IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: YEBOAH, CJ (PRESIDING)
BAFFOE-BONNIE, JSC
APPAU, JSC
PWAMANG, JSC
AMEGATCHER, JSC

CIVIL APPEAL
SUIT NO. J4/05/2019

22ND JANUARY, 2020

1. THOMAS TATA ATANLEY KOFIGAH

2. BILOLA ROSE ATANLEY KOFIGAH … PLAINTIFFS/APPELLANTS/RESPONDENTS

(SUING AS THE BENEFICIARIES OF THE LAST WILL & TESTAMENT OF THOMAS ATANLEY KOFIGAH ALIAS KOMLA ATANLEY KOFIGAH)

VRS

1. KOFIGAH FRANCIS ATANLEY
2. REV. FATHER ATSU ……. DEFENDANTS/RESPONDENTS/APPELLANTS

JUDGMENT

PWAMANG, JSC:-

This is an appeal against the judgment of the Court of Appeal dated 22nd February, 2018 which judgment reversed the decision of the High Court upholding the validity of the Will and Testament of the late Thomas Komlah Atanley Kofigah dated 14th November, 2007 and deposited in the registry of the High Court, Accra.

The background of the appeal is as follows; The late Thomas Komlah Atanley Kofigah was a Togolese national who migrated and settled in Ghana. He had a successful

business stint while in Ghana, setting up companies, establishing a hotel and other businesses. He acquired several movable and immovable properties in the Republics of Togo and Ghana. He had twenty-one children from different marriages. He died on 5th September, 2009 in Accra. After his death, it emerged that he left a Will which was said to be in the possession of one Lawyer Asiedu and he had it deposited in the Registry of the High Court, Accra on 7th October, 2009.

Following the deposit of the Will, the Registrar of the High Court summoned the relations of the deceased and read the Will to them. The plaintiffs/appellants/respondents, hereafter referred to as the plaintiffs, who are two children of the deceased, had course to complain about the Will so they caused their lawyer to file a caveat against the grant of probate in respect of it. In accordance with the procedure on caveats against Wills, they were warned to disclose their interests and the grounds for the caveat which they did by filling an affidavit of interest. Paragraphs 4 and 5 of the affidavit are as follows;

"4. We have subsequently procured a copy of the said Will and it is our contention that the Last Will & Testament as deposited is fraudulent, to the extent that the signature which appears on the Will as the signature of our late father, Thomas Komla Atanley Kofigah is indeed not the mark of the testator"

5. In consequence therefore, we make bold to state that the Last Will & Testament of Mr Thomas Atanley Kofigah alias Komlah Atanley Kofigah allegedly made on 14th day of November, 2007 is a complete forgery and ought to be cancelled and/or annulled."

Having regard to the above depositions in the affidavit, the filing of the caveat was a false procedural step since by **Rule 11 of Or 66 of the High Court (Civil Procedure) Rules, 2004 (C.I.47),** the filing of a caveat against grant of probate or letters of administration is for the court to determine the proper persons to be appointed executors or administrators and not for the purpose of challenging the

validity of a Will. Under the Rules, the procedure by which the validity of a Will may be challenged is different and it will be discussed in the course of this opinion.

Upon service of the affidavit of interest on the executors named in the Will they, acting through Lawyer Somtim Tobiga, filed a motion on notice in the High Court, Accra praying for grant of probate over the Will, with what was described as a copy of the Will annexed. It was served on the ceveators. The record before us is silent on what happened in the proceedings on the motion for the grant of probate but the next development in the matter was that the caveators issued a writ of summons in the High Court, Accra against the defendants/respondents/appellants, hereafter to be called the defendants, who are the executors named in the Will praying for;

i. **A declaration that the purported Will & Testament of the late Thomas Atanley Kofigah alias Komlah Atanley Kofigah executed on 14th November, 2007 and which was deposited in the Registry of the High Court, Accra on October 7 2009 after his death by the 1st and 2nd defendants is invalid.**
ii. **An order refusing the grant of probate to the 1st, 2nd, 3rd and 4th defendants, the within named executors of the purported Last Will & Testament of the late Thomas Atanley Kofigah alias Komlah Atanley Kofigah.**

In the statement of claim accompanying the Writ of summons, the plaintiffs, apart from averments to the effect that the Will deposited in the High Court Registry was a forgery, also averred that the copy of that Will which the executors annexed to the motion for grant of probate differed from the deposited Will. They pleaded that on the copy attached to the motion, the signature of the testator was incomplete and the addresses of the attesting witnesses differed from what was stated on the deposited Will.

The case went through a full trial at which both plaintiffs testified and tendered documents containing the usual signature of the testator to make their case that the

signature on the Will was not that of their late father. The 1st defendant, who was a wife of the deceased but not the biological mother of the plaintiffs, testified on behalf of herself, 2nd defendant, her biological son begat with the deceased and 3rd defendant, a Roman Catholic Reverend Father and friend of the deceased. She stated in her evidence that, to her knowledge, the Will was drafted for her late husband by Lawyer Somtim Tobiga. The 4th defendant, an attesting witness of the Will and John Kwaku Quarshie, the other attesting witness also testified. The evidence of the two attesting witnesses was that they were both present at the same time and saw the testator execute the Will and both signed as witnesses. The court thereafter directed the Police Forensic Science Laboratory to examine the signature of the testator appearing on the disputed Will and compare it with the undisputed signatures of the testator tendered in evidence. This was done and one DSP Godwin Larse testified and tendered a report of their findings. The defendants also commissioned a signature expert, a retired police officer, Albert Owusu, who examined the documents and the report from the police and testified for the defendants. The defendants subpoenaed Lawyer Somtim Tobiga, who had ceased representing them as lawyer in the case, to testify as their witness but when he appeared before the court he declined to give evidence, citing ethical reasons for his refusal.

At the close of the trial, the judge in his judgment dated 13th February, 2015 discussed at length the evidence that had been led by the plaintiffs to discredit the Will and took the view that the plaintiffs dwelled more on discrepancies between the copy of the Will annexed to the executors' motion for grant of probate, tendered as Exhibit "C", and did not lead sufficient evidence of forgery of the original Will deposited in the Registry of the court which was tendered as Exhibit "B". The trial judge in concluding his judgment upheld Exhibit "B" as the valid Will and Testament of the testator but declared Exhibit "C" as invalid. He then stated that he was refusing the grant of probate in respect of Exhibit "C".

The plaintiffs appealed to the Court of Appeal against the part of the decision of the High Court judge where he upheld the Will deposited in the Registry as the valid Will of

the testator. The Court of appeal allowed the appeal and held that Exhibit "B" was equally invalid since Exhibit "C" that was pronounced invalid by the trial judge was a replica of Exhibit "B". The defendants have appealed against the decision of the Court of Appeal on a number of grounds but they all relate to one central issue; Is the Will deposited in the Registry of the High Court on 7th October, 2009 the valid Will and Testament of the late the late Thomas Atanley Kofigah alias Komlah Atanley Kofigah or not?

In Ghana, issues pertaining to Wills are regulated by statutes and these are the **Wills Act, 1971 (Act 360)** and **Or 66 of C.I.47**. Act 360 states the manner a Will shall be made for it to be valid, the custody and interpretation of Wills and related matters. Or 66 of C.I. 47 sets out the procedure to be adopted in applying for the grant probate to Wills and for trial of contentious probate matters. As the claim of the plaintiffs in this case was that the document deposited in the Registry of the court is not the act and deed of their late father, it was a simple matter of evaluating the evidence that was led and applying the law as in the statutes and the decided cases to answer the question whether Exhibit "B" is a valid Will of the testator or not. The situation in this case whereby two Wills came to be in evidence and the trial judge and the Court of Appeal made pronouncements on two Wills is because the procedure that has been coherently provided for in Or 66 was not followed by the lawyers and the High Court judge failed to take control of the proceedings and direct the parties and himself on the correct approach to the case. Therefore, before dealing with the merits of the appeal, we shall draw attention to the basic procedural slips by the High Court which the Court of Appeal as a corrective court ought to have rectified.

On the facts in this case, the Will was discovered after the death of the testator. In that case, Section 12 of Act 360, requires that it shall immediately be deposited in the registry of the High Court, failure to do so would be an offence punishable under the Act. Therefore, what was done in this case when the Will was deposited in the registry of the High Court, Accra is in compliance with the law and ought not to have been a ground of suspicion as far as the Will was concerned. Since the Will is in the custody of

the court, it was irregular for the lawyer of the executors to annex a duplicate to the application for probate. The practice is that, when an application is filed for grant of probate or letters of administration with Will annexed, the Registrar of the Court will take the original Will from the registry and add it to the docket of the case for the hearing of the application by the judge. Rule 17 of Or 66 is as follows;

"17. (1) On receiving an application for probate or for letters of administration with a will annexed the Court shall inspect the will and see whether it appears to have been signed by the testator, or by some other person in his or her presence and by his direction and to have been subscribed by two witnesses in accordance with the Wills Act, 1971 (Act 360) and shall not proceed further if the will does not appear to be so signed and subscribed.

(2) If the will appears to be so signed and subscribed, the Court shall then refer to the attestation clause, if any, and consider whether it shows the will to have been in fact executed in accordance with the Wills Act, 1971 (Act 360)."

The procedure stated in the above Rule is followed where there is no dispute regarding the Will and it is being proved in common form. Where any person challenges the validity of the Will, she has two alternative ways of proceeding under the Rules. She may file a notice pursuant to Rules 26 of Or 66 calling on the executors to proof the Will in solemn form or to renounce probate. Executors prove a Will in solemn form by issuing a writ of summons against the person calling for it to be proved and praying the court to declare the Will valid. Rule 26(1) & (2) provide;

"26. (1) Where for any reason the executors of a will are in doubt as to its validity or the validity of the wills disputed, the executors may if they consider it necessary to do so, prove the will in solemn form in an action commenced by writ asking the Court to pronounce the will as valid.

(2) Any person who claims to have an interest in the estate of a deceased person may by notice in writing request the executors named in the will of the deceased to prove the will in solemn form."

The alternative method is for the person challenging the validity of the Will to issue a writ of summons pursuant to Rule 28 (1) of Or 66 against the executors praying the court to declare the will invalid. The Rule is as follows;

"28. (1) Any person who claims to have an interest in the estate of a deceased testator may, instead of issuing a notice to the executor to prove the will under rule 26 (2) of this Order, bring an action against the executor for a declaration that the will is invalid."

On the facts of this case, the plaintiffs who challenged the validity of the Will adopted the second method. In all of the above instances, the Will in contention is the one deposited in the court's registry and no duplicate, copy or replica can be entertained for the purpose of the proceedings. Of course, certified copies of a deposited Will that has been read by the Registrar may upon application be issued out but not for use in proceedings leading to the grant of probate.

The failure of the court in this case to follow the laid down procedure led to the introduction of Exhibit "C" and the consequent diversion of the focus of the High Court and the Court of Appeal by considering an irrelevant document which is in fact a red-herring. But, even if the High Court judge had just kept his mind on the reliefs that were endorsed on the writ of summons, which have been reproduced above, he would not have faulted because the reliefs were in respect of the Will deposited in the registry of the High Court and not any copy that he made his final orders in respect of. The orders the trial judge made in respect of Exhibit "C" were void. Consequently, we shall in this judgment disregard any references to Exhibit "C" which was wrongly introduced into evidence.

In reversing the High Court judge, the Court of Appeal criticized him for failing to make findings from the evidence in relation to Exhibit "B" before declaring it a valid Will of the deceased. We shall quote them at length;

"As stated earlier in this judgment, the learned trial judge seemed to have been so fixated with the idea that exhibit B had been so well proven to be the will of the deceased that he did not bother to look at any other evidence that was likely to derail his decision to declare it valid. This probably explains why he did not assign any reasons why he should reject the evidence proffered by the appellants to persuade the court that both exhibit B and the will attached to exhibit C were in issue and deserved his equal attention. He therefore focused his attention only on the will attached to exhibit C to the neglect of exhibit B because had he paid more attention to exhibit B, he would have realized that the appellants were also attacking the validity of that document as exemplified in the excerpts of the evidence quoted above. But even then, he contradicted himself when he said in the same judgment at page 337 of the ROA that:

"The plaintiff's contention was that after perusing the signature which appeared, the signature as appearing on the will was not the true deed and mark of their late father and that it was forged. This was in reference to exhibit B ie the will deposited at the Court's Registry which was read to them". (SIC)

This alone should have alerted the learned trial judge that the appellants' complaint was not just against the will attached to exhibit C but exhibit B as well. So even though he might still have come to the conclusion that exhibit B was the valid will of the deceased, he had a judicial duty to explain why, in the light of the appellants' valiant efforts to discredit the document, he still came to the conclusion that it was the valid will of the deceased. One would have expected that from pages 337 to 340 of the ROA (all of which are parts of the judgment) there would have been a definitive pronouncement by the trial judge on the issue of the signature on exhibit B, which after all, was really part of the bone of contention between the parties. But even though he went to the trouble of analyzing the evidence of the two hand-writing experts and subsequently made

findings of fact on other matters, he never really made a finding of fact that the signature on exhibit B was the signature of the deceased. This failure on the part of the learned trial judge was a very serious lapse that undermined the finding that exhibit B was the valid will of the deceased because it was, so to speak, based on nothing. He had a duty, as a trial judge, to make a primary finding of fact as to whether or not the signature on exhibit B was the signature of the deceased before making the declaration that it the valid will of the deceased. This failure was fatal to the declaration that exhibit B was the will of the deceased. In any case, he could not have made a finding different from the finding he made about the will attached to exhibit C because, as said earlier in this judgment, he would have being setting up a completely different case for the respondents' from their case contrary to law. We therefore think the appellants are once again right in raising the matter on appeal and we according allow ground 2 of the appeal.

From the totality of the foregoing, we hereby allow this appeal in its entirely and set aside the judgment of the High Court, Accra dated 13th February, 2015."

From the above passage, the reason the Court of Appeal provided for reversing the High Court was that the judge did not make a definite finding as to whether the signature on Exhibit "B" was that of the testator or not. However, by reversing the conclusion of the High Court judge that Exhibit "B" is valid, the Court of Appeal in effect are saying that the signature on Exhibit "B" is not that of the testator and it was forged. But, it is evident from the above passage that the Court of Appeal too did not undertake any evaluation of the evidence that was led in relation to the signature of the testator on Exhibit "B" and the testimonies of the two attesting witnesses who both gave direct evidence of being present and seeing the testator sign Exhibit "B". After all, Ground 1 of the appeal that came before the Court of appeal is as follows;

"1.The decision of the trial judge in declaring exhibit "B" the purported last Will and Testament of the late Thomas Atanley Kofigah alias Komlah Atanley Kofigah deposited in the registry of the High Court, Accra on 7th October, 2009 to be his last Will and Testament is against the weight of the evidence."

And Rule 8(1) of the **Court of Appeal Rules, 1997 (C.I. 19)** states as follows;

"Any appeal to the court shall be by way of re-hearing and shall be brought by a notice referred to in these Rules as "the notice of appeal".

In **Tuakwa v Bosom [2001-2002] SCGLR 61** at page 65, the Supreme Court speaking through Sophia Akuffo, JSC (as she then was) stated as follows as regards an appeal being a re-hearing;

"Furthermore, an appeal is by way of a re-hearing particularly where the appellant, that is the plaintiff in the trial court in the instant case, alleges in his notice of appeal that, the decision of the trial court is against the weight of the evidence. In such a case, although it is not the function of the appellate court to evaluate the veracity or otherwise of any witness, it is incumbent upon an appellate court, in a civil case, to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before it arrives at its decision, so as to satisfy itself that, on a preponderance of the probabilities, the conclusions of the trial judge are reasonably or amply supported by the evidence. It is our view that the Court of Appeal in this case failed to do this."

Therefore, beyond criticizing the trial judge, the Court of Appeal are required to have evaluated the evidence and satisfied themselves whether Exhibit "B" is a forgery as the plaintiffs contended or it is the valid Will of the testator. We as a second appellate court are equally required to re-hear the case and evaluate the evidence and satisfy ourselves if the evidence supports the conclusion of the trial judge that Exhibit "B" is the act and deed of the testator and that it is a valid Will having regards to the provisions of the Wills Act. See **Koglex Ltd (NO.2) V. Field [2000] SCGLR 175.**

Both lawyers in their statements of case have stated the correct requirements of the law where the validity of a Will is challenged especially on grounds of forgery as in this case. The settled position is that, in such a case the proponents of the Will have the burden to satisfy the court that the document presented as the Will and Testament of the deceased was freely made by her and was duly attested to by two witnesses who

were present at the same time. The proponents are further to satisfy the court that the testator at the time she executed the Will was corpus mentis not suffering from any impairment of mind. Once the proponents of the Will discharge this burden on them, then the burden of proof shifts to the party alleging that the document is a forgery or does not meet the requirements of the Wills Act to prove those allegations. See the cases of; **In Re Blay-Miezer (Deced); Ako Adjei & Anor v Kells & Anor [2001-2002] SCGLR 339, Dodoo & Anor v Okine & Ors [2003-2004].**

The defendants who are the executors of the Will led evidence through the two attesting witnesses, whose evidence was unequivocal, that they were present at the same time in the house of the Testator at Tesano in Accra when the testator brought out Exhibit "B" and informed them that it was his Will and he required them to witness it for him. He signed in their presence and the two also signed the portions as witnesses. The testator was then not suffering from any mental incapacity. They identified the signature of the testator and their respective signatures. Their evidence was not discredited by the cross-examination they were subjected to. We are satisfied that the proponents of the Will discharged the legal burden on them as we find the evidence led sufficient proof of the free making of the Will by the testator and its due execution in accordance with the provisions of Act 360.

We now turn to consider the evidence led by the plaintiffs to prove the forgery they alleged. In the testimonies of the plaintiffs themselves, they alleged that the signature on Exhibit "B" attributed to their late father was not his because it looked different from the manner he usually signed his signature such as on some court processes that were tendered. Their contention was supported by the testimony of the court appointed document examiner from the Police Forensic Science Laboratory. We have read his testimony and examined the report of the court appointed expert, just as we have considered the evidence of the defendants' expert. The settled position of the law is that where the authorship of a writing is in dispute and hand writing experts are called to offer expert opinion, such opinion is only meant to assist the judge in forming her opinion as to the authorship of the writing and is not binding on her. It is the judge who

has the final say as to who the author of the writing is. See **Commey v Bentum-Williams [1984-86] 2 GLR 303 and In Re Blay Miezah (supra).** Particularly, where two experts give contrasting opinions, such as we have in this case, the judge is to decide which expert opinion she prefers and assign reasons for the preference.

We notice from the report of the court appointed expert that he identified many similar features between the signature attributed to the testator on Exhibit "B" and the undisputed signatures and he himself admitted so under cross-examination. We ourselves have taken a close look at the signature on Exhibit "B" and compared it to the undisputed signatures and we have formed the opinion that the signature on Exhibit "B" is by the same person who signed the undisputed signatures. Of course, there are minor differences but we do not find them significant since no two signatures are exactly the same. We therefore are of the view that the plaintiffs have failed to prove that the signature on Exhibit "B" has been forged, especially having regard to the fact that, by the provisions of Section 13 of the **Evidence Act, 1975 (NRCD 323)**, such an allegation is required to be proved beyond reasonable doubt.

Part of the reasons on account of which the plaintiffs are contesting the Will is that some of the devises in the Will could not have been made by their late father as they knew him well. That cannot be a legal ground to challenge the validity of a Will. A testator is at liberty to give out her self acquired property in the manner she pleases without meeting the expectations of any person. As Knight Bruce said in **Bird v Luckie (1850) 68 ER 373:**

"No man is bound to make a will in such a manner as to deserve approbation from the prudent, the wise or the good. A testator is permitted to be capricious and improvident, and is more at liberty to conceal the circumstances and the motives by which he has been actuated in his dispositions. Many a testamentary provision may seem to the world arbitrary, capricious and eccentric, for which the testator, if he could be heard, might be able to answer most satisfactorily."

The Court of Appeal in their judgment said that the failure of Lawyer Somtim Tobiga to testify cast suspicion on the geniuness of the Will. They cannot be right because the evidence led by the attesting witnesses was that the Will was executed in the house of the testator in the presence of only the two witnesses and the testator. The validity of a Will is determined by its due execution and attestation so since the lawyer was not present when the Will was executed and attested to, he could not have been a material witness. If it were said that the Will was executed and attested in his presence and the attesting witnesses are unavailable to testify, then the Lawyer may be called to testify but not on the facts in this case.

On the totality of the evidence on record, we are satisfied that the trial judge was right in holding that Exhibit "B" is the valid Will of the late Thomas Atanley Kofigah alias Komlah Atanley Kofigah. In the circumstances, the appeal succeeds and is accordingly allowed. The judgment of the Court of Appeal dated 22nd February, 2018 is hereby set aside. Exhibit "B", the Will of the late Thomas Atanley Kofigah alias Komlah Atanley Kofigah dated 14th November, 2007 and deposited in the Registry of the High Court, Accra on 7th October, 2009 shall be admitted to probate.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

AMEGATCHER, JSC:-

I have had the opportunity of reading the erudite and well-reasoned opinion by my learned and respected brother Pwamang JSC. I entirely agree with his analysis of the evidence and law in this probate action as well as his conclusion that the Court of Appeal erred in setting aside the trial High Court judgment and declaring the will, exhibit 'B' a forgery and not the deed of the testator. I will, however, want to comment on one issue for emphasis.

The only copy of a Will which is valid for the purposes of an application for the grant of probate is the one deposited in the court in accordance with the provisions of the Wills Act of 1971 (Act 360). All other copies of a Will in the possession of third parties have no role to play in the probate process. Their relevance will come to play when the copy deposited in Court has been tampered with and a duplicate copy is needed for comparison for the purposes of confirming its authenticity.

In the appeal before us, Counsel who represented the executors at the application for probate stage committed a grave blunder when he attached to the application for probate, a photocopy of a duplicate of the testator's Will in the possession of a third party. It has never been the practice in our civil procedure for a photocopy of a testator's Will to be annexed to an application for probate.

The role of the judge when a probate application comes before him is first to ensure that the Registrar has added to the application the Will deposited in court. Secondly, he is to examine the Will and satisfy himself that on the face of it all the formalities such as a testator's signature, attestation clause, jurat clause (in the case of blind or illiterate persons) and two attesting witnesses have their signatures on the document. Thirdly, the judge is also to satisfy himself that there are no interlineations or other insertions which may arouse his suspicion. If on examining the Will deposited at the court he finds the document regular, then in the absence of any caveat or application seeking the Will to be proved in solemn form, probate must be granted by the court. In effect, if the signature of the testator was genuine and the evidence of the two attesting witnesses confirms this, then the requirements of the Wills Act, 1971, (Act 360) have been satisfied. See Order 66 r, 17 (1) & (2) of the High Court Civil Procedure Rules, C.I. 47.

In the case of *In re: Kotei (Dced): Kotei v. Ollenu*, [1975] 2 GLR 107 at 111 Abban J (as he then was) confronted with a similar problem resolved it as follows:

"**The will in dispute herein was typewritten and it is evident that the testator, Clement Kotei, signed it as his final will. There is an attestation clause at the foot of the Will which clearly states that the testator signed it in the presence**

of two persons, Nunoo and Tawiah, and that the said two persons in the presence of the testator also subscribed their names as attesting witnesses and in the presence of each other. There is, therefore, no doubt whatever that the will itself, on its face, is perfectly regular as regards all formalities of signature and attestation. In the circumstances, the maxim *Omnia praesumuntur rite esse acta* must apply. Where a will appears to be duly signed and witnessed, as in the instant case, it is a presumption of law that the execution was duly carried out according to the requirements of the Wills Act, 1837, and strong evidence will be required from those who alleged the contrary to show that it may not have been properly executed and thus shift the burden of proof on the persons propounding it."

We adopt the reasoning in the dictum above as the correct proposition of the law on the subject.

In the appeal before us the claim was to declare the Will deposited at the Court exhibit 'B' invalid. The evidence, however, adduced at the trial was mostly against exhibit 'C', the copy attached to the probate application. The attestation clause in Exhibit 'C' was partly defaced and had interlineations as well as abbreviations in the names of the attesting witnesses quite different from what appears on the copy deposited at the High Court. The learned trial judge carefully examined and compared the two documents. He came to the conclusion that they were essentially the same, the dispositions in the paragraphs were the same, the number of paragraphs the same and the executors and attesting witnesses the same. The evidence to support this was exhibit 'B' itself and the unchallenged testimony of the attesting witnesses. He concluded then that while exhibit 'C' was a nullity, exhibit 'B' constituted the valid executed Will of the testator.

It has been the habit of recalcitrant children disinherited in the Will of their deceased parents or guardians to mount challenges against the Will. Children ought to know that after the age of 18 years, a parent or guardian is under no obligation to make provision in his or her Will for them. Any such provision is based on the whims of the testator

arising from natural love and affection, respect for, care for and cordial relationship a child shows or strikes with the parents or guardians when they were alive.

In **Bird v. Luckie: [1850] 8 Hare 306** Knight Bruce made this clear in the following words:

"**No man is bound to make a will in such a manner as to deserve approbation from the prudent, the wise or the good. A testator is permitted to be capricious and improvident, and is more at liberty to conceal the circumstances and the motives by which he has been actuated in his dispositions. Many a testamentary provision may seem to the world arbitrary, capricious and eccentric, for which the testator, if he could be heard, might be able to answer most satisfactorily**."

Again Cocburn, C.J. in **Banks v. Goodfellow: [1870] L. R. Q. B. 549 at 564** also said:

"The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice, or passion, or the power of the new ties, or artful contrivance, or sinister influences, may lead to the neglect of claims that ought to be attended to, yet, instincts, affections and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, that could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law.

The practice whereby recalcitrant children challenge the Wills of their parents or guardians is becoming so rampant that it is time to call upon professional advisors to confront such children with the realities of life. That is not to say that Wills suspected to have been forged should not be challenged. There are guidelines laid down in the rules and case law by which Wills can be challenged and proved in solemn form. We

recommend these guidelines to all who intend to pursue true justice in the Probate division of the courts.

N. A. AMEGATCHER
(JUSTICE OF THE SUPREME COURT)

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