who at the date of the testator's death were then aged 12, 10 and 7 respectively. Donna was then herself 31 years old and had been sired by the testator prior to his

marriage to Rose, his senior in age and who had borne no children.

[14] Following the testator's death in New York in mid-December, 1991 he was buried in Antigua about a week later and application for a grant of probate of his 3rd will dated 17th August 1991 was made by the plaintiffs's solicitors on 31st December 1991.

[15] The application together with a copy of the said Will and other necessary documents were lodged in the Registry of the High Court of Justice on 2nd January, 1992 at 2:35pm and the order for the grant was duly made at the same time and on the same day by Anthony Greer, Assistant Registrar of the High Court of Justice. On 7th January, 1992 the defendant's solicitor duly filed a caveat against the application for probate whereupon Edward Chaia, one of the executors named in the said Will renounced "all right and title to the Probate and execution of the said Will" on 25th February, 1992. A deed of disclaimer of trusts of will was also lodged by the said Edward Chaia simultaneously.

[16] By writ of summons dated 26th February, 1992 and filed 10th March, 1992 the plaintiffs applied to this Court to pronounce against the validity of the testator's fourth will aforesaid dated 26th October 1991 on the ground that execution had been procured by the defendant Donna by undue influence and to pronounce in solemn form in favour of the third and earlier will dated 17th August, 1991.

[17] Inasmuch as the first plaintiff Edward Chaia had renounced his executorship of the latter will prior to commencement of this action, he cannot be a proper party thereto and his name is accordingly struck off.

[18] The hearing of this matter spanned several days and concluded approximately nine months after its commencement. The evidence was inevitably voluminous and was accompanied by a number of documentary exhibits including a mass of photocopies of hospital medical records some of which were barely legible or intelligible.

[19] The Court was however provided with a host of case authorities and excerpts from leading texts on the subject which has proved immensely helpful. A debt of gratitude is also owed to Counsel for the able manner in which they argued their respective cases.

[20] Before embarking on an analysis of the evidence and applying the relevant principles of law pertaining thereto it would be helpful at the outset to give a brief profile of the principal actors in this unfortunate saga and provide an account of the circumstances which gave rise to it.

[21] At the heart of this controversy is ofcourse the testator himself Anthony Chaia alias Tony. According to his nephew and confidant Joseph Bahri, a teacher by calling and first cousin of Donna, Anthony Chaia was a self-made, self-taught man and a very

independent person. A man who had his own views, he was not fearful to express them, sometimes in language that was not always becoming the court was told.

[22] Bahri, who impressed the Court as an honest fair-minded gentleman went on to say in cross-examination by Mr. Simon that:

> "He was a person who used people as a sounding board but did not necessarily take their advice. He was certainly a man if he did not like something he would certainly let you know in very graphic language. He certainly had very strong views and he certainly did not give a damn what others thought.
> He was an entrepreneur. I know that for a time he ran a travel agency, pool table and juke box business. In the 60's he ran a snack bar, sold ice cones and popcorn, hot dogs etc.
> I am aware of several close friends that he had. In fact he regarded some of them as a closer than blood relatives."

[23] Bahri, who replaced Donna as executor of the testator's third will dated 17th August 1991 went on to disclose that Donna was the testator's only daughter born out of a relationship outside of his ethnic circle.

[24] Marcella John, Branch Manager of Barbados Mutual Life Assurance Company Ltd. told the Court that her husband had introduced Tony to her in September 1959 as his very good friend. He became her very good friend as well she added stating:

> "I would say I was his confidant-personal and business. He sought my advice in his matters and when asked I offered advice. He did not always accept."

Cross-examined by Mr. Hamilton the witness further deposed that:

> "Mr. Chaia reared Donna from a baby. In the first years it would be true to

say that he was a single parent. I would look after Donna on his behalf on certain occasions. She was the apple of his eye and he loved her a lot. This was sometime before Anthony Chaia married Rose and after. That love for Donna lasted up to the day he left for New York, and at the time of his last illness the defendant Donna Chaia was the person he chose to take with him to New York."

[25] She herself had known Donna Chaia from very small she declared and had seen her grow up from a child to an adult woman.

[26} Like Joseph Bahri, Marcella John impressed as a witness of truth and I shall revert later to their testimony in relation to what the testator had confided in them regarding his own financial status as well as his cares and concerns in the months prior to his departure for the United States for medical treatment when he was in failing health.

[27] Of her father (the testator) and of her ownself Donna Chaia, the scribe, only daughter and sole executor of the testator's fourth will dated 26th October 1991, had this to say:

"As a child I grew up with whichever guardian my father would leave me with from time to time. During that time my father had total custody of me. I am his only daughter.
Following the marriage of my father I subsequently lived with him and his wife from about age 11 or 12. I lived with them until age 16. I had a good relationship with Aunt Rose during that period.
My father operated a pool table and juke box business at the time. I was involved in that business with my father. My main role was to be aware of the latest songs, purchase records, distribute them to the various tavern/venues and to collect the money from the various juke boxes and pool tables. I also assisted with the maintenance and repairs of his pool tables.

The pool tables and juke boxes were installed in whore houses, Government House, taverns , hotels, and such places. I worked with my father until 1976. I was a student at the time. I went to Christ the King High School.

After leaving school I taught at Golden Grove Primary School. I also worked at the Blue Heron Beach Hotel, at the Jolly Beach Hotel and finally at Antigua Commercial Bank. (ACB)

I worked at ACB from 1987 to 1996 as an Accounts and Verification Officer.

I am the mother of 3 daughters, no sons. My eldest daughter Reina was born in 1979. My second daughter Wolete is 17 years old and my last daughter Tchir is 14 years old.

My father was extremely affectionate and loving to my children. His favourite was Tchir. Aunt Rose loved them just as much as my father did and they loved her too.

My father and I had a loving relationship at this stage. I don't consider that we had any problems in our relationship. He however did not approve of my employment at ACB. He would calculate my salary and try to impress upon me that it was not worthwhile. He felt I should be operating the business with him.

He attempted a business but it did not work out. We sold barbecue chicken. That was the main feature along with other food items. This was in the two-storey building on Cross Street now known as Tony's Place. It operated between 1985-1986. I was not otherwise employed then. I had resigned the job at Jolly Beach to operate the business.

I live at Gambles with my 3 children from 1985 or thereabouts. My father informed me that it was an annex to his home as I lived there under his jurisdiction. He put me there.

I would say that in 1991 my father was not a well man. I had some idea of his complaint. I spoke to the Credit Manager of the ACB about something and I mentioned it to my father - that is that I wanted to borrow some money for us to go away. My father declined. This was about mid 1991.

My father requested that I give up my job and stay home to take care of him. I was willing to travel with him but could not give up my job. He was not please with that.

Around that time members of his family began visiting his house. Camella Michael took up residence there. Prior to that my father and his wife Aunt Rose lived there alone. I saw Camella living at the house.

My father was in a serious dilemma. He was very ill and he was insolvent. He told me that he was attempting to borrow money from various persons, his brother Raymond Chaia, his sister Yvonne Chaia, Joseph Bahri, Maxwell Francis, Junior Chaia.

Up until a day or two before his departure he was unsuccessful. Subsequently he received US$3,000.00 from Raymond Chaia, US$2,000.00 from Joseph Bahri, US$1,000.00 from Imelda Gabriel and US$10,000.00 from Maxwell Francis.

He left Antigua on 23rd October, 1991. I accompanied him. He requested that I accompanied him. The request was made indirectly by Mr. Isaiah James. My father never requested me to accompany him and I denied him. I made the travel arrangements. He paid for both tickets. I did not know for how long I was going."

Under cross-examination the said witness revealed:

"My father had great ambitions for me his only daughter. He did not follow my progress at school. I never left school prematurely. I graduated from Christ the King high School in 1978 and so my father could not have been gravely disappointed when I left school prematurely because I did not leave school prematurely. I was suspended from school but I was not asked to leave. It is not true that I was asked to leave and that it was on my father's entreaties that I returned and graduated."

She later testified that:

"When I left home and became a Rastafarian, my father came for me. Aunt Rose played no part in this. My father was disappointed when I joined the Rastafarian faith.

This was a period of conflict and alienation between my father and I. More conflict than alienation.

My father held his wife in very high regard - loved her. I agree that amongst my father's closest friends was Mrs. John who testified in Court. She is in my opinion a straightforward person. I would not be in a position to say if she is a trustworthy person. My father did confide in her many times."

Under further cross-examination Donna Chaia disclosed that:

"In the summer of 1991 it would be true to say that my father and I had some

disagreements but there was no alienation between us. I would not say that relations were strained rather we were not seeing eye to eye.

Nor was our relationship in early 1991 strained or alienated. We still had disagreements - always had and again did not see eye to eye on certain things. He wanted me to be with him and I was not. I would not say he was disappointed with me.

Camella Michael Cochrane moved into my father's house in the summer of 1991 when my father was seriously ill needing personal care and attention both day and night. Prior to Camella moving in Aunt Rose was the only person living at home with my father. He never appealed to me to move in to look after him. He asked me to stop working and stay there with him but I didn't. I suppose he must have been disappointed at my refusal to do so.

I would agree that what my father requested of me was not to give up my job but to move in so that I could look after him during the nights and whenever I would have been available.

My father was not crazy. At that time my father was in dire financial straits. No income to look after himself or pay his debts or provide for his wife. I would not say he was a crazy man to ask me to give up my job to look after him but he did ask. I had children at school and he was aware of that fact."

Of Joseph Bahri and Marcella John, Donna had this to say:

"I would describe Joe Bahri as intelligent, honest forthright. I wouldn't say he is a crook or a cheat or a liar. I would not say he would fabricate stories and say things my father said if they were not true. So too Marcella John is not the type of person who would fabricate a story and say that my father said things which he didn't."

Isaiah James, a retired builder and a close friend of Tony Chaia for over 40 years told the Court that:

"Mr Chaia was a nice man but very arrogant - always liked to have his own way. His relationship with his wife Rose Chaia was very good. His relationship with his daughter Donna Chaia was excellent.

Sometimes they had daughter/father misunderstandings. Most of the time when they were not on speaking terms he would get upset and tell me to tell her to talk to him. I would go to her and I would talk to her.

> The last time he sent me to talk to her was a few days before he went away to Mayo Clinic. I was in his bedroom when he spoke to me.
>
> We were discussing the matter of his going away - him and I - both of us were alone.
>
> He said his people (meaning his relatives) wanted one of his wife's nieces to come with him. He said "I don't want nobody to come with me but Donna" his daughter. And he told me to go right away to Donna and talk to her. I left him and went down to Donna's place. I went to Donna and talk to Donna of what he said to me.
>
> The same evening Donna came up. She came by herself. I myself returned to Cross street and when she came she met me there. I left both of them in the bedroom discussing transportation arrangements etc. No one else was in the bedroom then."

In cross-examination Isaiah James confirmed that:

> "Tony Chaia was an arrogant man. He was very very rude. He was a nice man. He was very argumentative. He was also a man of strong convictions. He was not an easy pushover. He knew his own mind and followed it."

[28] Lastly, the picture portrayed of Rose Chaia, Tony Chaia's widow his senior and now of advanced years is that she had been a paragon wife, loving, kind and patient - a peacemaker. Marcella John aptly summoned it up in the closing paragraphs of her evidence in chief thus:

> "A couple of months before he (Tony) actually left (for the USA), he called me at my workplace specifically to tell me "you know of the high regard I hold you in. Now, you cannot come near to Rose in this regard. He said she stood head and shoulders above me in this regard. He went into details of what she meant to him, the care she gave him, her patience with him. He told me he was a very sick man - that he could not so much as take his shower without help and that his wife had waited on him hand and foot both day and night."

[29] She had stood shoulder to shoulder with him in some of his business ventures and

discharged her domestic duties with unfailing love and affection.

[30] By the early summer (June) of 1991 Tony Chaia had become seriously ill the Court was told and needed continuous nursing care. His various business ventures had by then either ceased altogether or were no longer viable. Steeped in debt and strapped for cash, he now needed urgent medical treatment abroad. A few relatives and a friend rallied to his assistance and he finally left Antigua accompanied by Donna for Rochester Minnesota on 23rd October, 1991 but his condition having deteriorated on reaching New York he was diverted to the Veterans' Hospital in Brooklyn 24th October, 1991 where he was admitted to the Cardiac Care unit **(CCU)** and finally succumbed on 16th December, 1991 approximately two months later to congestive heart failure following cardiorespiratory arrest. Just prior to his death he was being medically managed in preparation for valvular surgery.

[31] Here is a man who between 8th September, 1988 and 26th October, 1991 is purported to have made no fewer than four wills, the first of which he voided, the second dated July, 1991 remained unexecuted, the third dated 17th August, 1991 which the plaintiffs ask the Court to pronounce in solemn form as the true last will of the Testator/Decedent and the fourth dated 26th October, 1991 which the plaintiffs ask the Court to pronounce against as being invalid on the ground that its execution was procured by the defendant by undue influence and that further on in the alternative the Decedent did not know and approve of its contents.

[32] In normal course, all things being equal, a later will is taken to supersede an earlier one. In light of the plaintiff's pleaded case it is therefore necessary to closely examine the circumstances leading up to and surrounding the preparation and execution of the fourth will by the decedent and to analyse the contents thereof having regard to the known affections and general sense of propriety of the Decedent himself insofar as they can be ascertained.

[33] I pause here to observe that in their re-amended statement of claim filed at the commencement of the trial on 24th June, 1998, the plaintiffs specifically abandoned their original plea (at paragraph 3) that execution of the impugned Will had been obtained by the defendant by undue influence and adhered solely to the alternative plea that at the time of the execution of the said will the Decedent did not know and approve of its contents. The particulars in support of that averment followed and are set out earlier in the judgment.

[33] Mention is made of this because notwithstanding the plaintiffs' withdrawal of the allegation of undue influence from the statement of claim, the evidence shows that this was still being affirmatively alleged (without being specifically pleaded) and relied upon in clear violation of **Order 76 r 9(3)** of the Rules of the Supreme Court **(RSC)** where for example the plaintiffs' fourth witness Christine Karam Prescod declared in chief:

"He (the testator) was in a very weak condition. Donna spoke with

Mr Chaia . He spoke a bit to both of us.
On that visit Donna started speaking with Anthony Chaia about his will of August, 1991. Shortly after, the patient took ill and we were asked to leave the room. As a matter of fact she started to harass him about this will - that is when Anthony Chaia took a turn for the worst and my reply to her was that she should leave Mr Anthony Chaia alone. This is not the place and time. The nurses asked us to leave the room." This was denied by the defendant.

The witness further deposed (and that too was denied) that:

> "She (Donna) wanted him to change his will to put her as the executor and she will take care of Ms Rose Chaia. Mr Chaia did not respond to the suggestion."

Later under cross examination Mrs Prescod told Mr Hamilton:

> "Donna did harass Anthony Chaia about his will on 25th October in my presence. I replied to her to leave Tony alone. This is not the time and place to do this. She was harassing him about the other will - for him to change it."

And she finally confirmed to the Court that:

> "Donna was trying to get Anthony Chaia to change his will so that she could become executor of the will and that she would take care of Rose Chaia."

Rule 9(3) of Order 76 (RSC) specifically enjoins that 'no allegation in support of a [plea of want of knowledge and approval] which would be relevant in support of a plea of undue influence should be made unless undue influence is also pleaded.'

It is plain that under cover of a plea of want of knowledge and approval, undue influence is in substance being alleged without specifically introducing it as an alternative plea. This is strictly not permissible **See RE STOTT (Deceased) (1980) I ALL ER 259.**

[34] For the picture which emerges from the testimony of the plaintiffs' principal witnesses is that here is a sexagenarian father who has been seriously ailing for some years and was now gravely ill and under heavy sedation being pressurised by his only child and daughter, who with her own three daughters of tender years were the principal objects of his affection to change a will the dispositions of which she was dissatisfied, by exerting her filial influence over him and she contrived to do so thereby having herself appointed sole executor and she and her children as the principal beneficiaries of his bounty and consigning the care and future well being of his wife entirely in her own hands in stark contrast to the provisions of the earlier will of which she was not a named executor (and thus not as now in absolute control of the estates) and was not as now the residuary beneficiary.

[35] The gravamen of the plaintiffs' case is that the circumstances surrounding the preparation and execution of the fourth will by the deceased excite grave suspicion and that it further did not speak his mind. For in the first place it is written by the defendant herself allegedly at the dictation of the Testator on two sheets of what appears to have been an exercise book and the lack of clarity and coherence has resulted in certain devises being ambiguous and patently unclear. Secondly, that by reason of his illness and treatment involving use of a combination of sedative drugs, the Testator at the time of execution of the will, lacked the requisite mental alertness, capacity and knowledge to fully comprehend the nature and contents of the document executed by him and to approve of same. Further, the alleged Will is at

variance with the Testator's general sense of propriety and his known wishes and concerns regarding his spouse who was significantly eclipsed from sharing in her late husband's estate whilst Donna and her children inherited the lion's share.

[36] Here, the rule of law as exemplified by **Willmer J in Re R (1951)P 10 at pages 16-17**, adopting the dicta of **Lindley L J and Davey L J** in the Court of Appeal decision in **TYRELL v PAINTON (1894) P 151** is that whenever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless the suspicion is removed.

In fact, **Lindley L J** went on to make it clear that the principle extends to all cases where circumstances exist which excite the suspicion of the Court referring more particularly to those attending the preparation or execution of the will. In such circumstances the burden of proof clearly rests on the person or persons setting up the will or seeking to propound it as a good and valid and not vice versa. The incidence of proof must be commensurate with the circumstances of the case - as the suspicion is great so must be the standard of proof.

[37] It must however be borne in mind that where a person proceeds to comply with the formalities of the Will **Act (Cap 473)** and has a document, whatever its form, duly executed as required by law, there is a very strong presumption that the document was intended to be his Will. In other words, there is a presumption in favour of the

validity of will and in the absence of cogent evidence to the contrary where the formal requirements of the Act are met, the Court will pronounce in favour of the will.

[38] It is essential to the validity of a will that the testator should have known and approved of its contents at the time of its execution. The learned authors of **4 Halsbury's Law Volume 17 at paragraph 905** go on to declare that the burden of proving these facts is assumed by everyone who propounds a will, but the burden is satisfied prima facie in the case of a competent testator by proving that he executed the will.

[39] **EVALUATION/ANALYSIS OF THE EVIDENCE:**

On the issue of the due execution of the will of 26th October, 1991 by the testator Anthony Chaia, leaving aside the evidence of the defendant and scribe Donna Chaia which may be regarded as self-serving, there can be no doubt whatsoever that based on the evidence of the attesting witness Pauline Klein a Notary Public of the State of New York and the opinion of the handwriting expert Alvin Langlais, that the testator Chaia duly executed the said will on the date in question as his last will and testament. I am fully satisfied that Klein's selection was done at random through the yellow pages of a telephone directory and that she attended the Veterans' Hospital in Brooklyn on the evening in question and duly attested Mr Chaia's signature to his will after having read it over to him. Her notarial seal is affixed beneath her signature. As there was no real serious challenge to that aspect of the case, there is no need to recap the relevant evidence. Suffice it to say that here was an independent

professional - a virtual stranger to all concerned and without any apparent vested interest in the subject matter at hand. I saw no reason to question her veracity. She in fact impressed as a witness of truth. Alvin Langlais, the handwriting expert, after a well reasoned scientific analysis opined that the signature Anthony J. Chaia on the document in question tallied/compared well with the known signature of the testator. Concluding his testimony Mr Langlais declared that he found no difference in the signatures in the known and unknown documents.

[40] To my mind, the crux of this case is whether at the time of execution of that will the testator was of sound mind and memory and had the requisite capacity in law to make a valid will. The evidence reveals and it was not disputed that for some years prior thereto Mr Chaia was afflicted with cardiorespiratory/vascular disease and suffered shortness of breath, chest pains, general debility and other symptons associated with that ailment. Now his condition had seriously deteriorated and in the **CCU** he is reported to have become restless and agitated and experienced sleeplessness.

[41] Following his hospitalization in New York on 24th October, 1991, his medical charts show that he was administered a combination of sedative drugs of varying dosages over various intervals so as to sedate him and to induce rest/sleep. At first he was prescribed Halcion (which he also requested) and when this proved ineffective he was put on Ativan.

[42] Joseph alias Joey Anthony John the then Medical Superintendent and Chief Surgeon of the Holberton Hospital who was deemed an expert in his speciality carried out an evaluation of Anthony Chaia's medical charts whilst he was a patient at the Veterans' Hospital in Brooklyn New York from which he claimed there was sufficient detail to enable him to diagnose the patient's medical condition and also determine his care and management whilst he was in the **CCU** as well as the medication and administration of drugs used in the management of Mr Chaia. Reviewing the patient's medical charts for the period 24th to 26th October 1991, his assessment was that this was a man in severe heart failure. He was in an unstable condition he added. Tridal was administered to ease the patient's chest pain and Ativan to induce a state of sedation. This basically numbs the senses and the cognitive function Dr John explained and the maximum duration was eight hours although there is some effect demonstrated up to 24 hours later he added. Halcion and Ativan he pointed out had longer effect. Peak effect of Ativan is two hours after administration he said and the clinical effect lasted six to eight hours but there is remaining drug up to 24 hours after administration. The cumulative effect of previous dosages could prolong the situation. Ativan, Dr John declared was a sedative hypnotic with anabolic properties - promotes amnesia and dulls the cognitive function. He was unable to tell from the notes whether there was any lack of recall. Dr John further declared that doctors would not accept a consent form for operation from a patient who has been on Ativan because they knew that a patient under the influence of Ativan does not have full control of his cognitive function and also forgets very quickly what has been said to

him at any one time. The sedative, hypnotic and anabolic properties of the drug are responsible for that he explained. He himself had administered Ativan to patients he said and had noted those results. One sees the calming effect on the patient and a sense of euphoria he further elaborated - neurological tests would be abnormal. Indeed he was most forthright in asserting that he would not certify that a patient in those circumstances was competent to execute a will adding that:

> "If the patient's life depended on the patient signing a consent form for surgical procedure his consent in such circumstances would not be valid. We would go to the next of kin."

In his considered opinion he concluded:

> "I would say that from the medical charts such a patient would not have been compos mentis (i.e possessing all of his cognitive faculties/abilities)" adding that "after administering Ativan to a patient who hitherto had been compos mentis, I would not certify such a patient as being competent to execute a will."

His conclusions he said were based on his examination and evaluation of Mr Chaia's medical charts, the patient's medical history and condition from the time of his admission to hospital (24th October 1991) to the time of his alleged dictation and execution of the will during the early evening (5 - 6 pm) of 26th October, 1991 as well as the drugs used in his care and management in that interval. The basis of his opinion he said was derived from his knowledge of the nature, effect and potentiating effect of Ativan and Halcion as contained in leading medical texts on the subject. In sum, the surgeon specialist opined that having regard to the patient's medical condition and the combined effect of the sedative drugs which had been administered to him within the 24 hour period preceding his dictation and subsequent execution of

the will in the early evening of 26th October, 1991 Mr Chaia would not have had the requisite mental capacity or ability to make a rational judgment or decision on any matter of importance or significance. His cognitive function would have been so impaired as to preclude his ability to think clearly and to reason sensibly.

[43] Dr Bertrand Russell O'Mard also a prominent and highly respected surgeon with a wealth of experience reiterated much of what Dr Joey John had earlier expounded to the Court. Like Dr John his own assessment of Mr Chaia's physical and mental state was based on examination of his medical charts and his own knowledge, experience and expertise derived over several years in that area of practice. Scanning the patient's medical charts for the period 24th October to 26th October 1991 Dr O'Mard noted that at 1.00 am on the latter date, Halcion was given to the patient orally, followed by Tridil in intravenous form at 2.00 am to decrease the work of the heart and increase the flow of blood to the heart muscles. At 3.00 am 2 mg of Ativan was administered intravenously over one minute. Like Halcion, the effect was to induce calm, drowsiness, sedation. The combination of Ativan and Halcion within two hours of each other the doctor opined was finding a quick way of knocking the patient out - putting him to sleep. He himself had used it for stress/anxiety cases and as a surgeon for the same thing and also as a sleep inducing agent. The life of Ativan Dr O'Mard went on to explain may be 12 up to 18 hours. The peak is usually 2 hours he said in tablet form, one hour intravenously. Under normal circumstances he pointed out, the significant effect of Ativan would endure within the 12 to 18 hour range. In

the case of Mr Chaia the medical charts showed that he was administered Ativan at 3.00 am on 26/10/91. Before that at 5.30 pm on 25/10/91 2.30 pm on 26/10/91 and Halcion at 1.00 am on 26/10/91. Dr O'Mard went on to point out that there are many variables which could affect any given situation. In the final analysis given the patient's condition and the intravenous administration of Ativan at the intervals stated he was satisfied that Mr Chaia would not have been able to function at full cognitive level and execute a consent form for surgery in the early evening of 26th October, 1991 when he is alleged to have executed his last will and testament in the **CCU** of the Veterans' Hospital in Brooklyn New York. He might have been able to read the doctor added but his understanding would be highly questionable. For his own part he would not have accepted a consent form from the patient on 26th October, 1991 he declared - not even if it were read to him for he did not think that he would fully understand the nature of the planned intervention given his behavioural pattern and the medication he had received that day. Substitution of another document such as a will would not have altered the position the witness disclosed. In sum, it was his considered opinion that all indications pointed to the fact that the patient was not fully capable of understanding and participating in making complex decisions relating to his affairs generally.

[44] At this juncture I venture to state that whilst cognisant of and giving due weight to the expert testimony of Drs John and O'Marde, one must bear in mind that neither of them in actual fact attended Anthony Chaia professionally during his last illness and

were unable to give direct personal testimony as to his state of mind or mental capacity to make a valid will at the relevant time. And it is indeed a matter of regret that the Court did not have the benefit of hearing the viva voce evidence of any of the professional personnel who attended Mr Chaia between 24th and 26th October, 1991 and particularly one of those who had written the medical charts which formed the basis of the expert medical witnesses' evidence. This is all the more crucial as the doctors' opinion on the fitness and capacity of Anthony Chaia to make a valid will at the time is clearly at variance with the evidence of the attesting witness and Notary Pauline Klein and the defendant Donna Chaia both of whom were actually present and testified to the circumstances surrounding the due execution of the will by the testator.

[45] Pauline Klein's account of what precisely occurred is instructive and runs thus:

> "I left from my home to go to the hospital and arrived there at approximately 5.00 pm. I went to the Cardiac Care Unit and I was met by Donna Chaia who I see in court this morning sitting at the far end of the bar table. She spoke to me and introduced herself and then her father.
> Her father was in a hospital bed sitting up and welcomed me. He was a man about 60 with greyish hair, very nice personality and was friendly.
> Ms Donna Chaia and Mr Chaia were completing details in the will that Anthony Chaia was dictating and Donna was writing. I asked where the witnesses were and I was told by Donna that two nurses were coming in shortly. Then one nurse came in and told Donna that the hospital rules from Administration did not allow hospital personnel to get involved with personal matters.
> Anthony Chaia told Donna to call various different people on the outside to come to the hospital and participate as witnesses. I said I'll wait. I only remember one of the names Mr Chaia told Donna she

should call. This was Giselle Isaac. Donna then left the room and I stayed in the room with Mr Chaia and we had a conversation. Mr Chaia as I said before was quite friendly and he asked me if I had children and I told him yes that my husband and I had four daughters between us and he told me that he had one daughter which was Donna. I told him that I was expecting another grandchild shortly and he told me that he had three grandchildren . I thoroughly enjoyed talking to this man because he had an amazing resemblance to my own father in physical appearance as well as personality. The conversation went on for at least threequarters of an hour.

Dinner was served during that time. It was a mashed potato, spinach and sliced turkey or sliced beef. He ate every last bite and enjoyed it thoroughly. He then smoked a cigarette.

Donna returned and said that Giselle Isaac should arrive in a short period of time and that I should be good enough to wait. I was running late to meet my husband. Donna was upset that he was smoking and he requested her to open the window so the evidence of the smoke would disappear. Giselle Isaac eventually arrived. Before her arrival Donna and Mr Chaia were putting little details into the will and Mr Chaia had an after-thought to bequeath someone a small amount and there was no more room on the page so I suggested that she should number the paragraphs so that the very last sentence could be inserted on the last page with a number. I witnessed that being done.

I recall that they were making a final read through before signing and one of the paragraphs as part of paragraph 9 was really a continuation of paragraph 4; so I suggested that they put a little star and make a notation of this. And now Mr Chaia was ready to sign. Everybody was gathered - the witnesses Giselle Isaac, myself, Anthony Chaia and Donna Chaia.

Anthony Chaia was sitting up in the hospital bed. Donna Chaia was on the right side of him toward the wall. I was standing in front at the foot of the bed. Giselle Isaac was standing to the left of him. I explained to Anthony Chaia that two witnesses are needed in the State of New York for a will. So therefore I as a notary who is supposed in reality to notarize the two witnesses and therefore in reality the notary would become the third witness but in this case we only have one witness and a notary so I asked Anthony Chaia if it was O.K that Giselle and myself be your witnesses and he said fine. I asked Anthony Chaia if this document was his last will and testament. He looked at the papers and said yes. I asked him if he wanted to read it or did he wish me to read it to him slowly. He said

read it to me again to make sure everything is exactly the way I want it. I read him the entire will. He said it is fine. I said you are ready to sign your last will and testament? He said yes. I asked him are you signing this last will and testament freely, are you of sound mind and this is exactly what you want to do? And he said yes.
I then put the date on and Anthony Chaia signed it. Then I requested Giselle Isaac to sign her name as witness and print her name and address and I signed as a second witness. I put my name and address. I put in the venue where we were. I put my notary stamp to show who I was and in reality I notarized Giselle's signatures. I was paid for my professional services which included coming to the hospital, my travelling expenses, the notarized act etc. I was paid there and then by Donna Chaia on instructions from Anthony Chaia. He said pay the lady and she did so. I gave my card to Donna and I wished everybody well and went. It was approximately 6.30 in the evening. I was an hour late meeting my husband."

Continuing her testimony the witness disclosed:

"I did form an impression of Mr Chaia as a result of my conversation with him. I found him to be very pleasant, very humourous, charming, lovely man. I don't think he made any complaint in my presence. I formed the impression that this man knew exactly what he was doing and wanted done. No doctor or nurse was called into that room whilst I was present. No medication was administered to him in my presence. I can identify as paragraph 10 of the last page at the top the request made by Anthony Chaia in my presence.
Having left the hospital that day I never again saw Mr Chaia. I got to know that Mr Chaia died by a letter either from Mr Simon or Ms Kentish. I replied."

[46] In cross-examination Pauline Klein stated:

"I regard the making of a will as a very serious act. And so too is its attestation. I am aware that actions are sometimes brought into Court contesting the validity of wills.
I knew that the validity of wills have been challenged on the basis that the maker was not of sound mind or for lack of their mental

faculties. I have attested/witnessed the execution of wills in hospitals. I have also witnessed/ attested wills of persons in **ICU.** I have also witnessed the execution of wills by persons who are very seriously ill in **ICU** hospitals.
Many times the patient's lawyer is present and sometimes not. If a lawyer is present he executes the proceedings and I merely notarize the witnesses. If I have to execute the proceedings I do my very best to satisfy myself that the patient is capable mentally of signing his last will and testament. On one occasion I have waited out of the room and refused to be part of it because I felt the patient was incapable and practically sleeping and I would have no part of it."

Later on the witness deposed:

"I have no qualifications in medicine. I guess that a person's illness could affect his/her mental capacity to make/execute a will. I also guess that the medication administered to a person could also affect his/her mental capacity to make or execute a will.
I assume that one would have to satisfy oneself who is witnessing a will of a person who is seriously ill in an **ICU** that it is prudent to assume that the person's illness has not affected his mental capacity to execute same. Likewise that the medication on which the patient is, does not affect his mental capacity. It is not my job. I don't have to ask what kind of medication the patient is on. The doctors and nurses would know what medication the patient is on. I agree that it is the medical people who would determine whether a person's illness or treatment has not affected a patient's mental capacity. No nurse or doctor came into the room while I was there."

Finally the Notary declared:

"I set off for the hospital that evening to execute a will and notarize two witnesses. By **"execute"** I mean to say to the testator is that your last will and testament to observe if the person's answers are competent, that I am satisfied that I want to be a party to the particular proceedings. It is part of my function to determine that the person knows what they are doing. If the person is lethargic, sleepy or can't hold a decent conversation. I don't do it."

[47] As regards the circumstances surrounding the execution of that will, the evidence of

the defendant Donna Chaia substantially tallies with that of Pauline Klein. First she denied having harassed her father about his earlier will during a visit on the evening of 25th October, 1991 as alleged by Chistine Karam Prescod and she further denied that he had taken a turn for the worse as a result as related by Christine Prescod and she went on to testify that it was a lie to say (as Prescod in fact told the Court) that the nurses had to come to her father's assistance by asking them to leave. Nothing like that had happened she emphasised. And there is no record on the medical charts of the patient having taken a turn for the worse during the relevant visit or of visitors being requested to leave.

[48] On the actual making of the Will, Donna Chaia told the Court:

> "I did visit my father on 26th October. I was not alone. I visited once on that day. That was before 9 in the morning. Christine Karam Prescod was with me. I stayed all day. Christine and Giselle did not remain. Christine remained for about 45 minutes and Giselle for about 3 hours.
> My father spoke to me about his will that day. In the morning he spoke to Giselle in my presence concerning his will. In the afternoon he again spoke to me about his will. This time no one was present. It was about 4.30 pm. **Nurses were around.**
> He was agonising over his will. He told me that he did not want to go to his grave leaving the will that he presently had. He told me that he had asked Aunt Rose to leave his estate to his grandchildren but that he knew that she was not going to do it. He said that he was afraid and that he was not going to take any chances and that he was going to change his will now.
> He instructed me to get paper and write what he dictated to me. He made me very much aware of the fact that he had very recently changed his will. He did not have a copy of that will with him.
> He also asked me to contact a notary public. He requested of the nurse (Karen Chin) to be a witness along with another nurse.
> I got paper from the Nurses Station and I proceeded to write as he

dictated to me. The dictation took around twenty minutes to half an hour. **The nurses were around to and fro** but no one remained in the room apart from me and him. He was now in a room. No longer in an open area. He was sitting up on the bed. I was sitting on a chair and wrote in my lap.
There was a door to the room. The door was open and remained open throughout. Giselle had not yet returned or Christine.
After I had written - his dinner was brought to him around the same time that the notary public arrived.
Before I started writing I went to the nurses station and borrowed a telephone directory. I looked through the yellow pages and I found a notary public. I called the notary public and I got an answering machine and I was directed what to do. I called the number that was given and spoke to somebody. It was a female voice. I made no other calls to a notary public. I called the notary before I wrote the will. I called from the hospital at the Nurses' Station. The person I spoke to on the phone identified herself. The person I spoke to arrived at the hospital. That was Pauline Klein.
My father told me to call a notary.
When the notary public arrived my father's meal was brought to him and around that time the nurse (Karen Chin) told us they were not allowed to be witnesses. Present was the notary public, my father, Karen Chin and I. She explained that too much time was lost by the hospital whenever their personnel had to be called to court.
My father then instructed me to contact Donald James and Bruce Thibou. When I got Mr James' wife she told me something and as a result I had to contact Mr Bruce Thibou. I got his wife too and we had a conversation and as a result I returned to the room and told my father that Mr James was in hospital for emergency by-pass surgery and that I had left word for Bruce to call or come to the hospital. Bruce was my father's friend.
He then asked me to call Giselle and ask her to return to the hospital. I was able to get Giselle by telephone at her home. I made all these calls at the nurses' station. The notary public was in the room with my father at the time.
Having spoken to Giselle I returned to the room and I told my father that Giselle would be coming and we went over the will in the presence of the notary public.
I read part of the will coming down on the first page. When we got to the second page we realized that it was not flowing in order.
The notary public suggested that we number the paragraphs so that is how we went over the will. I numbered all the paragraphs on the will.

> Giselle arrived close to 6 o' clock and we proceeded to execute the will. By then he had had his supper.
> The notary public offered to be a witness and my father accepted. The notary public read the will to daddy and he was listening very attentively. Giiselle was on the right and I was on the left of the bed. The notary public was at the foot of the bed facing my father. The notary had the will. I gave it to her. Whilst the notary was reading the will I left once to take a phone call.
> During the execution she (the notary) asked him if that was his last will and testament and if that was what he wanted to do. He said yes. The signing of the will took place.
> My father signed and initialled all the pages. He signed at the bottom of the writing. Then Giselle signed. Then the notary public signed. Then she placed her stamp and seal on it. I then put the will in an envelope and kept it. The notary public was paid and she left. I paid her $150.00 cash, Giselle stayed."

This is the Will of which the defendant as sole executrix now seeks to obtain probate in solemn form.

[49] The witness went on to disclose that she had seen the earlier will to which her father had made reference before dictating the present will. Her father she said had taken her to his bedroom and given it to her to read the very morning of the day they had travelled to the United States.

On her arrival in New York she told the Court that she had stayed with the Prescods for about four days then moved to a half-sister of hers by mother for the remainder of her stay: Christine and herself were no longer on speaking terms the Court learnt. Donna Chaia went on to testify that during her stay with Christine and on 24th October, 1991 in particular, she did not discuss her father's previous will with her. She never spoke to Christine about her father's will she reiterated. Nor did Christine

ask her how she had got hold of it since it was an important and confidential document. She barely knew Christine she pointed out and had last seen her when she (Donna) was 12 years old. That would have been about 1972. They did not correspond she added or communicate otherwise.

[50] In cross-examination Donna Chaia told the Court:

> "About 4.30 pm on 26th October, 1991 my father was agonising over his will. I did not say that his agony stemmed from the fact that he had asked Aunt Rose to leave his estate to his grandchildren but that he knew that she was not going to do it. I concluded that he was referring to the will that he had made.
>
> I am aware that in the 17th August will there were several beneficiaries, not just one included among which were my children - his grandchildren. I am aware that he had left to Tchir the two storeyed building which he considered to be his most valuable property. I am also aware that under that will Aunt Rose was not one of the named executors or trustees.
>
> My father gave me instructions for the will of 26th October 1991 in about 20 minutes. My role was to write what he dictated. I did not have anything to say I did not suggest to him to wait to have a lawyer do it for him. I understood that what he was saying to me was that he wanted to leave his estate to his grandchildren. All of the grandchildren were at the time minors. I appreciated that this would have meant that I would be the person in charge of their interest.
>
> I was the only person present throughout the time that my father dictated the will. **I did appreciate that that will to some extent represented a radical departure from the will of 17/8/91.** I don't agree that as a result his loving and cherished wife was not in as good a position as she would have been under the 17th August will.
>
> In the August 17th will she had been left the dwellinghouse at Cross Street absolutely; but under the October 26th will she was left only a life interest. There is a difference but that is not all that was in the

will.

> I appreciate that under the August 1991 will he had given her a 25-years lease of the two-storeyed building which she could rent if she wished. I would put the rental value of that property in 1991 as $1,200.00 per month.
>
> Under the October 26th will that lease interest disappears. I agree that there is no comparison between the value of the dwellinghouse on Cross Street - the property left to Aunt Rose under the August 1991 will and the devise of the Coolidge property which she would now inherit under the October 26th will. The value of the former far exceeds the latter."

In actual fact the value of the land at Cross Street **(Parcel 108)** was put at **$914,760.00** in April 1996 and the buildings at **$403,628.00** whilst **Parcel 53** at Coolidge was put at **$76,230.00** (land only without any buildings).

In concluding her testimony the witness declared that she would not agree that at the time her father had executed his will of 26th October, 1991 he was not aware and could not appreciate that he was executing a will. Nor would she agree that her father at the time did not appreciate, understand or know the contents thereof. Earlier, Christine Karam Prescod told the Court under crossexamination that on the evening of 25th October Mr Chaia had instructed Donna to give her $500.00 as a gratuitous payment for the assistance that she had rendered her. He was alert she added and knew what he was doing and saying. And in answer to the Court Donna Chaia confirmed that no one other than the nurses who were going to and fro was present whilst her father was dictating the will to her adding that he only details in the will which were put in whilst the notary public Pauline Klein was present were paragraph 10 at the top of the last page and insertion on the notary's instructions of

the word **"included"** at the bottom of page 2.

[51] From the evidence before the Court I entertain no doubt that on the face of it, the will was properly executed, that is to say, it was duly signed by the testator in the presence of two attesting witnesses after it had been read over to him and he seemed perfectly to understand its contents. The effect on the mind of the testator of the sedative drugs Halcion and Ativan which were administered to him orally as well as intravenously over the forty four hour period preceding his execution of the will would in the opinion of Drs John and O'Marde have so impaired his cognitive faculty as to render him incapable of making a valid will.

From the patient's medical charts the court notes that **0.125 mg** of Halcion was first administered to him at 10.00 pm on 24th October 1991 in order to induce sleep. At 5.30 pm on 25th October 1991, **2 mg** of Ativan was for the first time administered to the patient intravenously for agitation. These are the minimum recommended dosages. At 1.00 am on 26th October, 1991 0.125 mg of Halcion was given to Mr Chaia orally at his request *"for sleep."* This was followed at 3.00 am by the usual (**2 mg**) of Ativan for agitation. The patient was reported to have been awake through the night and to have been restless. Neither drug proved effective it was noted. Finally, at 2.45 pm the said day (i.e. 26th October, 1991) he was given two Tylenol tablets for headache and **2 mg** of Ativan for agitation. Observation at 4.30 pm revealed that the results were satisfactory. The patient's medical chart shows that no further Ativan was given to him until 11.20 am the following day (27th October 1991) and Halcion

(for insomnia) at 1.00 am on the 29th October, 1991. The use of Ativan appears to have been discontinued thereafter.

[52] On the effect of Ativan and Halcion, on the patient in the prescribed dosages between 25th and 26th October 1991, the Court had the benefit of the expert opinion of George Evelyn Mahey, a Consultant Psychiatrist at the Queen Elizabeth Hospital for five years i.e. since the post was created. His duties he told the Court included supervising and teaching medical and postgraduate student of the University of the West Indies at the Cave Hill Campus in Barbados.

Mr Mahey told the Court that:

> "During the course of my professional duties I have had the opportunity of seeing patients entirely in Psychiatry.
>
> I am familiar with patient charts as used in Barbados. It covers your mental state, your physical responses and in the case of Psychiatry, your thought content. The administration and effect of drugs form part of my speciality.
>
> One group of drugs that I prescribe and I am very familiar with is known as ANXIOLYPIC. We also use mood altering drugs and anti psychotic drugs."

Mr Mahey was shown Mr Chaia's medical charts for the period 24th to 26th October, 1991 and had this say:

> "These are the documents I looked at. I am looking at 25/10/91. The previous page is 24/10/91. In the second box is HALCION at 10.00 pm.
>
> I am familiar with that drug. It was used as a hypnotic to induce sleep and the dosage is usually **.25.** This drug belongs to the group

Benzodiazepines **(BZ)**. On this chart **.125** mg was given and according to the chart it was not effective for sleep. The use of that drug to induce sleep is consistent.

Side effects - drowsiness, lethargy and sleep at that dosage - which is half the usual dose.

Three hours after **XANAX** was given - a very similar kind of preparation. .25 was given in this case. That was effective. Those are the only two drugs on that page which call for comment and I was familiar with.

Drug given at 5.30 pm on October 25th was ATIVAN **2 mg.** This was given for agitation - slightly effective.

Then at 1.00 am (26/10/91) HALCION **.125 mg** was administered. That was again used for sleep and found to be ineffective Ativan is a pharmaceutical drug name given by the specialist drug company. Ativan is an anxioliphic belonging to the Benzodiazepines **(BZ) same** family as Halcion - to reduce anxiety, tension or nervousness - to give a calming effect on someone but the desired effect can only be achieved if closely monitored. On the same day at 3.00 am ATIVAN **2 mg** repeated for agitation but was found to be ineffective three hours after administration.

It appears to me that all three dosages of Ativan were administered intravenously.

Ativan was repeated at 2.00 pm the same day for agitation and it was reported to be effective - one hour and five minutes later.

On 27th October at 11.20 am Ativan **2 mg** was administered for agitation and was effective. Ativan is also used as a pre-operative medication as are other BZ drugs for a wide variety of medical conditions. In addition as a pre-operative medication for minor and major surgical procedures. It is an anti-anxiety agent.

The dosage chosen and the route chosen would depend on what you want the drug to do. There is also an individual variation in one's metabolism. For example ½ mg could put me to sleep and some people may need twice, thrice or four times that dosage.

I am very satisfied with the medical regime and the recording of its

effect. I don't think I could have done any better. In my practice I have administered ATIVAN in particular for anxiety cases - also for students before they write exams and for general anxiety disorders.

If I have never administered Ativan before to a patient I would administer a low dose (1 mg) and I would suggest that you take it last thing at night.

For an examination student I would recommend that the student try the drug one week before. I would not prescribe the night before the exam for the very first time. That is because the likelihood of sleep that might follow. The thought processes would be slowed down. This is all short term administration. Long term is different. It is not classified as a mood altering drug. It would be unusual for the patient to have experiences over which they have no control. It would not likely cause retrograde amnesia but ante-retrograde amnesia i.e. before administration of the drug.

I did have a look at the medical record of Anthony Chaia. **(Exh JJ1-29** shown to witness) My opinion is that the observations were well recorded. Re Pg 25 - 10/25/91 9.30 pm.

On 26/10/91 at 1.00 am Halcion **.125** was administered in keeping with the medication record JJ2. Patient restless before administration. On pg 25A 26/10/91 3.00 am Ativan **2 mg IV** over one minute period for agitation. That is also on **JJ2**. Over one minute period means there is caution in giving the drug and observation necessary. No further medication is mentioned on page 25A.

Page 26 10/26/91 1.00 am Patient rolling over in bed. .. .. IV. I assume patient was very agitated. Drug then inserted in left arm. Page 27 10/26/91 9am. **AAO+3** is not a term I use. This practice is discouraged. It looks like "Awake, alert and Oriented." To me it is a very important observation and suggest the patient is fully conscious. It means that you are aware of everything in your environment and you are capable of making a response and oriented would suggest you know where you are - date, time etc. and you would be able to answer appropriately. Orientation is a very important part of a mental patient's examination. In my practice this is done routinely.

"Complete AM care rendered. Patient assisted ... ... cooperative"

This is consistent with proper orientation."

"Patient incontinent with urine." Nothing to do with mental state.

"Patient shows understanding and knows not to remove it." That again fits in with his orientation.

Page 28 10/26/91 - note at top of page means nothing to me. CCU etc.

"1.00 pm Family visiting etc. 2.45 pm ATIVAN given. Medical chart shows 2.50 pm for agitation. Checked at 4.30 pm and found to be effective. 4.45 pm eating supper tolerated well. Daughter with patient. Feels very comfortable "Like a boy". I would assume that he would have to be relieved by 6.00 pm. No drugs administered.

Medical chart - last administration was 2.45 pm. From the charts I got the impression that the patient was scared and felt that he would die. That is my subjective view.

I would not use the word euphoric as a psychiatrist to describe "feeling like a boy." I see it as expression of people who is or are very ill and would feel relieved.

"Patient fully **AAO** etc" - it appears that the patient's mental state was at that stage even better than when it was reported as **AAO+3**. This seems in keeping with the way the patient described his feeling.

There is nothing in the patient's chart that I have seen which suggests that he was disoriented. Nor is there anything in his chart which suggests that his judgment may have been impaired.

It would not be scientifically accurate to say that the drug ATIVAN and HALCION are mood altering drugs."

Elaborating further, the Consultant Psychiatrist explained that:

"In my experience the paradoxical effect of these drugs is very very uncommon. People with personalities of high anxiety levels are inhibited when they are given BZ drugs - their inhibitions are removed and they have an opportunity to release their inner feelings

but that is not euphoric."

[53] In contrast and direct contradiction, Mr Bertrand O'Mard, the Consultant Specialist Surgeon had earlier informed the Court in chief that:

> "Re Exhibit JJ1 (Medical chart) at page 28 - 6.00 pm (entry). There is nothing here that changes my opinion. In fact the verbalisation of "feeling like a boy" is very typical of the euphoric reaction one may have after having been given Ativan or other mood altering drug. In fact the sudden sensation of feeling so well whilst in a life threatening situation when death could occur at any moment highly suggest that his good feeling is due to medication since it certainly is not due to any significant improvement in his medical condition."

And earlier on Mr O'Mard referring to the hypnotic effect of drugs such as Ativan explained that:

> " The hypnotic effect of any medication is one that mimics a well known technique known as hypnosis where one although fully awake and alert may actually be placed into a trance-like state where they may say and do things that they are not fully aware of or may not be able to recall at a later stage. Such a person under the hypnotic influence may appear to the inexperienced observe or to be functioning normally." .. ..

Mr Mahey whilst conceding in cross-examination that he would hardly have been in charge in treating a patient such as Anthony Chaia deceased in an **ICU** setting he might nevertheless be consulted in treating a patient in such a condition and his experience was quite extensive he pointed out in the psychological aspects of such patients. From his examination of the patient's charts for the relevant period he would not say that he was very unstable.

The charts he continued show that the patient was suffering from a heart condition,

shortness of breath, insomnia and appeared to be in heart failure. The patient was administered drugs he added and the focus was to control his agitation and restlessness . From the charts he concluded that was the effect they were looking for as well as sedation - alertness orientation etc.

Concluding his testimony Mr Mahey declared:

> "The age and clinical condition of the patient are important considerations in determining the effect or impact of the Ativan on him especially in repeated doses over a relatively short period of time i.e. just under 24 hours. And the presence of Halcion and Ativan would also have an important effect on how the patient reacts or how the drugs impact upon him. It is possible that the patient's ability to function at a higher cognitive level and to make decisions in complex matters would be impaired. To determine whether the patient's higher cognitive level are affected one would have to do other physiological and psychological tests."

Learned Counsel finally posed the following question:

Q. .A 63-year old patient (suffering) with Aortic Stenosis, Congestive Heart Failure, Hypox, anxiety and Hypertension, who hours before appears to be in some difficulty fearful that he could die at any time, suddenly feels "like a boy" - to what would you ascribe that sense of well being?

A Relief from his anxiety from Ativan.

Reviewing the evidence as a whole, one can fully appreciate the high level of anxiety in the patient having regard to the circumstances in which he was rushed to the Cardiac Care Unit of the Veteran's Hospital in Brooklyn in the small hours of 24th October 1991. To begin with, this was not his original destination and the deterioration in his already serious physical condition must have accentuated his concern and increased his anxiety not only as regards his health but his current state of affairs generally.

[54] The most recent edition of the widely acclaimed The Pill Book which is produced and edited by a number of distinguished consultant pharmacists and synthesises the most

important facts about each drug in a concise and readable manner states that Ativan which is the brand name for Larazepan **is a minor tranquiliser** prescribed for relief of symptons of anxiety, tension, fatigue or agitation. It is a member of a group of drugs known as benzodiazepines **(BZ).** So is Halcion. They are used as anti-anxiety agents, anti-convulsants or sedatives (sleeping pills). They exert their effects by relaxing the large skeletal muscles and by a direct effect on the brain. In doing so they relax the patient and make him either more tranquil or sleepier, depending on the drug and the quantity used.

It is the preferred drug. **BZ's** tend to be safer and have fewer side effects and are usually as, if not more effective. The most common side effect is mild drowsiness during the first few days of therapy especially in older adults or the debilitated. Less common side effects include confusion, depression, lethargy, disorientation, headache, slurred speech, stupor, dizziness, inability to contain urination, changes in heart rhythm, lowered blood pressure, itching rash and inability to fall asleep. The usual dose for adults is **2 mg - 10 mg** per day. Care should be exercised if driving or operating machinery one is advised.

[55] Halcion is the brand name of the drug Triazolam. It is a sedative and is prescribed for short term treatment of insomnia or sleeplessness, frequent night-time awakening etc. It is used only as a sleep inducer. Characterized by Diezepan (Valium), other BZ drugs are used for anti-anxiety agents, anti-convulsants and sedatives (sleeping pills). Triazolam is distinguished from other **BZ's** by the fact that it has a very short

duration of action and produces less hangover than other sleeping pills. Possible side effects are drowsiness, headaches, dizziness, poor muscle co-ordination, light headedness, nausea and vomiting. Less common side effects include a **"high feeling"** rapid heartbeat, confusion, temporary memory loss. Usual dose for seniors is **0.125** mg to start.

[56] Speaking for myself I am persuaded by the evidence of Mr George Mahey whose deductions from the patient's medical charts suggest that Mr Chaia was not at any time between 24th and 26th October 1991 disoriented or that his judgment or cognitive functions may have been impaired. That view is reinforced by the evidence of Christine Prescod who testified that on the evening of 25th October 1991 Mr Chaia knew what he was saying and doing. The testimony of the independent notary Pauline Klein also attests to that fact even more forcefully as regards the testator's state of mind the following evening at the time that he executed the will and ofcourse the evidence of the defendant Donna Chaia herself (self-serving though it could possibly be) surely supports that finding. There were no other witnesses available to give direct evidence on the testator's actual mental ability or capacity at the time in question. I myself entertain no doubt and share Mr Mahey's view that the purpose of administering Ativan and Halcion to the patient was to relieve his anxiety, restlessness and agitation and to induce sleep. Minimal dosages were used. And I am not by any means persuaded that those prescribed drugs either individually or collectively rendered Mr Chaia non compos mentis so that he would have been

incapable of executing a valid will at the time that he did as Drs Joey John and Bertrand O'Mard would have the Court believe bearing in mind the minimal dosages administered and the intervals between each dose and their stated purpose and effect. In that regard wherever the evidence of Mr Mahey and those two surgical specialists differ I prefer and accept with respect that of Mr Mahey which in my considered opinion more closely accords with the views expressed in the authoritative manual to which I referred earlier and on which I rely. The medical charts themselves confirm as Mr Mahey indeed pointed out that at 6.00 pm on 26th October, 1991 the patient's mental state was at that stage even better than when it was earlier reported (i.e. at 9.00 am) when he was described as fully awake, alert and oriented. The notes indicate that he had eaten supper and tolerated it well - that he felt comfortable, was cooperative and conversed appropriately - not a feeling of emphoria as Mr Mahey indicated but one rather of relief from his anxiety. I accept that having regard to the fact that it is fully corroborated by the eye- witness account of Pauline Klein. So that in my judgment the will of 26th October 1991 was properly executed by Mr Anthony Chaia who at the time of execution had the mental capacity to execute a valid will.

[57] Finally, I turn to the Will itself. For whilst it is true that there is a presumption in favour of the validity of a will which has been properly executed, the onus in every case lies on the party propounding the will to satisfy the Court that the will is in actual fact the last free and capable Will of the testator. And where, as in this case, a party writes

or prepares a Will under which he or she takes a benefit, the circumstances will excite the suspicion of the Court and call upon it to be vigilant and jealous in examining the evidence in support of it. And the Court is admonished not to pronounce for such a will unless the suspicion is removed and it is satisfied that the paper propounded does express the true will of the deceased. See **BARRY v BUTLIN (1838) II MOORE 480**

The question I ask myself is, having regard to all the circumstances, does that Will in truth represent the last will of Anthony Joseph Chaia having regard to his known wishes and concerns as far as they can be ascertained? For the answer I look to his previous testamentary intentions and the evidence of persons in whom he confided his wishes and concerns more especially that of his nephew Joseph Bahri and Marcella John, his friend advisor and confidante for several years. The burden on the defendant is particularly high as she herself wrote the will with no one else according to her being around and in which she is appointed sole executrix and inherits either in her own right or through her three children, the lion's share of the deceased's estate to the almost total exclusion of the testator's aging widow Rose whom he held in high esteem and whose welfare and future well-being were one of his primary and paramount concerns. Comparison of each of the testator's three previous wills shows that Edward Chaia and Camella Cochrane were always chosen as executors of Anthony Chaia's will. These are persons in whom he evidently reposed confidence and trusted to carry out his intentions in accordance with the terms of his will. The defendant Donna was chosen as a third executrix in his first

and second wills but was sidelined in favour of Joseph Bahri in his third will of 17th August, 1991. Could it be that the confidence which he previously reposed in her had by then been shaken? There is evidence which points to that conclusion. In any event, both Joseph Bahri and Marcella John testified that Mr Chaia had always expressed the desire to have at least a minimum of two executors to his will. Here there is only one - the one who for all intents and purposes had been discarded as such from the testator's third will.

[58] Turning to the Will itself, the defendant Donna Mary Grace Chaia, on her very own admission under cross-examination conceded that to some extent that will represented a radical departure from the will of 17th August 1991. Let us see how it did. Two parcels of land at Carnival Gardens which had been left to the testator's longstanding friend and physician Dr Babu were now left to Donna Chaia absolutely. A portion of land with two storey building which was to be leased to Rose Chaia for $1.00 per year for 25 years - determinable on death and then to Tchir Chaia at age 30 absolutely now goes to Tchir Chaia at age 25 absolutely. Meanwhile, the executrix Donna Chaia obviously will hold the same in trust for the infant beneficiary. The other portion of the Cross Street property comprising the deceased's matrimonial home fell as part of his residuary estate to Rose Chaia. Under the present will she derives merely a life interest with remainder to Donna herself and her three children and is to be excluded from payment of the deceased's debts. A gift of money to Kamroy Price of $5,000.00 is reduced to $3,000.00. Cars and pool tables which were

bequeathed to Rose Chaia under the 17th August will now went to Donna Chaia. A portion of land without building at Coolidge which had been devised to the testator's sister Victoria Bahri is about all that Rose Chaia received absolutely under the manuscript will of 26th October 1991, the value of which was put at $76,230.00 as against $914,760.00 in respect of the two storeyed building at Cross Street and $403,628,00 in respect of the other building, viz the bungalow and matrimonial home. This gives a fairly broad picture of how radical a departure there was between the one will and the other. It is not difficult see who stood to benefit and to what extent from the manuscript will of 26th October 1991 and who is as a result deprived of a real share of the deceased's estate.

For that is the gravamen of the plaintiffs' case - that is that the will which the defendant now seeks to propound in solemn form does not represent the known wishes and concerns of the testator. What were they?

[[59] In order to determine that I now revert firstly to the evidence of Joseph Bahri and then to that of Marcella John.

Joseph Bahri told the Court in chief:

> "The first matter he addressed concerned his daughter Donna. He said they were not getting along and she had disappointed him. Nevertheless she was still his daughter, his only daughter. He still loved her and wished to leave for her his property at Gambles - the house at Gambles. He went on to explain that this house was actually given to his wife Rose by a Mrs Abbott. He said that Aunt Rose had looked after Mrs Abbott, cooking, cleaning and general house-keeping and that she (the lady Mrs Abbott) had rewarded Mrs

Rose Chaia with this house but he pointed out that Rose had allowed him (Tony) to put the house in his name not hers. Having said all of that he still wanted the house to be Donna's. Donna was living in it. He (Tony) had renovated it and wanted to leave it for her.

The next topic his grandchildren - Donna's three daughters. He loved his grandchildren very much. To the first two Reina and Wolete he wished to leave his land at Piccadilly. He then gave me the whole history of the land at Piccadilly which he obtained by way of settlement of money owing.

The third grand daughter Tchir he wanted to leave the two storey concrete building on Cross Street. He made no effort to hide the fact that Tish (Tchir) was his favourite. Whenever he spoke of her there was a twinkle in his eye, smile on his face. She was his baby. He wanted her to have this property in particular because he described it as his most prized possession.

He explained that everything else he owned he had inherited or purchased but this was the house that Anthony Chaia built from foundation to roof he would say with blood sweat and tears he would add. So this was for Tish - no Michael, no other Chaia, not even Donna. This was for Tish he would say with great emphasis.

He had two concerns about leaving this building for Tish both of which he told about on separate occasions. The first concern related to creating a boundary separating the land upon which the two-storey building intended for Tich is located from the parcel of land upon which the dwellinghouse in which he and Rose lived was located.

He wanted to create a parking spot for Tish to park her car in the future. He said the Cross Street would become a very busy high-way. No parking would be allowed on it. And he never wanted any police officer to have the privilege of moving Tish's car from in front of her own property.

Ralph Francis, Tony's lawyer and I actually took the measurement relating to the creation of the car park

Second concern was that Tish was less than 10 years old in Primary School and he was concerned about who would control the property until she became of age. He wanted the executors of the will to hold

the property in trust for Tish until she became of age and was mature enough to handle her own affairs. He therefore wanted the will to be worded accordingly.

He then discussed a number of people who had been of great assistance to him in his lifetime. He thought first of Dr Babu his personal physician and friend for over twelve years. He would visit him in the middle of the night, always came to his assistance and gave him sound advice and importantly never charged him anything for his visit. He therefore wanted to reward Dr Babu with a piece of land at Carnival Gardens. And the person was Ruthina Edwards a faithful worker in his home and business and he wanted to leave some money for her. He was also very fond of Ruthina's son Kamroy Price whom he wished to leave some money as well.

He then started to talk about my mother Victoria. She had been a good sister to him. I did not feel comfortable listening to what he wanted to leave to my mother.

Another small piece of property that his father Toufik Chaia had left for him in Lebanon he wanted to leave it to his godson Toufik Chaar.

The next subject concerned his wife Rose Chaia. He pointed out to me that in the will located in the bank, he had left for Rose only a life interest in their dwelling home but had actually not left anything for her absolutely. He said this was not because he did not love her. He said he wanted to leave the main dwellinghouse for her in which they both resided absolutely. He explained to me why he had changed his mind. The reason for the earlier life interest was that he was fearful who she would leave it for. And he wanted no Michael, no Chaia to inherit it. He said that he had come to realize that he was wrong and could not deprive her of what was rightfully hers as a faithful wife and as an equal partner just because he did not approve who she would eventually give it to. He said even if he had maintained the instructions contained in the will in the bank which gave her only a life interest any good lawyer could secure for her what was rightfully hers. He had come to appreciate just how wonderfully devoted a wife she had been. In his illness she waited on him hand and foot

Other matters he wanted to discuss was his executors. He planned to retain Edward Chaia and Camella Michael as executors. The latter had a powerful voice and would look after her aunt Rose and

no one would take advantage of her.

Edward Chaia was a decent man well respected and would make a good executor. He wanted to remove Donna from the 1988 will in the bank and wanted a replacement. He said Donna had disappointed him. She had let him down. She had turned her back on his business and on him just when he needed her.

He would call me on average once a week. The will was not discussed on every occasion Sometimes when I got there he would be unwell and he never discussed the will once he was feeling unwell. On at least four occasions I simply went back home.

After the will of August 1991 had been signed about two weeks later about the end of August he called my mother and had a conversation. As a result of that conversation. I accompanied mother to Tony's house. There he dictated a note which he signed instructing the Bank to allow my mother access to his safe deposit box. He also telephoned the Bank and had a conversation with I believe the Manager. My mother retrieved the will from the bank, took it to him and in my presence he tore it up. That was the 1988 will. It was no longer valid.

I spoke with my uncle whilst he was in hospital. My mother and I returned to Antigua in early November. We had been in Rochester Minnesota.

I spoke to my uncle on more than one occasion. My best guestimate would be four. One was early November, 16th November when he called to wished my mother Happy Birthday. Then towards the end of November and then the first week of December.

He wanted me to come up "Come up!" he said "I need you!" He knew he had to have surgery. He wanted someone else there who could be with him. He said Donna was not visiting him as often as he would have wanted her. He needed someone else there. **"Please Joe come!"** he said.

Finally in examination-in-chief Joseph Bahri told the Court that he saw a copy of the will of 26th October 1991 and he was surprised because he had spent the better part

of three months discussing with Tony the will he had prepared and signed in August. That was settled and so he was surprised that there was a new one which he had not spoken to him about. When he looked at the will several things surprised him and I quote:

> "First there was a sole executor - one executor. From our previous discussions he had always expressed a desire for two and preferably three. I was also surprised that he had left Donna in total control since during the summer he had not wanted her to even control the property/building intended for her daughter Tish.
>
> I was also surprised that it was handwritten, somewhat scrappy since he had always been very particular about legal documents usually prepared by a lawyer.
>
> Tony Chaia was adventurous and a very kind and generous man. He was also quick to anger. He could also be very fussy or fastidious. And he was very careful.
>
> For example whenever I visited him and he was ill he would refuse to discuss wills. I would either go home or wait until he felt better."

[60] In cross-examination the witness disclosed that he was not aware that prior to the execution of the 17th August will that Tony had given instructions for the preparation of a previous will in July 1991. He was himself surprised at the revelation. That was the will which in fact remained unexecuted. Joseph Bahri further disclosed that there were other persons such as Marcella John. Dr Babu and Ralph Francis whom Tony used as sounding boards besides himself. Throughout those three months he (Bahri) was predominantly listening to Tony Chaia the witness added and was surprised when Tony asked him to be the third executor of his 17th August will in place of Donna

who had been an executor in the previous will. Finally Joseph Bahri testified that:

> "Based on my discussions with Tony in the summer of 1991, it would not surprise me that he gave instructions to leave the entire Cross Street to his wife Rose Chaia absolutely - but I am referring here to the matrimonial home excluding the two-storeyed structure. It therefore would surprise me that he gave instructions to leave the entire Cross Street property including the two-storey building to his wife Rose Chaia absolutely. He said he wished to leave land at Carnival Gardens to Dr Babu. Again it would surprise me that Tony Chaia instructed to leave property at Carnival Gardens to Donna and her three children."

The witness further testified that during their telephone conversation whilst Tony was in hospital in New York he (Tony) never told him that Donna had wanted him to change his will and he never mentioned anything about his will - hence, his surprise on seeing it after his death.

[61] On that aspect of the case Marcella John who as I said earlier impressed as a witness of truth told the Court that:

> "I was a frequent visitor to his home and more so he to mine. I have seen the defendant Donna Chaia grow up from a child to an adult woman.
>
> I was at his home whilst he was making preparation to travel abroad for surgical treatment. He told me that he had asked his daughter to accompany him. He told me that she had declined. I was not present when he asked anyone to accompany him.
>
> It is true that he was concerned that his wife would not be left dependent on anyone.
>
> I am aware that in issue is the question of the validity of two wills as the last will and testament of Anthony Chaia

My reaction would be one of total disbelief it I were told that in one of those wills the defendant is sole executrix.

If in the said will Donna Chaia is given full responsibility for the two-storeyed building on Cross Street my reaction would be that this would be different from what the deceased had expressed to me. And that would be so even if Tchir would inherit it on her 25th birthday.

If in one of the said wills the deceased's wife Rose Chaia were given only a life interest in the matrimonial home I would have to say that this would be contrary to what Anthony Chaia told me he was seeking to do for his wife based on his experience -meaning the position in which he found himself in.

At the time of his departure for the United States (in October 1991) he was relieved that his daughter had agreed to accompany him but he was concerned of the relationship when they went to the United States because he told me that prior to her agreeing to accompany him she showed no care and concern for him.

It was during the period of his illness that he expressed to me what he thought - that is that she did not care about his illness and did not show concern for him."

Concluding her evidence in chief Mrs John revealed that:

"The fact that the deceased Anthony Chaia in one of his wills in which he gave the two-storey building on Cross street to his grand daughter Tchir but nevertheless granted a lease for twenty five years to his wife Rose Chaia at $1.00 per year rental - all of this in my view would have been in keeping with his expressed desire/wish for Tchir and his wife Rose which he had disclosed to me in his lifetime."

Finally, Marcella John ended her testimony thus:

"He (Anthony Chaia) told me that he had lost confidence (in Donna) because she had not shown any care or concern for him. I have no hard feelings for Donna, on the contrary. I think quite fondly of her. We are friends."

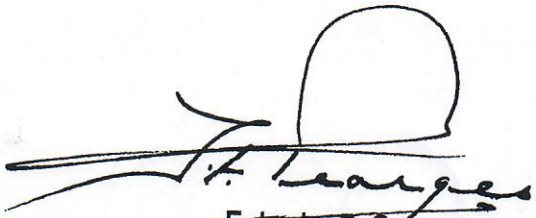
[62] It is this variance or radical departure (as Donna herself put it) between the terms of the 17th August will and the impugned or questioned will of 26th October 1991 which arouses and has sustained my own suspicion throughout this case. In the earlier will the defendant Donna no longer is an executor of Tony Chaia's will. In two previous wills she was one of three executors. Why the change? Is it that as Joseph Bahri and Marcella John both testified that by the summer of 1991 Tony Chaia's confidence in his daughter's business acumen had been shaken and had almost dissipated altogether. Is that why Joseph Bahri was substituted in her stead thus causing him (Bahri) to feel uncomfortable as he himself confessed. Then after months of soul searching reflection and discussion, the 1988 will was revoked and the 17th August 1991 will with three duly appointed executors was prepared with professional guidance and assistance and was duly executed by Anthony Chaia; then just two short months afterwards there is this volte face by the testator on 26th October 1991 when as a gravely ill man he dictates a manuscript will from his hospital bed to his daughter Donna constituting her sole executor thereof and the principal beneficiary directly or indirectly and giving her total control over most of his property. All of this is so sharply at variance with the previous will which the testator himself had so painstakingly drawn up and executed just two months previously that it is simply mind-boggling. All the more so because of its radical departure from the earlier will and its variance with the known affections and concerns and general sense of propriety of Anthony Joseph Chaia.

[63] So that whilst I find as a fact that Anthony Chaia duly executed the questioned will in the presence of two attesting witnesses and well knew what he was doing; having regard to the contents and complexity of the will itself and its obvious imperfections, lack of clarity and coherence I personally have the gravest reservations in light of all the surrounding circumstances that he fully appreciated, understood and approved of it. It is essential to the exercise of such a power (i.e. testamentary power) that a testator should understand the nature of the act and its effects, should understand the extent of the property which he is disposing; be able to comprehend and appreciate the claims to which he ought to give effect. In the absence of proper legal advice it is extremely doubtful to my mind that Anthony Chaia would have fully understood and appreciated the nature and effect of the complex and complicated will which he executed on the evening of 26th October 1991 from his hospital bed at a time when he was gravely ill. It is for example to be noted that the testator placed his initials no fewer than nine times in the margins of the will for no explicable reason. They were not against any alterations or interlineations. Did he appreciate what he was doing one may well ask? Or was he merely acting on instructions? He had never done this before. Further all of this occurred less than 72 hours of his admission to the CCU of the Veteran's Hospital in Brooklyn in very poor shape. Throughout much of that period he had been complaining of and was being treated for chest pains, he had been restless and agitated and had had little or no sleep and was under sedation. At the end of the day, there is the lurking suspicion that Anthony Joseph Chaia may not have been the author or sole author of the will of 26th October, 1991 and clearly

would not in all the circumstances have understood, appreciated or approved of its contents. Further, the Court notes that the said will contains two paragraphs 9 and 4 that do not clearly relate to each other. The devises contained therein are patently confusing and ambiguous and hence difficult to comprehend. A testator must be able to exercise a rational appreciation of what he is doing.

[64] It seems to me that upon consideration of the substantial changes of testamentary dispositions made between the two wills within a relatively short period of time and bearing in mind that the impugned will was prepared and executed when the testator was in a very poor state of health and in contact mainly with the defendant throughout that entire day coupled with the fact that the defendant Donna Chaia and her children are to derive significantly increased benefits under the latter will of which she is herself sole executrix and that the testator's widow is to receive a substantially reduced and less valuable share of the testator's not insubstantial estate; all give rise to suspicions which in my view have not been dispelled and lead to the belief that the will dated 26th October 1991 does not truly reflect the true last will of Anthony Joseph Chaia and that he could not in the circumstances fully understand, appreciate and approve of its contents and implications.

For these reasons I hold that the impugned will should not be admitted to probate and pronounce in favour of the earlier will and order that probate of the will of 17th August, 1991 should be decreed in solemn form with costs to the plaintiffs to be taxed in default of agreement.



Ephraim F. Georges
High Court Judge.