

IN THE SUPREME COURT OF BELIZE A.D.2009

CLAIM NO.: 177 of 2008

	(HUANG WAN XIAN MONTEJO	CLAIMANT
	(
BETWEEN	(AND	
	(
	(LUCINDA MONTEJO	1 st DEFENDANT
	(RACHEL MONTEJO	2 nd DEFENDANT

BEFORE The: Honourable Madam Justice Minnet Hafiz-Bertram

APPEARANCES: Hubert Elrington S.C., for the Claimant
Eamon Courtenay S.C., along with Ashanti Arthurs Martin for
the Defendants

Hearings: December 2nd 2009
December 3rd, 2009
December 21st, 2009
December 22nd, 2009
April 14, 2010
April 15, 2010

J U D G M E N T

Introduction

1. The Claimant is a business woman who was married to the late Remejo Montejo Sr. who died on 3rd May, 2007. The Defendants are the daughters of the late Montejo Sr.
2. The Deceased, Montejo Sr. purportedly made a Will on 26th March, 2007 and the Claimant seeks Declarations as to the Validity of the Will and an Order granting probate of the estate of her deceased husband, Montejo Sr.

3. The Defendants in attacking the Will, alleged, *inter alia* that the deceased lacked the capacity to articulate and/or propound the paper writing dated 26th March, 2007 purporting to be the last Will and Testament of the late Remejo Montejo Sr. and that the Will was not duly executed in accordance with **section 7** of the **Wills Act, Chapter 203**.

Statement of Case of the Claimant

4. The Claimant states that since 1997 she and the deceased, Montejo Sr. lived and cohabited at No. 629 Vista Del Mar, Belize. That on 26th day of August, 2001 Remejo Montejo Jr. was born to the Claimant and Remijio Montejo Sr.
5. At paragraph 5, 6 and 7 of her statement of claim, the Claimant states that on 26th February, 2007, Montejo Sr. became ill and sought medical attention at the Universal Health Services. He was diagnosed with a brain tumor by Dr. Cervantes and was advised to seek further medical treatment in the form of Chemotherapy and Radiotherapy outside of Belize. Dr. Cervantes informed her that Mr. Remejo's neurological deficit which was consistent with left sided weakness in the arm and leg along with a slight difficulty to express himself when talking did not interfere with his capacity to understand written or spoken language as his capacity to reason and his mental functions were intact.
6. At paragraph 8 of her Claim she stated that with this knowledge as stated above, she got married to Montejo Sr. on 24th March, 2007.
7. The Claimant states that on 3rd May, 2007, Montejo Sr. slumbered to his illness and died. That in the month of June, 2007 she sought legal assistance to administer her late husband's estate at the law firm of H.E.

Elrington & Co. That it was during that process she discovered that her late husband had died testate and not intestate as she had thought.

8. She stated at paragraph 12 and 13 of her claim that the office manager of H.E. Elrington and Co. informed her that her late husband's sister, Mrs. Tomasa Munoz had given her Montejo Sr. Will before she had departed for the United States of America. She stated that she had no knowledge that a will existed and was surprised of this information.

9. ***Relief Claimed***

The Claimant claims:

1. *A Declaration that the paper writing dated 26th March, 2007, purporting to be the last Will and testimony of the said Remijio Montejo was executed by him in proper form and is valid.*
2. *That the Applicant is the Executrix named in the Will and is entitled to a grant of probate in respect of his estate.*
3. *An Order granting Probate of the estate of the said Remijio Montejo late of Belize City, Belize to the Claimant.*
4. *Costs.*
5. *Such further or other orders and remedies as the Honourable Court deems just.*

10. ***Statement of Case for the Defence***

In an Amended Defence dated 4th November, 2008, the Defendants admit paragraph 7 of the Statement of Claim in so far as it constitutes the initial diagnosis of Dr. Cervantes.

At paragraph 5 of the Defence, the Defendants say that on or about 5th March, 2007, Dr. Cervantes performed a craniotomy/craniectomy surgery upon the deceased and removed a tumor from the deceased's brain.

The Defendants at paragraphs 6, and 7 state that the deceased was recovering from his brain surgery when he fell at Universal Health Services on 13th March, 2007 and had to undergo an emergency brain surgery by Dr. Cervantes on the said day. That after the surgery the deceased ability to communicate was greatly reduced and that he could only mutter unintelligibly and had great difficulty expressing himself through action or by words.

The Defendants say at paragraph 8 of their defence that in view of the condition of the deceased he lacked the capacity to articulate and/or propound the paper writing dated the 26th March, 2007 purporting to be the last Will and Testimony of Remejio Montejo Sr.

Further, at paragraph 9 of the Defence, the Defendants say that Tomaza Munoz admitted to drafting the purported Will after Remijio Montejo died.

The Defendants further say at paragraph 10 of their defence that Poulina Ramsey was the first witness to the purported Will and that at the time Poulina Ramsey signed the purported Will the thumb print had already been impressed upon the purported Will. That Ms. Ramsey did not see the deceased impress his thumb print on the Will, nor did she sign the Will in the presence of the deceased, nor did any other witness sign the Will in the presence of the deceased.

At paragraphs 11 and 12 the Defendants say that in view of the above the purported Will is a forgery. Further, they deny that the paper writing dated 26th March, 2007 purporting to be the last Will and Testimony of

Remijio Montejo Sr. is valid and deny the Claimant is entitled to the reliefs claimed.

11. **Reply**

The Claimant in reply stated that the deceased's sister, Tomasa Munoz did not make the purported admission that she drafted the purported Will after the death of Montejo Sr.

The Claimant says that the Will was executed by the Testator in the presence of two witnesses both present at the same time and that the witnesses in his presence and in the presence of each other signed their names as witnesses.

12. **Evidence**

The Claimant, Huang Wan Xian Montejo, the wife of the late Remijio gave evidence and was cross-examined. Amaurie Segura and Tomasa Munoz also gave evidence for the Claimant and they were cross-examined. Mr. Segura is a Justice of the Peace and signed as witness to the purported Will. Mrs. Munoz is the sister of the late Remijio Montejo and a witness to the purported Will. She was also the person who was responsible for the preparation of the purported Will.

There were a number of witnesses for the Defence which included the daughters, brothers and Doctors of the late Remijio. The daughters are Lucinda, the first Defendant and Rachel the second Defendant. The brothers who gave evidence are Cruz Montejo and Silvano Vidal Montejo. The Doctors who attended to the late Remijio are Dr. Andre Joel Cervantes and Dr. Jorge Hidalgo M.D. Poulina Ramsey, the niece of the late Remijio who is a witness to the purported Will of the deceased also

gave evidence. Roque Blanco MLT who is now a Doctor is another witness for the Defence. He was working at the hospital at the time the late Remijio was there. All the witnesses were cross-examined.

Submissions for the Claimant

13. In written submissions, Mr. Elrington, SC submitted that that the Defendants allege:
 - (1) That the Will was a forgery.
 - (2) That the Will was not a forgery, but that at the time their father made the Will, he lacked the mental capacity needed to make a Will.
 - (3) That if he had some mental capacity to make a Will, the Will was so complicated that he did not have capacity to make a complicated Will, even though he may have had capacity to make a simple Will.

14. Learned Senior Counsel, Mr. Elrington submitted that if a Will is to be forged, it requires intention, (*mens rea*) and action (*actus reus*). That it is a serious criminal offence to forge a Will and it carries a penalty extending to life imprisonment. That the proof of forgery must be by evidence that is capable of persuading the tribunal of fact, not on the civil standard but on the criminal standard. Further, by alleging fraud the Defendants took it upon themselves to prove fraud.

15. Learned Senior Counsel submitted that the Defendants brought no evidence that was capable of establishing fraud on the part of Claimant, or any other of the attesting witnesses or anyone else. That the evidence relied on by them proved irregularity, not amounting to fraud, or any criminal act. Their evidence was that Tomasa Montejo and Mrs. Huang

Montejo went to the place of employment of Paulino Ramsey after the death of Remejio Montejo Sr. and Mrs. Tomasa Montejo asked her to sign Remejio Montejo's Will. A document was produced to her which she signed. She exhibited the document to her affidavit and it forms part of the evidence. She said that at the time the document was signed by her, it had on a finger print, which Tomasa Montejo told her was Remijio Montejo Sr.'s "mark" and it had no other signature. Learned Senior Counsel submits that it was just the fingerprint which was represented to Pounlina by Tomasa Munoz to be the thumb print of Remejio Montejo Sr is the supposed evidence of forgery.

16. Mr. Elrington SC further submitted that Tomasa's evidence is that at the time Paulino Ramsey signed the Will it had on three (3) signatures, namely, Remijio Montejo's signatures, Amaurie Segura's signature and her signature. Learned Senior Counsel submitted that if what she is saying is true, neither the *mens rea* or *actus reus* of forgery was present. That the *mens rea* was not present because she mistakenly believed that a signature could properly be added to a Will after the Testator's death. This was clearly a wrong belief, but she agreed that it was made after Testator's death and not in his presence. She therefore told the truth to the Court as to how the signature of Paulino Ramsey came to be on the Will. As for the *actus reus*, Learned Senior Counsel submits that a Will that is validly executed cannot be forged or rendered void by adding another signature to it after the Testator had signed it in the presence of two attesting witnesses who thereafter signed it in his presence and in the presence of each other.
17. Learned Senior Counsel further submitted that the Justice of Peace, Mr. Segura was shown a true copy of the Will in Court whilst giving his

- testimony. As he looked at it, he pointed to the signature of Paulino Ramsey and said *“this signature was not on the Will at the time it was signed by the Testator and by us as witnesses.”* Further, that Mr. Segura told the Court in his evidence how he came to witness the Will and how it came about that Remijio Montejo’s thumb print was on the Will.
18. Learned Senior Counsel submitted that the Defendants could have challenged the evidence that the thumb print was not that of Remejio Montejo Sr, but they never challenged it. They accepted that it was that of the Testator and that this is a most important concession. Further, that the Defendants were in effect saying that the Will has on Remejio Montejo’s thumb print, but it was not put on the Will in the presence of Amaurie Segura and Mrs. Tomasa Munoz, the attesting witnesses.
 19. Mr. Elrington SC further submitted that the finger print was admitted by the Defendants to be Remijio Montejo’s on the pleadings. Further that the unchallenged evidence of Tomasa Munoz and Amaurie Segura show that the fingerprint is that of the Testator.
 20. In further written submissions, Learned Senior Counsel submitted that the defence accepts the fact that the Will was properly executed as stated by Justice of the Peace, Amaurie Segura. However, they later put to him that at the time Remijio Montejo signed it, he lacked the mental capacity to do so. Thereafter, this was later altered to, *“If he had mental capacity to sign a simple Will, he lacked the mental capacity to sign a complex Will”*.
 21. Learned Senior Counsel submitted that the Defence was driven to make this fine distinction between his capacity to sign a simple Will and his capacity to sign a complex Will because of the strength of the evidence brought by Claimant and by the Defendants themselves to prove that

Remijio Montejo Sr. at all material times had the mental capacity necessary to make a Will in law.

22. Learned Senior Counsel submitted that less than two days before the making of the Will, that is, on the 24th day of April, 2007, the deceased had married Claimant and had done so in a religious ceremony at the hospital attended by his family members and close friends. He had signed the Marriage Certificate and clearly recognized his family members and friends and clearly knew what he was doing and intended to do it. That in addition, his wife had consulted the specialist attending to him to inquire whether he had the mental capacity to marry. The Specialist was emphatic that he did have the capacity and gave the wife a Certificate to that effect. See Report of Dr. Cervantes at Exhibit **H.M. "1"**.
23. Mr. Elrington SC further submitted that it would have been an imposition to have asked the same Specialist to certify that he had the mental capacity to make a Will less than forty-eight (48) hours later. Further that there is no evidence whatsoever that within a day and a few hours after marrying his condition had deteriorated to the point where he could not understand his Will.
24. Learned Senior Counsel also pointed to the effect of the illness of the deceased. He submitted that the unusual aspect of his illness was that it affected his ability to control his limbs and to speak but not his ability to understand. That only the two daughters in their evidence and cross examination tried to show that after he had a fall in the bathroom his condition steadily deteriorated. The medical evidence and the evidence of all the other witnesses refuted this allegation very strongly. The evidence was that Remijio Montejo Sr was a man of strong will, strong views, a decisive man and well read who according to Mr. Michael Godoy some people underestimated.

25. Learned Senior Counsel also referred to the evidence of Mr. Godoy who said that Montejo Sr. had asked him to look after a business for him which he had deliberately put off and he kept asking him about it on his visits to the hospital. Counsel submits that Mr. Godoy's evidence is that the Testator had prepared an architectural drawing and later prepared another, but because of his deteriorating condition his second drawing was not as good as the first. Mr. Godoy was adamant that he visited Remijio daily and that they had discussions and that Montejo Sr. understood him and recognized him. Learned Senior Counsel submitted that from every other witness the evidence on this point was the same. Even when he got so tired that he could no longer control his speech or hands he still made valiant efforts to communicate to say what he wanted to say. Mr. Elrington submits that the deceased problem was clearly not a sensory problem, but, was a motor problem.
26. Learned Senior Counsel, Mr. Elrington further submitted that the issue of how long Remijio was able to concentrate without becoming completely exhausted, according to Dr. Andre Cervantes, was a concentration span about 10 to 15 minutes. That he would begin to speak quite clearly and as he got tired he began to speak with less control until he reached the point where the speech was so blurred it was not intelligible. The doctor said that he would then have to rest for 20-30 minutes before he would be able to communicate. Learned Senior Counsel submitted that it does not take 10 minutes or 15 minutes to read a Will. Further, Remijio was not the one reading it. He was listening to it being read to him slowly and with pauses to give him a chance to respond.
27. Mr. Elrington SC also referred to the evidence of Dr. Cervantes who said that in his opinion, in relation to Mr. Montejo's concentration span, it was not based on an exact science. That, it was a rough guide,

sometimes he would go longer, sometime not as long. Senior Counsel submitted that Mr. Segura and Mrs. Tomasa Munoz gave sworn testimony that Mr. Montejo listened to his Will being read and nodded his approval until the whole of it was read to him and at the end of it he nodded his approval. He was not exhausted but, his hands shook too much to sign and when asked if he wanted to sign by making his mark he readily understood and agreed.

28. As for the allegation by the Defendants that the Will was too complex for the Testator to understand, Learned Senior Counsel referred to the evidence of Mrs. Tomasa Munoz who told the Court that she discussed the contents of the Will with Remijio as it was being prepared, read it to him and told him he could make changes. That it was only after this process had been completed that she went for the Justice of the Peace and asked him to come and witness the Will. Learned Counsel submitted that the suggestion that Montejo Sr. did not know what was in the Will and did not understand it has no factual basis. Further, that it had been discussed with him and had been prepared under his direction and had been read over to him and when it was finally ready a Justice of the Peace had been asked to read it over to him slowly. The Justice of Peace paused to get his approval or disapproval. That the Testator had approved each section as it was read to him and had approved the whole Will at the end and had signed it. That this is the clear and uncontroverted evidence.

29. Learned Senior Counsel further submitted that the Will is not complex. It has legal words and phrases that are standard in all Wills prepared by lawyers. That these legal words and phrases have found their way into standard form Wills used by some Testators. Counsel submitted that it would be strange if the Courts would strike down such Wills on the ground that they contain some legal words and phrase which the Testator

might not have understood. Further, that there is no evidence whatsoever that Montejo Sr. lacked the intelligence and ability to understand all the words and all the phrases used in his Will.

30. Learned Senior Counsel submitted that in light of the evidence the Court should find that the Testator made and executed his Will in the presence of the attesting witnesses and at the time he did so he had the mental capacity to make his Will.

31. Learned Senior Counsel at the end of his written submissions stated:
Authorities : Robert Panton and Knox Arnold v Eric De Four and Marqus De Four, Belize Civil Appeal No. 1 of 1990;
Daisy Watson v Alexander Watson, Supreme Court of Belize, Action No. 647 of 2007. Learned Senior Counsel did not identify any principle in these authorities which is applicable to the facts of the case before the court.

Submissions for the Defendants

32. The Defendants submitted that the facts surrounding the execution of the Will are suspicious and since this suspicion has not been removed by the Claimant the Court should not pronounce in favor of the will.

33. Learned Counsel relied on *Tyrrell v Painton [1894] P 151* where the Court of Appeal established the principle that “*whenever a will is prepared and executed under circumstances which raise the suspicion of the Court, it ought not to be pronounced for unless the party propounding it adduces evidence which removes such suspicion and satisfies the Court that the testator knew and approved of the contents of the instrument.*”

At pages 156 to 157 Lindley LJ stated that:

“In Barry v Butlin Parke B delivering the opinion of the Judicial Committee said ‘the rules of law according to which cases of this

nature are to be decided do not admit to any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two: The first, that the onus probandi lies in every case upon the party propounding the will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased” ...

The rule in Barry v Butlin ... is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove that suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they may rely on to displace the case made for proving the will.”

34. Learned Counsel for the Defendants submitted that the law is therefore very clear that where the circumstances surrounding the execution of a Will raises suspicion the onus is on those who propound the Will to remove the suspicion (“*to satisfy the conscience of the Court*”), and that it is only where the suspicion is removed that the onus is then thrown on the party opposing the will to prove fraud or undue influence.
35. In the instant case the Defendants say that the suspicion arises from (1) the testator’s open refusal to have a will prepared before his first surgery (2) his difficulty in expressing himself by speech or writing (3) his alleged inability to sign his Will a mere two days after signing his marriage certificate (4) the evidence of his neurological surgeon that the testator

could sign his name (5) the length and complexity of the will (6) the evidence of the neurological surgeon that even if the Will was read to him, the testator could not understand more than two pages of at any one time (7) the absence of evidence that the Will was read and the testator was afforded the necessary twenty to thirty minutes breaks to rest (8) the evidence of Poulina Ramsey that the will was produced to her after Remijio's funeral, that she was the first witness and that at the time she signed it the will was not dated (9) the fact that the Will did not make provision for Lucinda's education notwithstanding Remijio's promise to pay for her education if she withdrew from school to care for him (10) that the Claimant applied to probate the Will and did not inform any member of the family, including the Defendants, that a Will had been found and (11) that the only witnesses to the Will were Tomasa and Amaurie Segura, a person barely known to Remijio and who was only asked to witness because he is a justice of the peace, when Remijio's good friend Michael Godoy and his brother Silvino Vidal Montejo are also Justices of the Peace.

36. Further Learned Counsel submits that the suspicion is heightened by the unreliability of the Claimant's witnesses as demonstrated under cross-examination. The evidence of the Claimant, Tomasa Munoz and Amaurie Segura was evasive and contradictory. While Tomasa gave evidence that the Will was executed by Remijio Montejo during the early morning of 26th March 2007, Amaurie Segura gave evidence that the Will was executed in the afternoon.
37. Furthermore, several statements in Tomasa Munoz and the Claimant's witness statement proved untrue. First, both Tomasa and the Claimant alleged that the Defendants did not assist with Remijio. The overwhelming evidence of the Defendants and their witnesses was that Lucinda was present most times for Remijio. Even Dr. Cervantes, while

giving evidence of Remijio's speech impediment stated "*Sometimes I would rely on his family members, who in most instances was his younger daughter who was present at this time and I would try to decipher what he was trying to say*". That there is also uncontradicted evidence that it was Lucinda and Rachel that arranged for Remijio to obtain medical attention in Merida and physically accompanied him during his month stay in Merida. Lucinda sacrificed her education and Rachel left her studies without permission to be at their father's side.

38. Learned Counsel referred to the evidence of Tomasa where she stated that she had not informed the Claimant of the Will because of the language barrier. However, as the Claimant aptly demonstrated during her cross-examination, she has a good understanding of the English language. Also, the Claimant gave evidence that she relied on Tomasa to explain things to her.
39. On the authority of ***Tyrrell v Painton supra*** the Defendants say that the evidence of the attesting witnesses is not sufficient to remove the suspicion arising from the circumstances under which the Will was purportedly prepared and executed. Further, the Court has not been provided with any compelling evidence by the Claimant removing the suspicion. Therefore, the Court should not propound the Will on this ground alone.
40. In further submissions, the Defendant say that no Will was read on 26th March 2007. The Defendant referred to the evidence of Lucinda who gave evidence that on 26th March 2007 she was with Remijio Montejo from approximately 7:00 a.m. through to after 12:00 p.m. when he was discharged from Universal Hospital. In fact, Lucinda gave further evidence that she accompanied Remijio in the ambulance to this home. Further, that at no time on 26th March 2007 did Tomasa or Amaurie Segura attend

- at Universal Hospital to read a Will. Even further, Lucinda's evidence has not been proven unreliable and should be accepted by the Court.
41. In further submissions, the Defendants say that Remijio Montejo could sign. They say that it is admitted by the evidence of the Claimant and the Defendant that Remijio Montejo signed his marriage certificate on 24th March 2007. This is a mere two days before the purported execution of the Will, and on the evidence, there was no drastic deterioration in the intervening two days that would justify a conclusion that Remijio Montejo's condition was worse on 26th March 2007.
 42. The Defendants referred to Dr. Cervantes' evidence that at the time of Montejo Sr. discharge he would have been able to write five long or ten short words, and he stated in no uncertain terms that "*I think he would be able to sign and it would be basically legible*".
 43. The Defendants submitted that the evidence before the Court is therefore that as at 26th March 2007 Remijio Montejo could have signed his name to the Will. That the suspicion as to why it was necessary to impress a thumb print a mere two days after Remijio signed his marriage certificate has not been removed by the Claimant and no plausible explanation has been offered. The Claimant's evidence is not supported by the evidence of Dr. Cervantes, Remijio Montejo's neurosurgeon.
 44. The Defendants also challenged the Will on the ground that the Will was witnessed after execution. They referred to the evidence of Poulina Ramsey who said that she was the first witness to Remijio Montejo's will, which was presented to her by the Claimant and Tomasa Munoz after Remijio Montejo had died. That there were no other signatories on the purported Will before she signed. She testified that she is certain of this as before she agreed to sign as a witness she inquired of Tomasa who

- else would be signing the will. Se said that she did not see Remijio impress his thumb print and that the Will was not dated at the time she signed it. Learned Counsel submitted that Poulina Ramsey did not waiver under cross-examination and asserted that *“When I got this will, there was no signature on this will, none, absolutely none. There was not even a date on this will.”*
45. Learned Counsel for the Defendants relied on **section 7(1)** of the **Wills Act** and submitted that based on the evidence of Poulina Ramsey, the Will was not executed in accordance with section 7 of the Wills Act as, even if the thumb print is that of Remijio Montejo (which is denied) Remijio Montejo did not sign or acknowledge the Will in the presence of two witnesses present at the same time and none of the witnesses attested and subscribed the will in the presence of Remijio Montejo. See also the case of ***Brown v Skirrow [1902] P 3***, relied on by the Defendants where Gorrell Barnes J stated at page 7 that *“The Wills Act is very precise, and must be applied with strictness.”*
46. The Defendants made further submissions on Remijio Montejo’s capacity to articulate or propound the Will. Learned Counsel submitted that the Defendants do not dispute that Remijio Montejo had the capacity to understand generally. However, the Defendants submit that Remijio Montejo lacked the capacity to articulate or propound the purported Will, and to understand the purported Will in the manner the Claimant alleges it was presented to him.
47. The Defendants referred to the evidence of Dr. Andre Joel Cervantes whose testimony is that Remijio Montejo could understand written and spoken language but that he could not speak for more than ten to fifteen minutes as his speaking would become slurred. Dr. Cervantes said, in relation to Remijio Montejo’s difficulties with speech that:

“He knew what he wanted to say, I could see that from a professional perspective but when he would try to name the object used to correct word, many times he would say the wrong word instead of that. Sometimes I would rely on his family members, who in most instances was his younger daughter who was present at this time and I would try to decipher what he was trying to say ... he could not express himself. He would start sometimes and he couldn’t be able to really say the words. I would try to understand.”

With respect to writing, Dr. Cervantes gave oral evidence that:

“Difficulty in writing had to do basically if he would hold a pen or pencil and you put paper to it, the writing would not be very readable. It would be like a scribble. Too small or too large the size of a letter and you would not be able to readily read what letter he was trying to make out ... At most I would say he would not be able to write beyond five to ten words ... Five long words, ten small words, maximum”

48. The Defendants submitted that Dr. Cervantes evidence is corroborated by the evidence of the Defendants that Remijio Montejo experienced difficulties in communicating whether by speech or writing. That Cruz Montejo gave evidence that *“When I visited Remijio he was able to open his eyes and nod and point to communicate. Occasionally, he would try to speak but he had great difficulty in pronouncing words.”*

49. Further, that Michael Godoy gave evidence that:

“Although I was at his bedside almost daily, Remijio found it increasingly difficult to communicate with me and with family members. He could not pronounce basic words and it took him several minutes for us to understand if he wanted to pee. Most times he resorted to gestures to help us understand what he wanted. Other times I would give him paper to write on and even then he would not write complete words and/or sentences. Many times I had to interpret his words.”

50. The Defendants further submitted that in view of the above, the evidence clearly establishes that Remijio Montejo’s ability to communicate was very

limited after his surgery on 6th March 2007 up to the date of his discharge from Universal Hospital on 26th March 2007. As such, he could not therefore dictate, articulate or express (by writing or speech) the contents of the purported Will which runs 3 ½ legal size pages in length. That he lacked the physical capacity to articulate and/or propound the purported Will as he could not, after 6th March 2007, give instructions for its preparation.

51. On the instructions given to Tomasa Munoz, the Defendants say that she was directly asked during cross-examination how and when instructions were given to her to prepare the purported Will. Evasively, she answered that she and Remijio spoke about what he wanted on several occasions when she visited with him, that she got a template for a Will from a friend whose daughter is a paralegal, took it to Remijio, showed it to him and read it to him. That the contents of the Will was what Remijio told her, yet she had no idea about the references to the sections of the Trust Act, and after a quite extensive cross-examination, Tomasa stated that the first time Remijio informed her he wanted to make a Will was before the first surgery (6th March 2007) after Dr. Cervantes had advised Remijio it was time to set things in order.

52. The Defendants submitted that Tomasa's evidence directly conflicts with the uncontradicted evidence of Rachel Montejo, Lucinda Montejo and Michael Godoy that prior to his first surgery Remijio Montejo rejected the advice of close friends that he should make a Will, instead asserting that the laws of Belize would provide for his wife and children if he died. Further, it is the Defendants' submission that Remijio did not give instruction for the preparation of the purported Will before 6th March 2007, and that after 6th March 2007 he lacked the physical capacity to articulate, propound, or in any way express to Tomasa Munoz the terms of the purported Will, whether by writing or speech.

53. The Defendants also made submission on Remijio Montejo's capacity to understand the terms of the purported Will. They say that he lacked the capacity to do so as the the terms of the purported Will are not simple and are not easily capable of comprehension.

54. Learned Counsel referred to the evidence of Dr. Cervantes who gave evidence that Remijio Montejo could not understand if more than two pages were read to him at any one time, and if the reading lasted more than five to seven minutes. He stated:

"I think he would have had to rest a couple minutes and then retake the document. I think after one or two pages he'd have to rest and then he retake the document after perhaps 20, 30 minutes for him to continue understanding what was in the document ... My honest opinion is I do not think he would be able to have withstood fifteen constant minutes. The latter part of the document I think he would not have understood. He would have to have rest at some point."

55. Learned Counsel submitted that Amaurie Segura in giving his evidence took more than one minute to read the last paragraph on the last page to the purported Will. It would have taken him considerably more than fifteen minutes to read the will and pause at every paragraph to get Remijio Montejo's agreement as he alleges. On the evidence of Dr. Cervantes, Remijio would not have been in a position to understand more than two pages or a couple minutes of listening without having to rest, otherwise he would not understand the Will.

56. The Defendants say that there is absolutely no evidence before the Court confirming that at any time Remijio Montejo was afforded twenty to thirty minutes to rest after the first two pages were read to him. That taking into consideration the fact that persons without any neurological deficit could not understand that Will and the evidence of Dr. Cervantes that

Remijio could not understand more than two pages and would have had to rest to understand more than two pages of reading, Remijio Montejo could not understand and so could not approve the content of the purported Will even if it were read to him as alleged.

57. The Defendants further submitted that the complicated structure of combining a Will with a Trust should also cause the Court to question the ability to Remijio to fully understand that this was what he wanted to do by way of his testamentary disposition.

Determination

Testamentary capacity

58. For a Will to be valid, it is necessary that the testator should be of sound mind, memory and understanding. The degree of mental competence required to make a will was enunciated by Cockburn CJ in **Banks v Goodfellow (1870) LR 5 QB 549 at 567**. In order to be of sound disposing mind a testator must be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them.
59. The burden of proof is on the executor or any other person setting up a will to show that it is the act of a competent testator, and therefore, where any dispute or doubt exists as to the capacity of the testator, his testamentary capacity must be established and proved affirmatively. The issue of capacity is one of fact. See **Sutton v Sadler (1857) 5 WR 880**.

60. In the case at hand, the totality of the evidence shows that at the time of the making of the Will, Remijio Montejio had the capacity to understand generally and this is not disputed by the Defendants. The Will is not being challenged by the Defence under the ground of incapacity in relation to sound mind, memory and understanding. As such, the court does not have to make a determination on a ground that was not pleaded.
61. See Exhibit **H.M. "1"** which is a letter from Dr. Andre Joel Cervantes, Neurosurgeon/Spine Surgeon, dated 26th March, 2007 which states:

*26th March 2007
Belize City, Belize*

TO WHOM IT MAY CONCERN:

RE: Remejio Montejio, 56 years

This serves to inform you that Mr. Remejio Montejio was first evaluated and diagnosed with brain tumor by my person on the 26th February 2007. During his in-hospital stay from the 26th February 2007 to the 26th March 2007 he underwent 2 brain surgeries and had supportive medical treatment. Mr. Montejio's neurological deficit which was consistent in left-sided weakness in the arm and leg along with a slight difficulty to express himself when talking did not interfere with his capacity to understand written nor spoken language. His capacity to reason and his mental functions are intact to date.

Mr. Montejio must seek further medical treatment in the form of Chemotherapy and Radiotherapy outside of Belize as these modalities are non-existent at this time in our country.

Sincerely,

*Dr. Andre Joel Cervantes
Neurosurgeon/Spine Surgeon*

The medical evidence clearly shows that the deceased Montejo Sr. had the capacity to understand written and spoken language as of 26th March, 2007, the date of the purported Will.

Issue 1:

Whether the Testator knew and approved of the contents of the will.

Knowledge and approval

62. The Defendants in their pleadings say that in view of the medical condition of the deceased he lacked the capacity to articulate and/or propound the paper writing dated the 26th March, 2007 purporting to be the last Will and Testimony of Remejio Montejo Sr. Further, that Poulina Ramsey was the first witness to the purported Will and that at the time she signed the purported Will the thumb print had already been impressed upon the purported Will. That Ms. Ramsey did not see the deceased impress his thumb print on the Will, nor did she sign the Will in the presence of the deceased, nor did any other witness sign the Will in the presence of the deceased.
63. It can be seen from these challenges that the broad ground of the challenge by the Defendants is the want of knowledge and approval of the Testator which is essential to the validity of any will. The issue for determination is therefore, whether the Testator, Remejio Montejo Sr. knew and approved of the contents of the Will.

Presumption of knowledge and approval

64. Where there is no fraud the general rule is that the fact that the Will has been read over to a capable Testator on the occasion of its execution should when coupled with his execution of the Will be held conclusive evidence that he knew and approved of its contents. However, there is no

conclusive presumption that a testator who executes his will after having it read to him must be held to have known and approved of the contents. It is open to the court before which the question arises to find as a fact that the will had not been read to him in such a way as to convey to his mind a due appreciation of its contents. See **Halsbury's Laws of England, Volume 17(2) (Reissue) at paragraph 317.**

65. As for the burden of proof, it is the person propounding the will to prove to the Court that the instrument is the last will of a free and capable testator. See **Barry v Butlin (1838) (2 Moo PCC 480) and Cleare v Cleare (1869) LR 1 p 657-658.** In this case it is the Claimant, Mrs. Montejo a beneficiary under the will who is propounding same.
66. Two of the witnesses for the Claimant gave evidence as to the due execution of the Will. The evidence of Tomasa Munoz is that on the 26th day of March, 2007 she presented the Will to her brother, Remijio Montejo Sr. which he had instructed her to prepare. That he was weak at the time, but he was in full control of his senses and made his wishes known to her clearly. Further that Amaurie Segura, Justice of the Peace, was present at the time when she presented the Will to the deceased. Further, in their presence the Justice of the Peace read the will over to the deceased slowly and distinctly who indicated that he agreed with it and wanted to sign it, but he could not write his name as he did not have control in his hands. That the Justice of the Peace suggested that the deceased sign the Will by putting his finger print on the Will and he agreed to do so.
67. Mrs. Munoz testified that the Justice of the Peace assisted the deceased to put his finger on the stamp pad, and then placed his print at the foot or end of the Will in both of their presence. Further, immediately thereafter

they both signed the will in his presence and the Justice of the Peace stamped his Justice of the Peace stamp under his signature.

68. The evidence of Amaurie Segura, Justice of Peace is that on the 26th day of March, 2007, at the request of Tomasa Munoz, he went to the Universal Hospital, Belize City, Belize, to witness the late Remijio Montejo make his Will. He stated that Mrs. Tomasa Munoz had informed him that her brother Remijio Montejo Sr. was seriously ill in the Universal Hospital and his presence was required as a Justice of the Peace to read the Will to him, verify that he understood it, verify that he agreed with the contents, and witness him sign the Will, witness her sign the Will as witness in his presence, and sign and stamp the Will as Justice of the Peace, attesting to the fact that the Testator, and the other witness had signed the Will in his presence and in the presence of each other and that he had signed and stamped the Will in the presence of the Testator and the other witness.
69. Mr. Segura further stated that he went to the Universal Hospital along with Tomasa and on arrival at the hospital, he saw Remijio Montejo Sr., whom he had known for many years lying in a bed. That the deceased immediately recognized him, smiled and gestured with his head greeting him. Mr. Segura stated that he greeted him in return and said some words of encouragement to him. He then explained to him that he was going to read over his Will to him, that if he did not agree with it, or anything in it, he could indicate that to him and it will be changed to his liking. He stated that the deceased nodded in understanding.
70. Mr. Segura stated that he slowly and carefully read the Will to the deceased in the presence of Tomasa Munoz. That as he read, he would pause to give the deceased an opportunity to nod his approval in respect of each section that he read to him and that at the end he nodded

- his approval emphatically, more than one nods. Thereafter, he immediately handed the deceased a pen and indicated to him where he was to sign at the end of the Will.
71. Mr. Segura stated that the deceased tried to hold the pen, but he was unable to control it. That he then suggested that the deceased should place his thumb print on the Will and he nodded in agreement. He stated that at that time he had with him his Justice of the Peace stamp and the ink pad. That he placed the deceased thumb on the ink pad, and thereafter passed it carefully at the end of Will. That the deceased thumb print was clearly impressed at the foot of the Will. Further, that Mrs. Munoz then signed the Will as a witness and he then signed the Will as a witness and stamped it with his Justice of the Peace stamp.
72. Mr. Segura stated that there were no signatures or marks at the end of the Will before Mr. Remijio Montejo Sr. made his mark on it and they both witnessed it in his presence and the presence of each other. That he saw no other mark or signature on the Will other than the deceased thumb print, Mrs. Tomasa Munoz signature and his signature and Justice of the Peace stamp.
73. Further, he stated that the deceased nodded in satisfaction after the Will was signed and witnessed. That throughout the process the deceased appeared weak, but fully conscious and fully aware of what was going on. He stated that present at the signing was Remijio Montejo Sr., his sister, Tomasa Montejo Munoz and himself.
74. Under cross-examination by Mr. Courtenay, Mr. Segura said that he went to the Universal to witness the deceased Will on 26th March, 2007. He also said that he knew Mr. Montejo as he visited his shop to buy but that he knew Tomasa very well as friends.

75. In further cross-examination, he said that Tomasa told him to read the Will to the deceased so that he understand it and asked him if he agreed with it. He said he read the Will to the deceased and whenever he asked him if he agreed with it, he nodded his head.
76. In further cross-examination, Mr. Segura testified that he showed the deceased where to sign and he gave him a pen but the deceased could not control the pen so he took the ink and made the deceased put his thumb. He said that he told the deceased to put his thumb in the ink and he put it down in the ink. He also said that the deceased could not do this by himself because his hand was shaking. That he held the deceased hand and put it in the ink. In re-examination, Mr. Segura said that the deceased did not pull away his thumb and afterwards he nodded his head as approval.
77. The evidence for the Claimant as presented to the court shows a presumption of knowledge and approval by the Testator. On this proof, a rebuttable presumption arises that the Testator knew and approved of the contents of the will at the time of execution. See **Barry v Butlin** *supra*. The evidential burden now shifts on the Defendants who are opposing the Will to rebut the presumption. The presumption will not apply where the surrounding circumstances raise a well grounded suspicion that the will does not express the mind of the Testator. In that event, the Will is not admissible to probate unless the suspicion is removed. See **Tyrell v Painton** *supra* at page 159.

Circumstances rebutting presumption of knowledge and approval

The Law

78. The evidence of the Claimant was rebutted by evidence of the Defence which shows, in my view, suspicious circumstances relevant to the preparation and the execution of the Will. Also, the Defendants in their written submissions have contended that the circumstances surrounding the execution of the Will raises suspicion.
79. In dealing with the plea of want of knowledge and approval, the circumstances held to excite the suspicion of the court must be circumstances **relevant to the preparation and execution of the will**. See the Privy Council case of **Barry v Butlin (1838) (2 Moo PCC 480)**.
80. In this case, the Claimant who is seeking to propound the Will did not prepare the Will under which she and her son benefitted the bulk of the estate. The Will was prepared by Tomasa Munoz and she did not benefit under the Will. However, it is not essential that a Will should have been prepared by a person taking a benefit under it to raise a case of suspicion. See **Tyrell v Painton** *supra* where the court discussed the rule in **Barry v Butlin** *supra*.
81. See also, the case of **Lucky v Tewari and Another (1965) 8 WIR 363 PC at page 367** where Lord Wilberforce in delivering the opinion of the Board said:
- “But although, in order to raise a case of suspicion, it is not essential that the will should have been prepared by a person taking a benefit under it (see Tyrell v Painton (1894) P 151, per Lindley LJ at page 157) yet where, as here, this is not so and the will had been prepared by a person who takes no benefit, the evidence of facts giving rise to suspicion must be such as to*

create a real doubt that the testator did not know or approve of the contents of the will

82. See also **Halsbury's Laws of England (4th Edition), Vol 17(2) reissue at paragraph 318** where it is stated:

Whenever the circumstances under which a will is prepared raise a well-grounded suspicion that it does not express the testator's mind, the court ought not to pronounce in favour of it unless the suspicion is removed. Accordingly, where a person propounds a will prepared by himself or on his instructions under which he benefits, the onus is on him to prove the righteousness of the transaction and that the testator knew and approved of it. A similar onus is raised where there is some weakness in the testator which, although it does not amount to incapacity, renders him liable to be made the instrument of those around him; or where knowledge of the contents of the will is not brought home to him; or where the will was prepared on verbal instructions only,; or where there was any concealment or misrepresentation; or where the will is at variance with the testator's known affections, or there is a general sense of impropriety. (emphasis added).

83. The Defendants at paragraph 15 of their written submissions say that the suspicions arise from 11 different circumstances which is heightened by the unreliability of the Claimant's witnesses under cross-examination.
84. I have to agree with the Defendants that suspicions arise in this case that Montejo Sr. did not know or approve of the contents of the Will. As the

evidence unfolded before the court, it became obvious to the court that the facts of this case is swarming with suspicious circumstances. I will now look at those suspicious circumstances surrounding the preparation and execution of the Will.

Suspicious circumstances

(i) Thumb print impressed on purported Will of Remijio Montejo Sr.

85. There is medical evidence before this court which carries great weight that Remijio Montejo Sr. could have signed his name on 26th March, 2007. It is suspicious in the mind of the court that on the said day his alleged thumb print was impressed on the Will dated 26th March, 2007.
86. The evidence of Mrs. Munoz and Mr. Segura, witnesses for the Claimant is that on 26th March, 2007 the Montejo Sr. could not write his name as he did not have control in his hands. That when it was suggested to him by Mr. Segura that he sign the will by putting his finger print on the will he agreed to do so. Mr. Segura then assisted the deceased to put his finger on the stamp pad, and then place his print at the foot of the will in both of their presence.
87. It is the evidence of both the Claimant and the Defendants that two days prior to the alleged impressing of the thumb print of Montejo Sr. on the purported Will, he got married in the hospital and he signed his marriage certificate. Further, Dr. Cervantes testified that during the course of his treatment of Mr. Montejo, members of his family inquired whether he was able to consent to marriage. He said that since he knew Mr. Montejo could fully understand what was told to him it was his opinion that he could consent to the marriage. That on the 26th day of March 2007 he therefore provided Mr. Montejo's family with a medical report confirming that Mr. Montejo could fully understand written and spoken language. See

Report at Exhibit **AJC “1”**. This medical evidence shows that the Montejo Sr. was of sound mind and understanding. On this date he was also capable of signing his name which he did on his marriage certificate.

88. In further examination- in- chief, Dr. Cervantes testified that to the best of his recollection, Mr. Montejo would become tired between ten to fifteen minutes at most then his speech would become slurred. He said that sometimes he would rely on his family members, in most instances, his younger daughter, to try to decipher what he was trying to say. That he also had difficulty in writing which would not be readable as it would be like a scribble.
89. Dr. Cervantes testified that at most Mr. Montejo would not be able to write beyond five to ten words during the period when he was discharged on 26th March, 2007. Further he said that in his professional opinion, *“I think he would be able to sign and it would be basically legible.”* This evidence from the medical doctor who attended to Mr. Montejo Sr. shows that he had the ability to sign his name on 26th March, 2007.
90. There is also evidence under cross-examination of Dr. Cervantes by Mr. Elrington, where the Doctor said that there are times when Mr. Montejo was literally too weak to even speak, to hold a pen or pencil to put to paper and he would reach a point of slurring. This evidence however, did not dispel the suspicions of the Court as it had not been proven by medical evidence that at the time of the execution of the Will, Montejo was in that condition. Learned Senior Counsel, Mr. Elrington in his written submissions stated, and rightly so, that there is no evidence whatsoever that within a day and a few hours after marrying, Mr. Montejo Sr. condition had deteriorated to a point where he could not understand his Will. Likewise, there is no evidence that he could not sign his name two

days after he signed his marriage certificate. As stated by the Defendants in written submissions, there is no evidence of drastic deterioration in the intervening two days that would justify a conclusion that Montejo Sr. condition was worst on 26th March 2007. Further, it is my view, that if Montejo Sr. had been in a state where he could not hold a pen, he would have been unable to willingly impress his thumb print on the will. In such a weak state, a Testator is liable to be made an instrument of those around him.

91. Remijio Montejo Sr. had a tumor removed from his brain and according to the evidence of Dr. Hidalgo he was taking several medications. His evidence is that these drugs have side effects. In my view, since Montejo Sr. was in the hospital at the time of the execution of the purported Will where there were Doctors and nurses, it would have been prudent for a medical personnel to be present on the execution of the purported Will despite the fact Montejo Sr. had the capacity to understand generally. It is also suspicious that enquiries were made about the Montejo's Sr. consent to marriage but not his ability to make a will which is certainly not simple in its terms. At least, a Doctor should have been present to witness the execution of the Will and to advise as Dr. Cervantes had done about the marriage, that the Testator at the time of the execution of the purported will was capable of understanding what he was doing and was not too tired or weak to hold a pen or communicate that he would like assistance to put his thumb print on the purported will.

92. In **Re Simpson, Schaniel v Simpson (1977) 121 Sol Jo 224** it is stated that:

“When a testator is elderly and infirm his will should be witnessed and approved by a medical practitioner who satisfies himself as to

the capacity and understanding of the testator and who records his examination and findings”.

93. In this case, Montejo Sr. was not elderly and infirm but was certainly weak, got tired easily and at times too weak to even hold a pen and had a difficulty communicating. Hence the reason, my view that no less than a Doctor who has been treating Mr. Montejo and knew his condition should have witnessed the execution of the Will, especially since at the time of the purported execution of the Will he was in the hospital.
94. There is no medical evidence to say that on the 26th March, 2007 at the time of the purported execution of the Will that the Testator could not write his name. There is however, the evidence of Dr. Cervantes that he could have signed his name. Further, there is clear evidence that Mr. Montejo signed his marriage certificate two days before the purported will was executed.
95. The onus is on the Claimant to prove the righteousness of the transaction and that the testator knew and approved of the contents of the Will where there is some weakness in the testator which, although it does not amount to incapacity, renders him liable to be made the instrument of those around him. The Claimant in my view has not done so. See ***Halsbury’s at para. 318*** above.
96. The suspicious circumstances under which the alleged thumb print of Mr. Montejo was impressed on the purported Will had not removed by the Claimant.

(ii) Will is at variance with the Montejo’s known affections

97. The evidence before the court shows that Remijio Montejo Sr. had no intention to make a Will as the laws of Belize would take care of his wife and children. It can be seen by the Will which is Exhibited at **PR “1”**

that the bulk of the estate went to the Claimant and her son, who is 5 years old and the youngest of the Montejo children. The other two children are the Defendants who are offsprings from a previous marriage. The evidence shows that Montejo Sr. was a very loving and caring person and loved his family. The evidence also shows that the Defendants were present at his bedside throughout his sickness at every possible moment. The youngest daughter, Lucinda gave up her studies at the University to go with her father to Merida for his third surgery. The oldest daughter, Rachel who was attending law school gave up her studies for a while to be at her father's bedside in Merida and also here in Belize. This by all accounts show that Montejo Sr. had a very close knitted relationship with the Defendants.

98. There is no doubt that the Montejo Sr. had a very serious illness. He was encouraged by his friends to get a second medical opinion as to his prognosis and to make a Will before his first surgery when he had the ability to communicate clearly. Michael Godoy a witness for the Defence stated that he was a very good friend of Remijio Montejo Sr. for over thirty eight (38) years. That from the date of Montejo Sr's diagnosis to the date of his death he visited with him almost daily. He visited with Remijio frequently at Universal Health Services Limited before his first surgery on March 6th 2007 at which time Remijio was able to speak clearly.
99. He stated that he advised Remijio in the presence of the then Minister Michael Espat and the Defendants to get a second opinion and to make a Will. He said that Remijio told him that he did not need to do so because the laws of Belize would take care of it. As such, he is therefore certain that as at March 6th 2007, Remijio Montejo had no Will and had not given any instructions for the preparation of a Will.
100. The evidence of Lucinda Montejo is that she spent every night with her father at Universal from 27th February 2007 up to the date of her father's

first surgery on 6th March 2007. She stated that prior to her father's first surgery he was visited by many good friends and advised in her presence many times by then Minister Michael Espat and his good friend Michael Godoy to make a will because of the seriousness of his illness. She said that on each occasion her father told them that there are laws in place to protect his children and his common law wife so he did not see the need for it.

101. Rachel Montejo's evidence is that during her stay with her father she advised him that he should take the advice of Minister Michael Espat, Mr. Michael Godoy and Mr. Tony Leslie, all long time friends, who cautioned him days before going to surgery that he should consider a second opinion outside Belize and to make a Will before going into surgery as she explained to him the seriousness of his brain tumor and its effects on documents of this kind. She stated that her father insisted in her presence that he would do surgery in Belize and that the laws of Belize would provide for his wife and children if he were to die.
102. Montejo Sr. as acknowledged by the Claimant was a very intelligent man and no stranger to the law as he was a member of the National Assemblies. By saying that the laws of Belize would take care of his wife and children, this can only mean that his beneficiaries will get their entitlement in accordance with the laws of intestacy. This is Remijio Montejo's known intention which remained unchallenged by the Claimant.
103. Further, the evidence as pointed out by the Defence as a suspicious circumstance is that the will did not make provision for Lucinda's education notwithstanding her father's promise to pay for her education

if she withdrew from school to care for him. Apart from the Claimant and her son who benefitted tremendously from the purported Will of Montejo Sr., 4 acres land was provided for Lucinda in the Will. There was no provision for her education. There was also no provision for Rachel Montejo in the Will.

104. The will dated 26th March, 2007 is at variance with Remijio Montejo's known affections. His intention was not to make a will as the laws of intestacy will take care of his children and his wife. As such, the making of the purported Will at a time when he was weak and had difficulty communicating, and which is not in keeping with his known intentions is a suspicious circumstance that has not been removed by the Claimant.

(iii) Concealment of the Will for four months by Tomasa

105. The suspicions of the court is that no Will existed before the death of Remeijio Montejo. What excited the mind of the court is the concealment of the Will by Tomasa Munoz from the Claimant and the Defendants for several months and even after the visit to the office of the attorney-at-law by the Claimant and Tomasa for advise on how to obtain a probate.
106. Mrs. Munoz said that when her brother died on 3rd May she had the Will. That two months had passed and yet she did not tell the Claimant, her brother's wife about the Will because her brother had given her instructions that his wife should not know anything about the Will before he died. She said that she did not tell anybody about the Will. That she did not know what to do with the Will because the Defendants, the daughters of the deceased were against the wife and she was caught in the middle. She did not know whether to give the Will to the daughters or to the wife. Also that she did not want to show the Will because she

thought that the Defendants and the Claimant would be able to settle things but the relationship got worse and so she decided to take the Will to the lawyer because she was leaving the country.

107. Mrs. Munoz further stated that the Claimant had no knowledge that her husband died testate. That it was during the process of administering her late husband's estate that the Claimant discovered that he had died testate and not intestate as she had thought. Mrs. Munoz further testified that the Claimant had no knowledge that a Will existed and was surprised of this information. She thereafter states that she did not previously inform the Claimant of the Will due to the communication barrier as she is not well versed in English and do not understand certain terms. This evidence contradicts her previous evidence as she has now given a different reason for concealing the Will.

108. But, there is also further evidence before the court which seems suspicious. The Claimant (also known as Jojo) along with Tomasa who prepared the Will went to Mr. Elrington's office for advise on her husband's estate. Mr. Courtenay in his cross-examination of Tomasa asked her how the Claimant knew to go to Mr. Elrington for advise. The following exchanges took place between Mrs. Monoz and Mr. Courtenay.

A. *I can't remember specifically if I told her that- - no. I think we asked Mr. Elrington to write up a probate.*

Q. *We ask Mr. Elrington? Who's "we"?*

A. *Well, I was with her and I told her that she needed to get a probate or something, that was what was first asked about- - this was before I took the Will to Mr. Elrington.*

Q. *Before you took the Will to Mr. Elrington- -*

A. *Before, yes.*

Q. *- - you went with her to get a probate?*

A. *I met Mr. Elrington outside of his office and I asked him a few questions about what the probate was about and how to go about it and then he just said, well, you can come by the office and I will explain or things like that. That was how we*

went to the office, me and JoJo so that he could explain to her about the dealings with a probate or something of that sort and I had not presented the Will as yet. And then after when I was leaving then I decided that, I didn't know what to do with it, I'm going to leave it with Mr. Elrington, he's a lawyer, he would know what to do with it.

THE COURT: *You did not have a Will yet when you talked to Mr. Elrington?*

WITNESS: *No. I didn't say about it yet.*

THE COURT: *And you tell Mr. Elrington at that time you had a Will?*

WITNESS: *If I told Mr. Elrington?*

THE COURT: *Yes.*

WITNESS: *No, I didn't tell him. I just presented it to the secretary before I left. I did not tell Mr. Elrington there was a Will. I did not tell anybody there was a Will.*

When Tomasa said that she left it with the secretary before she left, she was speaking about before leaving Belize to go to United States of America.

109. Mrs. Tomasa further testified that Poulina signed as witness to the Will in July. She said she kept it a secret because of the family dispute. That she did not tell the wife anything about it but just left it with the lawyer's secretary Juliet. That at that time the lawyer was already dealing with the Claimant.

110. The evidence shows that Tomasa concealed the purported Will dated 26th March, 2007 for over two months after the death of the Montejo Sr. When she went with the Claimant to seek legal advise the attorney explained how to probate an estate and yet Tomasa did not disclose that she had the purported will of Remijio Montejo, deceased. In June 2007 when she was leaving the country, it was then that she left the Will with Mr. Elrington's secretary. It is certainly suspicious that the wife who is the Claimant was not told or given the Will even after going to the office of Mr. Elrington.

111. The court has closely scrutinized this evidence and I have great suspicions as to whether this Will had in fact existed at the time of the

visit to the office of the legal adviser by the Claimant and Tomasa. Remijio Montejo died on the 3rd May, 2007. Tomasa concealed the purported will almost two months before the death of the deceased. In June when she left Belize, she took the will to the office of the legal adviser. This is almost two months after the death of the Montejo Sr. Tomasa concealed the Will for almost four months. My suspicions that no will existed before the death of Montejo Sr. have not been removed by Tomasa's explanation of a family dispute and due to the communication barrier with the Claimant as she is not well versed in English and do not understand certain terms. Tomasa had a perfect opportunity to disclose the purported will when she and the Claimant went to the attorney for advise on how to get a probate but she did not do so. Further, as pointed out by the Defence in their written submissions the evidence before the court is that the Claimant can communicate in English as seen by her evidence before this court. Further, the Claimant in her evidence said that she relied on Tomasa to explain things to her.

(iv) Instructions for preparation of the Will

112. The court find it suspicious that verbal instructions and instructions on a whole were given by Remijio Montejo Sr. to Tomasa to prepare the Will. There is no evidence before the court that the will was prepared by any written instructions from Remijio Montejo Sr. There is no written evidence from Tomasa herself to show that she had taken instructions from her brother for the preparation of the will. The evidence of Tomasa is that on or about the 26th day of February 2007 she found out that her brother Remijio Montejo Sr. was ill and had sought medical attention at the Universal Health Services. That after the deceased was diagnosed with brain tumor, Dr. Cervantes advised him in her presence to put his life in perspective. That thereafter, the deceased informed her that he wanted to marry the Claimant and that he wished to make his will.

113. The purported Will of Remijio Montejo which is exhibited as **PR “1”** is certainly not a simple one. It is a combination of a Will and a Trust. It created a Family Trust in accordance with the Trust Act. As stated by the Defendants in written submissions the Will is 3 1/2 legal size pages. The court closely scrutinized the contents of the Will and it is certainly complex for a layman. In normal circumstances, such Will will be prepared by an attorney at law after receiving instructions from his client. Tomasa who prepared the Will has no legal training. She said that she received a Template from the daughter of a friend. But, the question that lingers in the mind of the court is why such an intelligent man as Montejo Sr. would allow his sister with no training in the law to prepare such a complex will. This certainly excites the suspicion of the court.
114. The Defendants in their pleadings as one of their challenge to the Will said that Remijio Montejo’s ability to communicate was greatly reduced after his surgery of March 13th 2007. That he could only mutter unintelligibly and had great difficulty expressing himself through action or by words. In view of the above, the Defendants say that the deceased lacked the capacity to articulate and/or propound the paper writing dated 26th March, 2007, purporting to be the last will and testimony of Remijio Montejo. I agree with the Defendants that the evidence clearly establishes that Montejo Sr. ability to communicate was very limited after his surgery on 6th March, 2007 and up to the 26th March, 2007 when he was discharged from the hospital. It is certainly suspicious that Montejo Sr. had the ability to articulate the purported Will after the 6th March, 2007 when Tomasa said that she continued discussions with Montejo Sr.
115. Tomasa said that she obtained a template for the Will from a friend whose daughter is a paralegal and she typed it up. After that she said that she spoke to her brother and he told her what he wanted and she

then put it in the Will. Further, that she read it to him the day prior to his marriage which is the 23rd March, 2007.

116. When asked by Mr. Courtenay about what her brother told her to put in the Will she said the following:

That I had given everything I could to my older daughters already. I have done everything for them already and I want to leave something for my son. And he says, I don't have much and the only thing I have that I can leave for him he says is the shop/building work that they had where he resided there for sometime on Central American Boulevard. And he said that his mother could use the rental money to pay his fees and school and she could survive from that to maintain him with the building that he would leave for him. And he said that he wanted to like leave a trust or something of some educational sort to put whatever money or stuff that was made because at the time they had a radio station or something and he said that he wanted to leave my older brother, leave him to reside in the building as long as he wanted. I can't remember the other details of what he said but that was basically what he wanted to leave for his son, something, and that he had given the girls already. He had helped them in their life already and they were already grown and so he wanted to provide for his son who was just five years old and to leave the things with his wife for his son.

117. Tomasa Munoz said that her brother told her this (meaning the above) several times during her visit at the hospital. She further testified that she took the template to her brother and showed it to him and read it to him. She then asked him what are some of the things that he wanted in his Will and he told her that he wanted a Trust and he listed the things that he wanted her to put in his Will. It seems from this evidence that

Tomasa had obtained a template for a Trust even before her brother told her that he wanted a Trust.

118. Mr. Courtenay in further cross-examination suggested to Mrs. Munoz that it could not be true what she is saying because her brother had difficulty speaking and she admitted that this was so at some point. She further admitted that the Will is a difficult one but that her brother understood everything and that he spoke with her as there were days when he did not talk and there were days when he could communicate.
119. I am suspicious of Tomasa's evidence about the instructions she said that she was given by Montejo Sr. to prepare the will for other reasons also. Montejo Sr. after learning of his diagnosis of brain tumor and before his first surgery had an agency document prepared. The evidence of Rachel who was a law student at the time testified that during the time she was with her father he was fully alert and able to fully communicate with her. On March 5th 2007 at her father's request he dictated to her the contents of an Agency document which she prepared giving authority to her uncle Cruz Montejo, to attend to his affairs including and attending to his various properties and allowing Cruz to reside at the property on the Boulevard. The document was signed by her father and witnessed by Michael Godoy J.P. in the presence of the Claimant.
120. I find it suspicious that Montejo Sr. did not prepare and sign his Will at the same time when he prepared the Agency document but waited until he was in a weak state to do so when he had difficulty expressing himself by speech and by writing. Montejo Sr's. friend, Michael Godoy who is a Justice of the Peace witnessed the Agency document. It is strange that this very good friend was not asked to witness the purported Will and instead Amarie Segura who was a friend of Tomasa was asked to witness the will by Tomasa. Further, the deceased himself had a brother who is

a Justice of the Peace, that is, Silvino Montejo but was not asked by his sister Tomasa to witness the Will. There is no evidence also that the deceased requested that Segura witness the purported Will.

121. Even further, there is no evidence of written instructions given by Montejo Sr. for the preparation of the Will either before the surgery or after the surgery. There is evidence that he gave instructions which were written down by his daughter, as he dictated to her, for the preparation of an agency document which he signed before his surgery. Tomasa said that her brother listed the things that he wanted her to put in his Will but she did not give any evidence as to whether that list was put in writing either by her or by the Montejo Sr.

122. As seen above, Tomasa admitted that there are times when Remijio could not communicate after the first surgery but that she received the instructions at moments when he was able to communicate. The evidence before the court is that after the first surgery the deceased had the ability to write although he did not have the capacity to communicate by speech at times. Yet, there is no evidence before this court of any written instructions to Tomasa Munoz.

123. As such, for all the reasons given, the suspicions in the mind of the court have not been removed that instructions were given by Montejo Sr. to Tomasa Munoz to prepare the Will dated 26th March, 2007.

*Conclusion on whether Montejo Sr. knew and approved
of the contents of the Will*

124. The onus was on the Claimant to remove all the suspicious circumstances surrounding the preparation and execution of the Will and prove the

righteousness of the transaction. In my view, on a totality of the evidence, those suspicious circumstances have not been removed by the Claimant to satisfy the court that Montejo Sr. knew and approved of the contents of the Will dated 26th March, 2007. As such, the court agrees with the Defendants that the court should not pronounce in favour of the Will. I find that the Will dated 26th March, 2007 is invalid on this ground alone.

Issue 2:

Whether the Will was properly signed and witnessed

125. There is further credible evidence before the court which shows that the purported Will dated 26th March, 2007 of Montejo Sr. was witnessed by Poulina Ramsey after the death of her uncle, Montejo Sr. **Section 7** of the **Wills Act, Chapter 203 of the Laws of Belize** provides for a Will to be in writing and to be duly executed as follows:

7. (1) *No Will shall be valid unless it is in writing, and executed in a manner hereinafter mentioned, that is to say –*
- (a) *it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and*
 - (b) *such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and*
 - (c) *such witnesses shall attest and subscribe the Will in the presence of the testator.*

126. Mrs. Munoz and Mr. Segura's evidence is that Poulina was the third witness to sign the Will. Mrs. Munoz gave an explanation as to why this

was done. She testified that she went to Mr. Elrington's office and she saw the secretary there and showed her the Will who told her that it is a legal Will and she should present it but before doing so she would need to have somebody else testify that this is what the deceased wanted because there is only her signature and the Justice of the Peace signature on the Will. She said that the secretary asked her if there is another member of the family who would know what exactly the deceased wanted and she told her that there is another person who knew what her brother wanted because it was discussed in the hospital room. She further testified that she was told to get that person to sign the Will and then bring back the Will. Mrs. Munoz then said she went to her niece, Poulina Ramsey and asked her to sign the Will and she was willing to do so. That the niece read it and agreed it was what her uncle wanted and then she signed the Will. That this was after the death of Mr. Montejo. Further, that she took back the Will thereafter to Mr. Elrington's office.

127. The evidence of Poulina Ramsey is that the deceased, Remijio Montejo was her uncle. That a couple days after Remijio's funeral, her aunt Mrs. Tomasa Munoz and the Claimant visited her at Chateau Caribbean Hotel where she is employed. She stated that Tomasa and the Claimant brought along with them a document which Tomasa identified as Remijio's Will. See Exhibit **PR "1"** for a copy of the said Will. She stated that Tomasa explained to her that they wanted her to sign as a witness to the Will.

128. Poulina further stated that she was concerned about signing the Will as she did not see Remijio sign the Will and in fact did not see his signature on the Will. She asked about Remijio's signature and Tomasa told her that it was the fingerprint which was impressed on the Will. That she was still concerned and inquired who else would be signing the Will as she did

not want to be the only person signing. That Tomasa told her that she and her husband Joel Munoz would also be signing as witnesses to the Will.

129. Poulina's evidence is that at the time she signed the Will no other witness had signed. That she did not sign the Will in the presence of Remijio. That at the time she signed Remijio had already died and was buried.
130. In cross-examination by Mr. Elrington, Poulina testified that when she got the Will there was no signature on the Will. Further, there was no date on the Will. She disagreed with Mr. Elrington that she signed the Will long after it had been in existence.
131. I find that the evidence of Tomasa Munoz and Mr. Segura lacks credibility. I find that Poulina was telling the truth when she said that she was the first person to sign the will and this was done after her uncle's funeral. Further, that there was no date on the will and only a thumb print which she was told by Tomasa belongs to her uncle. As such, the court finds that the Will was not executed in accordance with **section 7** of the **Wills Act** which provides that the signature of the Testator shall be made or acknowledged by the him in the presence of two or more witnesses present at the same time and such witnesses shall attest and subscribe the Will in the presence of the testator. See **Brown v Skirrow (1902) P 3** cited by the Defendants. Accordingly, the will is invalid on this further ground as it is not in compliance with section 7 of the Wills Act.

Issue 3:

Whether the Will was read on 26th March, 2007

132. At paragraph 15 and 16 of Lucinda's witness statement she stated that on 26th March 2007 her father was released from the hospital between the hours of 12:00 to 12:30 p.m. That she can clearly recall that she spent the entire day with her father. That she accompanied her father in the ambulance to his home in Vista Del Mar while her Aunt Tomasa made preparations such as getting her father's wheel chair and bed, and otherwise assisted the Claimant. She said that she is absolutely certain that at no time on 26th March 2007 was any Will read to her father while he was in the hospital. Further, she stated that she is certain that on 26th March 2007, Amaurie Segura J.P. did not visit with her father.
133. Lucinda's evidence was unshaken under cross-examination by Mr. Elrington who referred to paragraph 16 of Lucinda's witness statement where she stated that:

I am absolutely certain that at no time on 26th March 2007 was any Will read to my father while he was in the hospital. I am also certain that on 26th March 2007 Amaurie Segura J.P. did not visit with my father."

The following exchange then took place:

Q. *How come you are certain?*

A. *Because I was there from approximately around 7:00 in the morning until he was released and I was also with him inside the ambulance when he was released. At no time that I was there I saw anybody.*

134. I agree with the Defendants that the evidence of Tomasa Munoz and Amaurie Segura was contradictory. Tomasa gave evidence that the Will

was executed in the early morning of 26th March, 2007 and Segura testified that the will was executed in the afternoon. Further, it has not been disputed that Lucinda was with her father on 26th March, 2007 until he was discharged and went with the ambulance with him to his home. I find that the Will was not read to Remijio Montejo and executed by him on the 26th March, 2007. The purported Will dated 26th March, 2007 is therefore invalid on this ground also for want of knowledge and approval by Remijio Montejo Sr.

135. As such, I find it unnecessary to address submissions on both sides as to whether Montejo Sr. had the capacity to understand the contents of the Will.

Issue 4:

Whether there is evidence of Forgery

136. One of the challenges to the will is forgery. The Defendants rely on the particulars of their other challenges to the Will to prove forgery. The findings of the court above is not sufficient to establish forgery. I agree with Learned Senior Counsel, Mr. Elrington that there must be an intent to defraud and that there is no evidence before the court that the Claimant or Tomasa or Segura or any other person had the intent to defraud by means of forgery of the Will.

Further, Tomasa Monoz did not admit before this court that she drafted the Will after the death of the deceased, Montejo Sr.

As such, the plea of forgery has not been proven by the Defendants.

137. **Conclusion**

The findings of the court are:

- 1) There are suspicious circumstances relevant to the preparation and execution of the Will dated 26th March, 2007. Those suspicious circumstances have not been removed by the Claimant to satisfy the court that Remijio Montejo Sr. knew and approved of the contents of the Will. As such, the Will is not admissible to probate. On this ground alone, I find the Will to be invalid.

- 2) The court finds that the Will was not executed in accordance with **section 7** of the **Wills Act** which provides that the signature of the Testator shall be made or acknowledged by the him in the presence of two or more witnesses present at the same time and such witnesses shall attest and subscribe the Will in the presence of the testator. For this reason also, the Will is invalid.

- 3) The court finds that the Will was not read to Remijio Montejo Sr. and executed by him on the 26th March, 2007. The purported Will dated 26th March, 2007 is therefore invalid on this ground also for want of knowledge and approval by Remijio Montejo Sr.

- 4) The plea of forgery has not been proven by the Defendants.

138. Accordingly, the following is ordered:

Order

The Declaration is refused that the paper writing dated 26th March, 2007, purporting to be the last Will and testimony of Remejio Montejo Sr. was executed by him in proper form and is valid.

The Claimant is not entitled to a grant of probate in respect of the estate of Remijio Montejo Sr.

The Order is refused granting Probate of the estate of the said Remejio Montejo Sr. to the Claimant.

The Claimant to pay the prescribed cost of the Defendants.

.....
Minnet Hafiz-Bertram
Justice of the Supreme Court

Dated this 29th day of July, 2010.