THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2014-02731

IN THE ESTATE OF DORRIE CLAUDINA FRASER also called CLAUDINA FRASER, DECEASED late of NO. 7 SECOND AVENUE COORA ROAD, SENNON VILLAGE, SIPARIA, in the island of TRINIDAD WHO DIED ON THE 30TH DAY OF JUNE 2012 AT NO. 7 SECOND AVENUE, COORA ROAD, SENNON VILLAGE, SIPARIA, in the Island of TRINIDAD

Between

(1) BERNADETTE SONIA SOBERS

(2) PATRICIA FRASER

(the lawfully appointed Administrator Ad Litem of the Estate of SYLVAN VICTOR FRASER by virtue of Order dated the 11th July, 2016)

(3) PATRICIA FRASER

(4) CLAUDIA LIZ FRASER BREEDY

(5) TAMMISHA MARY B FRASER

(6) RACHEL FRASER

(7) The Estate of SEDRICK FRASER, DECEASED

Claimants

And

SHARON FRASER BENJAMIN

(the executrix named in the will of Dorrie Claudina Fraser also called Claudina Fraser, deceased, dated 4 August 2011)

Defendant

Date of delivery: 1 April, 2019

Before the Honourable Mr. Justice James C Aboud

Appearances:

Mr Jerome Herrera instructed by Ms Nalini Jagnarine for the claimants.

Mr Alexei Mc Kell instructed by Ms Rebekah Ali-Gouveia for the defendant.

JUDGMENT

BACKGROUND

1. This case involves the disposition of the estate of Dorrie Claudina Fraser also called Claudina Fraser ('Claudina') who died on 30 June 2012. Her estate comprises a number of properties, but the main focus of the dispute revolves around Claudina's home.

2. The parties to this action are Claudina's children of the deceased. Two siblings, Sedrick (who died in 2011) and Sylvan (who died in July 2016, after this claim was filed) are parties by way of representation. The other litigants are sisters. Claudina made two wills in the year preceding her death, roughly a month apart. The first will purported to dispose of Claudina's property in this way: save for an acre of land intended for the second claimant, Sylvan Victor Fraser ('Sylvan'), everything went to Tammisha Mary Fraser Gould, the fifth claimant ('Tammisha'). She was appointed the executrix of the first will. According to the claimants, Tammisha received the estate (save for Sylvan's one acre) on a fully secret trust to distribute the various properties (including Claudina's home) to all the next of kin in accordance with her mother's oral wishes.

3. The second will is virtually identical to the first save that the defendant, Sharon Fraser Benjamin ('Sharon'), is substituted for Tammisha.

4. The claimants contend that both wills are invalid: the first due to informalities in its execution, and the second due to undue influence and the incapacity of the Claudina. An issue with the due execution of the second will has also been raised. Save for the first claimant, Bernadette Sonia Sobers ('Bernadette'), who lives in Trinidad and Tobago, and Sharon,

all the sisters migrated to England, Canada and the United States of America. Sharon now lives in Claudina's home. She moved there in 1986 after her marriage broke down and she divorced her husband. She at first lived downstairs and her mother lived upstairs. As her mother aged her role as a caretaker increased. Since her mother's death Sharon has taken over the entire property. She has moved into her mother's upstairs apartment and her children live in the downstairs apartment. This judgment will decide whether Sharon takes the whole estate inclusive of the family home (save for the one acre to Sylvan) or the estate is divided equally among the children pursuant to the rules of intestacy.

5. Witness statements were filed on behalf of the claimants by Patricia Fraser, the second claimant ('Patricia'), Tammisha, Edmond Warner and Bernadette. Sharon and Lalchan Seelal, the Commissioner of Affidavits who prepared both wills, filed witness statements on behalf of Sharon.

The claimant's case

6. The claimants and Sharon are the lawful children of Claudina and Dunstan Fraser. All the siblings survived Claudina except Sedrick Fraser, who died on 18 June 2011, shortly before both wills were made. Most of the claimants had previously migrated to the United States, Canada and England in search of better lives while Sharon and the first claimant, Bernadette Sonia Sobers ('Bernadette'), live in Trinidad.

7. Claudina died on 30 June 2012 and before her death she made two wills. The first will was made on 5 July 2011 ('the first will'). In it, she appointed Tammisha as the sole executrix. Given the numerous discussions held beforehand with Claudina, the claimants allege that Claudina intended that Tammisha would distribute all the property devised in her name to

her siblings, save for Sylvan's one-acre parcel. Various properties would go to different children except for Claudina's home, which would remain a family home for the benefit of all and in which, allegedly, Sharon would have a life interest in the downstairs apartment.

8. In light of these discussions with their mother, repairs and renovations were allegedly done to Claudina's home beginning in 2010. Extensive works were done to the inside and outside of the home and the project was financed by Patricia, Sylvan, and Sedrick in three phases. The fourth claimant, Claudia Fraser-Breedy ('Claudia'), Tammisha, the sixth claimant, Rachel Fraser ('Rachel'), and Kervin Simmons (a cousin) all allegedly contributed to the furnishing of Claudina's home. The estate comprises various properties, some of which were converted into apartments and rented. These rents supplemented Claudina's income. In the course of years Sharon, who lived with Claudina, became responsible for collecting these rents.

9. According to the claimants, Tammisha was directed to give the other properties in Claudina's estate to those children who had expended money to fix certain properties before they migrated. This meant that the houses developed by Sedrick, Sylvan and Patrick on certain parcels would be given to them, Bernadette would be given their grandfather's house, and "Mammy Tat's land" would be given to Sharon.

10. The claimants allege that Sharon and Claudina had a strained relationship since 2006 and that that Sharon and/or members of her family would often steal Claudina's jewelry as well as money earned from the rental of her property and monies sent from abroad by the claimants for her medical care.

11. The claimants also assert that Claudina often complained that she was unhappy with Sharon's continued occupation of the home despite her requests for her to leave. They say that this was due in part to a failure by Sharon to contribute to the maintenance of the family home. The claimants further allege that Claudina was mistrustful and fearful of Sharon and her family since they verbally abused her.

12. It is the claimants' case that in 2010 Claudina began to become noticeably forgetful. They say that at times she was unable to recognize family members, including her own daughters and recall events and conversations. They say that the grief from the death of her son Sedrick in June 2011 took a serious emotional toll on her—she seemed to have lost the will to live, became inconsolable and would often cry. On one occasion she aimlessly wandered onto the streets and was found by her nephew. On another occasion before her death, she wandered in the backyard of her home during the night and fell into a cesspit.

13. In their submissions, the claimants have challenged the validity of the first will based on non-compliance with the due execution procedures set out in section 42 of the Wills and Probate Act, Chapter 9:03 ('the Act'). Tammisha says that she was in the room with the Commissioner of Affidavits, Mr Seelal, who prepared the will. According to her, Claudina signed in his presence but there was no other attesting witness. She says Mr Seelal told her to leave the document with him and he would get another person to witness it.

14. On 4 August 2011, some four weeks later, Claudina made a second will ('the second will') leaving Sharon as the sole executrix and also devised all of her assets to Sharon except for Sylvan's acre of land. The second will

basically substituted Sharon for Tammisha, but there is no assertion by Sharon of a trust for the benefit of any family member: Sharon takes the whole estate, save for Sylvan's acre.

15. The claimants allege that they had absolutely no knowledge of the making of the second will and that Claudina, knowing of the extensive works carried out on her home would not have consented to leaving it to one child alone, especially in light of her discussions with Tammisha. They also claim that Claudina was under Sharon's undue influence at the time of making the second will and was not of sound mind.

16. Sharon applied for a grant of probate of the second will and the claimants filed a caveat. This triggered the court action.

17. The claimants are seeking court orders for a declaration that Claudina died intestate. They seek a grant of Letters of Administration of her estate, an injunction against Sharon and her agents from occupying the upstairs portion of Claudina's home, an injunction restraining Sharon from selling the property or receiving any rent or monies therefrom. They also seek an account of all the rents and profits that have come into Sharon's hands.

The defendant's case

18. According to Sharon, Claudina was of sound mind, memory, and understanding at the time that she made the second will.
19. Although Sharon admitted that Claudina at times may not immediately have recognized one of her children or a relative, she did not believe it was unusual since the relative's appearance may have changed or if she had not been in contact with them for a long time. Sharon claims that Claudina, of her own free volition, revoked the first will. She also denies having a

strained relationship with her mother and that any accusations of theft were made against her by Claudina.

20. Sharon alleges that she was the only sibling who remained in Trinidad to take care of Claudina. According to her, Claudina wanted to ensure that Sharon was well taken care of, given her inferior economic circumstances compared to her other siblings who had made successful lives abroad. Claudina also allegedly wanted to ensure she was rewarded for the years she had taken care of her.

21. Sharon claimed that the properties which were alleged to be given to various children based on their investment in the properties is untrue. Sharon also stated that Claudina's house was not meant to be a family home.

22. Sharon further denied that the claimants all contributed to the renovations done to the house and that only Sylvan made financial contributions for that purpose.

23. Sharon stated that Claudina insisted that her estate and her home was to be left for her after her death. This was apparently because Claudina was angry that Tammisha took the original of the first will with her to England, shortly after Sedrick's funeral. Sharon said that Tammisha had told her mother that she may have to return to living downstairs, and this made her decide to cut Tammisha and all her siblings (except Sylvan) out of her estate. Sharon and Mr Seelal testified as to the circumstances of the making and the execution of the second will. According to Mr Seelal, the witness, one Ms Mendoza was present and saw Claudina execute the will.

Ms Mendoza did not testify at the trial. In the application for probate she did not swear an affidavit of due execution. Mr Seelal swore one.

24. Although Sharon applied for probate of the second will on 20 May 2013 she did not file a counterclaim in these proceedings seeking to propound the second will. If the claimants fail to disturb the second will she will obtain probate of it.

Issues in the case

25. The claimants have sought to challenge the validity of the first will on the ground that its execution ran afoul of the statutory requirements of section 42 of the Act. With respect to the second will they allege that Claudina was not of sound mind, memory and understanding at the time the second will was made, and that it was obtained under the undue influence of Sharon. The issue of due execution of the second will was also raised in the course of the trial and in the written submissions. If the claimants fail to establish lack of testamentary capacity or undue influence with respect to the second will then Sharon will take the entire estate in accordance with that will, save for Sylvan's one-acre parcel.

26. The issues to be determined are both a mixture of fact and law:

(a) Whether the first will was executed in conformity with the Act;

(b) Whether Claudina was of sound mind, memory and understanding at the time the second will was made;

(c) Whether Claudina was a victim of undue influence in making the second will;

(d) Whether the second will was executed in conformity with the Act;

(e) In the event that the wills are invalidated, who would be entitled to occupy Claudina's home.

(a) Whether the first will was executed in conformity with the Act

27. Section 42 of the Wills and Probate Act Chap. 9:03, requires a will to be made in writing and signed at the foot of the document by the testator. The execution of the will must be witnessed by two persons who must sign at its foot in the presence of each other at the same time and in the presence of the testator.

28. I was not impressed with Mr Seelal's evidence about the execution of the first will. If a will is being challenged I expect that the circumstances of its execution would best be explained by its two witnesses. Only Mr Seelal testified at the trial. His son was the other witness but he was not called to testify. Mr Seelal was also unconvincing in cross-examination. His son was apparently "in the area" (as he described it) when the will was signed, but I am in doubt whether he was standing or seated close enough to actually see Claudina's signature being affixed and to sign it at the same time as Mr Seelal. I am not sure whether he was there continuously. Mr Seelal was entirely unbelievable as a witness, especially on this issue of the presence of his son. I formed the impression that he was mistaken. Tammisha, on the other hand, was very clear and forceful in her testimony about its execution: she swore that the other execution witness was not present. She testified that she was told to return the next day to collect the will, after Mr Seelal got someone to "witness" it. She did not bend under cross-examination, even slightly. I feel satisfied with her evidence on a balance of probabilities. In my opinion, the first will was not executed in accordance with section 42 of the Act.

(b) Whether Claudina was of sound mind, memory and understanding at time the second will was made

29. In dealing with this issue, the court must determine whether Claudina possessed the necessary *animus testandi* to make the second will. It must be established whether or not she (a) had the mental capacity to make the will, (b) knew and approved of the contents of her will, and (c) that the will was that of a free and capable testator, (d) that she must have exercised her genuine free choice in making of the will and more particularly that she did not make it as a result of the undue influence or fraud of another (see: *Non-Contentious Probate Practice*, 1998, Karen Nunez-Tesheira). The test of whether the testator knew and approved of the contents of the will is objective and the standard of proof is on a balance of probabilities. Unusual or suspicious circumstances usually militate against a positive finding of the requisite knowledge and approval.

30. In *Banks v Goodfellow* (1870) LR 5 QB 549 Cockburn CJ stated the law like this, in language that has stood the test of time:

> 'It is essential to the exercise of such a power (of making a will) that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.
> Here, then, we have the measure of the degree of mental

> power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its function, and to lead to a testamentary disposition, due only to their baneful influence – in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand.'

31. Therefore, in summary, in order to assess a testator's mental capacity or *animus testandi* it must be established that the testator (1) understood the nature of his/her act (2) understood the extent of the property of which he/she is disposing, (3) comprehended and appreciated the claims to which he/she ought to give effect and (4) was not suffering from any disorder of the mind that causes a disposition that would not otherwise be made if the mind was sound.

32. In *Key and Anor v Key and Ors* [2010] EWHC 408 (Ch) an 89-year old farm owner made a will one week after the death of his wife of 65 years. He left the bulk of his estate to be divided between his two daughters. They did not live or work on the farm and had no connection with it. This was in sharp contrast with a previous will that left his assets in favour of his wife for life and remainder to be divided equally between his two sons. The sons worked on the farm with their father. The will was challenged on the basis of a lack of testamentary capacity and want of knowledge and approval. Briggs J (as he then was) referred to 'the golden rule':

7. “The substance of the Golden Rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings: see *Kenward v Adams* (1975) Times 29th November 1975; *Re Simpson* (1977) 121 SJ 224, in both cases *per* Templeman J, subsequently approved in *Buckenhan v Dickinson* [2000] WTLR 1083, *Hoff v Atherton* [2005] WTLR 99, *Cattermole v Prisk* [2006] 1 FLR 697, and in *Scammell v Farmer* [2008] EWHC 1100 (Ch.) at paras 117 to 123.

8. Compliance with the Golden Rule does not, of course operate as a touchstone of a will nor does noncompliance demonstrate its invalidity. Its purpose, as has repeatedly been emphasized, is to assist in the avoidance of disputes or at least in the minimization of their scope. As the expert evidence in this present case confirms, persons with failing or impaired mental faculties may for perfectly understandable reasons, seek to conceal what they regard as their embarrassing shortcomings from persons with whom they deal, so that a friend or professional person such as a solicitor may fail to detect a defect in mental capacity which would be or become apparent to a trained and experienced medical examiner, to whom a proper description of the legal test for testamentary capacity had first been provided.”

33. *Key v Key* qualifies and expands the 1870 *Banks v Goodfellow* test in a material respect. Briggs J acknowledged that advancements in psychiatric medicine now recognize

> "an ever-widening range of circumstances now regarded as sufficient at least to give rise to a risk of mental disorder, sufficient to deprive a patient of the power of rational decision making, quite distinct from old age and infirmity. The mental shock of witnessing an injury to a loved one is an example recognized by psychiatrists as Dr Hughes and Professor Jacoby acknowledged [they testified before Briggs J]. The latter described the symptomatic effect of bereavement as capable of being almost identical to that associated with severe depression. Accordingly, although neither I nor counsel has found any reported case dealing with the effect of bereavement on testamentary capacity, the *Banks v Goodfellow* test must be applied so as to accommodate this, among other factors capable of impairing testamentary capacity, in a way in which, perhaps, the court would have found difficult to recognize in the 19th century."

34. It is to be noted that medical experts testified in *Key v Key* about the psychological effects of bereavement. Dr Hughes had made a psychological evaluation of Mr Key some five months after the disputed will was made and testified as an expert. Professor Jacoby did not examine Mr Key but testified as to his opinion of the psychological effects of bereavement. The GP, Dr Duthie, who visited and examined Mr Key contemporaneously with the making of the disputed will, did not testify. However, he kept notes of his examination of Mr Key (which states that he is 'high risk' due to the death of his wife, and 'desperate'). These notes were adduced, and Briggs

J relied on them in coming to his decision, despite the fact that Dr Duthie was not called.

35. The legal burden of proving that a testator was of sound mind rests of the person propounding the will: see generally, *Ledger v Wooton* [2007] EWHC 2599 (Ch) per HHJ Norris QC at para 5, quoted with approval by Briggs J in *Key v Key*—(a) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity. (b) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity. (c) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity nonetheless. In my opinion, real doubts have been raised about Claudina's capacity and the legal burden of establishing capacity has shifted back to Sharon.

36. The claimants in their written and oral evidence allege that Claudina was suffering from dementia in 2011. Patricia was the second witness for the claimants, and she gave evidence of and adduced a medical report of one Dr. Miroslaw Dutzack dated 18 March 2015. I found her to be a truthful and confident witness. I accepted her evidence. She described Dr. Dutzack as her family doctor who examined Claudina on her several visits to Canada. The medical report indicates that Claudina was suffering from failing health for the last 18 years of her life. More importantly, it reveals that Claudina was showing symptoms of dementia in 2011. This was the year she made both wills. Direct evidence from any doctor who examined Claudina would be far more valuable than this report tendered by Patricia. An expert's report, duly admitted under Part 33 CPR, would be very weighty. But, according to Patricia, her attempts to reach her mother's doctors in Trinidad were futile. I believe her when she said that. It does

not seem to me that Sharon was alert to the vagaries of her mother's health by having her medically examined, especially in light of her age, occasional lapses in behaviour, and her emotional distress after Sedrick's death. It is a matter of concern that Sharon did not call any medical evidence to rebut the allegations of lack of capacity.

37. However, in my view, the medical report from Dr. Dutzack is not entirely weightless. It has something to say, however ethereal it may be in terms of its weight. Often, in cases involving testamentary capacity (and indeed in several other types of cases), the absence of an expert testifying at a trial in order to adduce a medical report is seen as fatal to the case of the party who requires such evidence. In those cases, the expert may have rendered a written opinion, but it is impractical or expensive or impossible to call him or her as a witness. Part 33 CPR makes provision for the adduction of a report into evidence in the absence of its writer. The claimants however never sought an order under Part 33 CPR to appoint Dr Dutzack as an expert. The question is what use, if any, can his report provide at the trial? The idea that a Part 33-appointed expert's report, even in cases when the expert is called to adduce it, is determinative of the outcome of a trial is a dangerous one. The outcome of a trial is dependent on the opinion of the court. The final decision is never delegated to an expert. In the case before me, Dr Dutzack's written report has some limited value, despite the fact that he was not called as a witness nor appointed under Part 33. Despite his absence from the witness box, I am not very uncomfortable in taking note of its contents because there are surrounding circumstances that, if proven, speak to the same issues in Dr Dutzak's report. In addition, these surrounding circumstances may or may not, in the estimation of this court, corroborate the doctor's opinion (not the other way around). Finally, Dr Dutzack is expressing an opinion that is

based upon his own personal or first-hand observations of his patient, and not the observations of a third party. In this sense, his report might be equated with the GP's notes in *Key v Key*, which Briggs J accepted as evidence and indeed the opinion of Professor Jacoby.

38. I must take note as well that no evidential objection was taken to the adduction of Dr Dutzack's report into evidence, notwithstanding the right to do so in accordance with trial directions at the pre-trial review. Insofar as Dr Dutzack expresses findings, I must have regard to the fact that no evidence was produced to contradict his findings, notwithstanding the disclosure of the report during discovery and the lack of capacity having been one of the main planks of the claimants' pleaded case. Mr Mc Kell, counsel for Sharon, asserted that there is no medical evidence adduced before the court or any direct evidence by means of oral testimony to support that Claudina lacked the requisite animus. This is not entirely correct. There is medical evidence before the court, even though it is of low weight. Sharon has mounted no serious forensic or medical challenge to its findings. Instead, the opinions or observations of laypeople are offered. From this Sharon asks me to determine whether or not Claudina's unusual or eccentric behaviour amounted or did not amount to dementia or early onset dementia.

39. Evidence of peculiar behaviour is not hard to find. There is evidence of erratic or unusual behaviour at the time the two wills were made and also afterwards. It is not unreasonable, having regard to the progressive nature of all incurable disease, even those with mild effects, that evidence of its presence in one year may suggest its infancy in an earlier year. What a court must do in those circumstances is to examine the evidence as a whole and form its impressions on the basis of any medical evidence

(having regard of course to its weight) and to the surrounding anecdotal evidence extracted from the witnesses. In reaching my conclusions I must say that I accepted the truthfulness of the claimants' witnesses. I particularly draw reference to the following indicators or alarm bells: Claudina wandering aimlessly in the street; the emotional breakdown after Sedrick's untimely death and Claudina's crying outbursts thereafter; Claudina's forgetfulness and her inability on occasion to recognize her own children or relatives; falling into a cesspit in the dead of night.

40. Bernadette testified that Claudina hallucinated in July 2011 after Sedrick's funeral by insisting that a man was standing in a croton shrub in her garden, or perhaps seeing in the wind-blown leaves the shape of a man. However, Bernadette did not personally witness this episode. A neighbour witnessed it and reported the incident to her. Incidentally, Sharon was also aware of this episode, but she explains it as a reasonable error of judgment of what the shadows signified. Bernadette's evidence is therefore hearsay. At best, it is evidence that a neighbour reported observations of Claudina's peculiar behaviour to Bernadette, but the truth of the contents of the reports is inadmissible. However, Bernadette did witness Claudina wandering on her street and saw her nephew Bolo find her and escort her back home. I found this to be a truthful recollection of events.

41. It was also universally agreed in the witness statements and cross examination that Sedrick's untimely death devastated her. In cross-examination, Sharon admitted that Claudina had suffered a breakdown after Sedrick's funeral in June, one month before the first will was made, and, further, at the time she made the first will she was still grieving. Tammisha also testified that on more than one occasion when she was

having a conversation with Claudina she burst out crying. These "crying outbursts" according to Tammisha were linked to her general unhappiness but also her inconsolable grief over late son.

42. The claimants and the defendant have both addressed the forgetfulness of their mother beginning in 2010. In their statement of case the claimants claimed that Claudina began to show signs of forgetfulness where she would fail to recall conversations, events or even recognize family members. Sharon replied to these assertions by admitting that her mother may not have recognized her own daughter because she had on too much make-up or by virtue of her wigs or hair-extensions. I do not find this explanation to be believable. It is hardly likely that a mother would forget the face of her own child, howsoever it is framed by hair or make-up. This is so especially as she visited her children abroad throughout the years. I do not accept Sharon's explanation for this forgetfulness.

43. Tammisha and Bernadette also testified under oath about their mother's forgetfulness. Bernadette stated that is was unlike her mother to confuse her children and described her mother's mental alertness by saying "some days she in it, some days she out of it". This was specifically in the month of July 2011 when she would go to visit her. Tammisha also testified that this forgetfulness started before Sedrick died and that Claudina also forgot the days of the week.

44. This court does not find it extremely unusual for a mother of eight children to confuse the names of her children. In a moment of anxiousness or haste the confusion of names does not necessarily indicate an abnormality, especially for an aged person. However, the name-confusion events should not be isolated from the rest of the more noteworthy events of

potential unsoundness of mind. It is worth noting that many of these events generally occurred around the time that Claudina was first medically diagnosed with the onset of dementia.

45. A noteworthy incident is the one in 2012. Claudina wandered out of the house late at night or in the early hours of the morning and fell into an open cesspit. This was the year she died, and about twelve months after making the two wills. I do not feel comfortable with Sharon's explanation that she simply lost her footing and fell into the cesspit. Is it the act of a rational person to be walking near to an open cesspit at that time of night or early morning? If it is, I expected Sharon to adduce evidence to shed some light on this incident. She didn't do so. The fact that this event took place one year after making the wills does not entirely diminish its usefulness. Dementia being a progressive disease, evidence of it in a later year might, as I have said, together with other contemporaneous evidence, signal its presence in an earlier year.

46. Claudina was 80 years old and not in good health. Mr Seelal prepared the first will about a month after Sedrick's death. Tammisha and Sharon knew that she was grieving and was experiencing something resembling a breakdown. She was traumatized by her son's death and had "crying outbursts". The questions for the court to answer are these: in the circumstances of her sorrow and with the onset of dementia as stated in the medical report (even with its weight limitations) and having regard to her occasional peculiar behaviour that was known to some of her children (certainly to Tammisha and Sharon), whether Claudina's mental capacity to make a will ought to have been evaluated. Should the Commissioner of Affidavits, Mr Seelal, have asked for the evaluation? Should Tammisha or Sharon have told him what they knew about her behaviour?

47. The gravitas of her mental capacity may not have been easily discernible to a layman such as Mr. Seelal. It seems to me to be a good practice, if ever there should be doubt, to put the matter beyond suspicion by taking the precaution of requiring a medical/psychological assessment. The signals that called for an evaluation should have been apparent to him, even if Tammisha or Sharon (for whatever reason) failed to disclose them. Mr Seelal was certainly in a position to make observations as to Claudina's demeanour in his office. He conversed with her. On the assumption that she appeared sufficiently composed to make a will (something that I have reasonable cause to doubt) he knew that, in the case of each will, the person who brought her to his office was taking the entirety of the estate, save for the small portion to Sylvan. This was a family of eight children. Something like that is a little red flag I think—one that ought to put the craftsperson of a will on notice to be cautious. By itself it may not amount to much but there are other red flags in this case.

48. Something that ought to have stood out to Mr Seelal (and, certainly, to Sharon), and that stands out to this court, is the second will's dramatic reversal in estate disposition. To be clear, Claudina was entitled to change her mind. But, depending on the evidence of a testator's contemporaneous thinking or behaviour and the extent of the reversal, a dramatic change of mind may afterwards put a court on enquiry as to mental capacity. This is why, in circumstances such as these, it is prudent to bullet-proof a testamentary disposition with a medical or psychological evaluation. It is noteworthy that the *volte face* occurred less than a month after the first will. Sharon's explanation for the sudden turnaround does not hold up to scrutiny. She says that her mother felt that Tammisha was wrong not to put the will in a safety deposit box in Trinidad and leave the

key with her. Sharon admitted knowing that the first will gave everything to Tammisha, only leaving her a life interest in the downstairs apartment and a lot of land on a four-acre parcel. She said that she was happy with that estate disposition. I did not believe her when she said that. I formed the impression that Sharon yearned for the success of her sisters and loathed the estate distribution in the first will.

49. Mr Seelal said that Claudina wrongly believed that the property disposition took effect from the making of the first will, and not after her death. Sharon said that she did not know her mother said that. The explanation she had for the turnaround was because Tammisha left for England with the first will. Sharon also said that her mother was angry that some of her daughters felt she had Alzheimer's disease or was becoming senile. This is consistent with the claimants' evidence of Claudina's declining capacity before or around the time of the two wills and suggests that they are not inventing incapacity to defeat the second will. Is there a rational explanation for Claudina's sudden turnaround of affections? The court's suspicions are aroused because considerable sums of money came from the claimants abroad for a complete up-grade of Claudina's home. The second will does not acknowledge this expenditure and solely benefits the person who spent no money on the improvements.

50. Neither Mr Seelal nor Sharon suggested that Claudina should telephone or write Tammisha to ask for the return of the original of the second will by mail. It seems to me that Claudina was confused by the effect of certain events and no one was prepared to explain things to her. As far as I could tell from her demeanour it suited Sharon to allow (or not to dissuade) the rewriting of the first will on the basis of these dubious criticisms of

Tammisha. By her own admission Sharon was aware when she went to Mr Seelal's office that her mother intended to give everything to her.

51. In *Key v Key* it was said that although *Banks v Goodfellow* dealt with insane delusions, many cases that followed it concerned cognitive impairment brought on by old age and dementia. Briggs J went further and accepted the expert opinion that symptoms arising from bereavement could mimic depression and could also deprive a person of rational decision making. In that case, Professor Jacoby made his evaluation after the fact, based on the observations of other persons. As Briggs J put it,

 > "A person in that condition may have the capacity to understand what his property is, and even who his relatives and dependents are, without having the mental energy to make decisions of his own about whom to benefit".

 I do not have reasonable cause to doubt that the psychological effects of bereavement on Mr Key, as explained by Professor Jacoby, were not operative on Claudina. This is not to say that the expert in one case is a witness in another case. But conclusions as to the effects of bereavement are scientific facts, whether they are explained by Professor Jacoby in *Key v Key* or in a psychiatric textbook. The important point is that Briggs J was prepared to extend the classification of impairment on facts that are remarkably similar to those before me.

52. I have also considered Mr Seelal's oral testimony which I found to be unconvincing due to his uncertainty in recalling vital events and his general forgetfulness. His assistance to the court would have been greater if he remembered more, and, more importantly, if he kept a written record of his instructions. Had those instructions been signed by Claudina, it would

have been even better. Sadly, contrary to fundamental norms of legal practice, he did not make or keep a record of his client's verbal instructions.

53. Mr Seelal admitted that Claudina returned to make the second will because she was distressed. She was distressed because, according to her, Tammisha thought that the properties already belonged to her. This was seemingly based on the fact that when Tammisha returned to England she took the original of the first will with her. Mr Seelal did not explain to her that the properties did not belong to Tammisha or that the will would only take effect from her death, and not before. I agree with Mr Herrera, the claimants' counsel, that Mr Seelal should have explained this to Claudina. Instead, according to his testimony, he gave her the advice that she should make a new will. Had she been properly informed would she have felt it necessary to make a new will? Armed with proper advice would the new will have effected the dramatic reversal of Sharon's fortunes, to the exclusion of all others (except Sylvan)? What were the specific terms of Mr Seelal's advice? I am not entirely sure. According to his evidence he advised her "to make a new will". Did he advise or encourage her to give almost everything to Sharon in the "new will"? I am left with a lingering suspicion that Mr Seelal advised her to give virtually everything to Sharon.

54. In *Key v Key* the court accepted the scientific opinion that bereavement may lead to an increased level of suggestibility in the mind of a patient where he or she simply assents to suggestions from others. I cannot remove from my mind, having listened to the evidence, the possibility that Claudina was unable to resist the suggestions of Mr Seelal or whoever else she spoke with including Sharon. I have my doubts on the truthfulness of the assertion that Sharon had no say in the contents of the second will. I

also have difficulty that Sharon left her aged and distressed mother alone in Mr Seelal's office and went about her business in the town. There is a likelihood that she remained there for longer than she said. The failure to call the other witness to the will, Mrs Mendoza, to testify at the trial only compounds my suspicions.

55. It seems to me on a balance of probabilities and having regard to the totality of the written and oral evidence, and my impressions as to the credibility of the witnesses during cross-examination that Claudina was not of sound mind when she made either of the two wills.

56. These findings determine this dispute, but I will nonetheless briefly address the two remaining issues relative to the validity of the two wills, and then I will deal with the nettlesome issue of the occupation of Claudina's home.

(c) Whether Claudina was a victim of undue influence in making the second will

57. In *Edwards v Edwards* [2007] WTLR 1387, Lewison J said that undue influence is a question of fact, not a matter in inference. He helpfully set out the approach to be adopted:

    (i) In the case of a testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence.

    (ii) Whether undue influence has procured the execution of the will is therefore a question of fact.

    (iii) The burden of proving it lies on the person who asserts it. It is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the

facts are inconsistent with any other hypothesis. In the modern law this is perhaps no more than a reminder of the high burden even on the civil standard that a claimant bears in proving undue influence vitiating a testamentary disposition.

(iv) In this context, undue influence means influence exercised either by coercion, in the sense that the testator's will must be overborne, or by fraud.

(v) Coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection, or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment, discretion, or wishes is enough to amount to coercion in this sense.

(vi) the physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will. The will of a weak and ill person may be more easily overborne than that of a hale and hearty one. As was said in one case, simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be induced for quietness's sake to do anything. A drip drip approach may be highly effective in sapping the will.

58. Mr Herrera has made a spirited case in support of undue influence. He grounds it in the activities of Mr Seelal during his interview with Claudina when the second will was made. There is a strong possibility that Mr Seelal specifically advised her to make a new will that named Sharon as the chief beneficiary. He partially admitted this in cross-examination. It is also fair

to say, as I have already held, that Claudina's mind was enfeebled. In that sense she was open to suggestion, especially at the behest of a person she considered a professional—a 'man of letters'—so to speak. He never told her that that the first will only takes effect upon her death. He allowed her to wrongly believe that Tammisha, who left for England after Sedrick's funeral, was the owner of her properties. However, it has not been proven that Mr Seelal influenced Claudina at the behest of Sharon. There is no evidence that he was carrying out her instructions or acting as her agent. It seems instead that he was a self-appointed advisor and gave poor advice. If there was influence, I would firstly expect that it was undue—in the sense that it was designed as part of a scheme or plan to obtain a particular result. Secondly, I would expect the influencer to benefit, directly or indirectly, from the influence he or she exerted and not only in the monetary sense, but perhaps in service of some moral or other purpose on behalf of a person or a cause.

59. In her emotional state Claudina seemingly accepted Mr Seelal's advice without bringing her independent judgment or volition into play. Now, it is obvious that a testator's lack of testamentary capacity can always create an area of vulnerability for those whose intention it is to exert undue influence. However, there must be something more than inferential evidence of undue influence by a third party who has no moral or other interest to serve and who is not an agent of the profiteering beneficiary. In this case, there is insufficient evidence and I respectfully reject the claim for undue influence.

(d)Whether the second will was executed in conformity with the Act

60. There were many inconsistencies in the evidence of Mr Seelal on this issue. Firstly, he was less than satisfactory in his explanation of the presence of

the execution witness, Ms Mendoza. At first, he described her as his receptionist who was in the reception area, outside of his office. Earlier, in describing the layout of his premises, he said that the reception area only had chairs for clients. I'm a bit confused as to whether a receptionist sits on a chair provided for a client or sits at a desk, with a phone and a notepad. Later he said she was working part-time. Pressed further he said that she used to be his receptionist but is now a nurse, working somewhere else. This confused me. If she worked part-time there is a possibility that she was not there at that time. Bearing in mind the importance of resisting this claim—which seeks to have the second will invalidated on the grounds of lack of formality—I expected Ms Mendoza to testify at the trial. She has not sworn an affidavit of due execution in the probate application so there is nothing by way of oath or otherwise to corroborate Mr Seelal's testimony.

61. As I indicated earlier in this judgment, Mr Seelal was not a witness in whom I feel confident. This is not to cast aspersions on his character. Despite his many years of experience as a Commissioner of Affidavits in a small country district I believe that his lack of legal training was brought sharply into focus. He has a general idea of general things and, if his work does not fall under the scrutiny of a court, all is well and good. Like most professional people whose work is questioned, they will seek to defend it. In doing so, some witnesses tie themselves up with a defensiveness that is often difficult to distinguish from untruthfulness. I had that problem in assessing his evidence. There was a disconnection between the narrative in his witness statement and in his testimony under cross-examination. Gaps in his witness statement were filled in his oral testimony by spur-of-the-moment add-ons that changed its meaning.

62. This case revealed in Mr Seelal, kindly gentleman as he is, several disturbing failings as a professional charged with the technicalities of preparing a will. I have dealt with some of these earlier. With respect to the execution of the second will I am not satisfied that Ms Mendoza was present in his office at the same time as Claudina, and, together with Mr Seelal, saw her sign the second will. I am not satisfied that they both attested as witnesses in each other's presence. I am also not satisfied that Sharon left her aged and infirmed mother alone with Mr Seelal to prepare the second will. On earlier visits—Mr Seelal prepared other documents in 1993 and 2001—Claudina was always accompanied by a relative. She was younger and presumably healthier in those years.

63. Notwithstanding these findings I recognize that the burden of proving a lack of formality in the second will lies with the claimants. The claimants are not in a position to discharge that burden as none of them were present. However, I nonetheless believe on the basis of my impressions of the evidence of Mr Seelal and Sharon that the circumstances of its execution were suspicious. I do not accept that the formalities of section 42 of the Act were followed.

64. In fact the court's suspicions are aroused by the circumstances surrounding both wills, and not only in relation to their due execution, but also the circumstance of diametrically different wills being prepared within a short space of time, and the inferences that can be drawn about Claudina's mental capacity by reason of that fact and the other circumstances I mentioned earlier when discussing her testamentary capacity. As Viscount Simonds said in *Re: Wintle v Nye* [1959] 1 All ER 552, "In all cases the court must be vigilant and jealous". Lord Reid imbued the court with what he described as "an extraordinary burden of

investigation". Wooding CJ in *Moonan v Moonan* (1963) 7 WIR 420 said that a court should adopt a cumulative approach in scrutinizing the circumstances, should they appear suspicious. In my opinion, the awareness of suspicious circumstances ripples through all the events surrounding both wills, not only with respect to Claudina's capacity but also with respect to their due execution.

(e) Who is entitled to occupy Claudina's home

65. The upshot of my findings is that Claudina died intestate. Someone will have to apply for Letters of Administration. All of Claudina's estate is therefore to be divided among her next of kin in accordance with the rules of intestacy. This will include Claudina's home. It is now fully occupied by Sharon and her family, which is to say, the upstairs and the downstairs apartment. Up until Claudina's death, Sharon lived in the downstairs apartment with her family. Unless the next of kin or their legal personal representatives can come to terms, the home will be jointly owned by them. The court should however, I think, preserve the *status* quo as at the date of Claudina's death, so that the upstairs apartment should be vacated by Sharon and she should remain in the downstairs apartment, pending the grant of Letters of Administration and the division of the estate. I should add that I am satisfied on the evidence before me that most of the improvements to the home, upstairs and downstairs, were undertaken, not by Sharon, but by her siblings. I am satisfied that Sharon continues to receive the rents from the properties in Claudina's estate and she should, of course, account for these.

66. In all the circumstances there shall be judgment for the claimants. The following orders are made and granted:

(1) A declaration is granted that Claudina died intestate, the two wills being invalid by virtue of her lack of testamentary capacity and by informalities in their due execution.

(2) An injunction is granted (a) forthwith restraining Sharon whether by herself, her servants, agents or otherwise howsoever from selling, pledging, realizing, entering into agreements or otherwise in any manner whatsoever dealing with the real and personal property of Claudina, (b) forthwith restraining Sharon from receiving or making a demand for any rents, profits, dividends, interest or other sums accruing to or becoming due to the Claudina's estate, and (c) injuncting Sharon to vacate the upstairs apartment of Claudina's home within three months of the date of this judgment.

(3) An order is made for an account of all rents and profits that came into Sharon's hands or was received by any other person on her behalf in respect of the said estate since 30 June 2012, such account to be taken before the Registrar in default of presentation by the defendant to the claimants within six months.

67. A formal order shall be issued by the court office in due course. I will now hear counsel on the question of costs.

James Christopher Aboud
Judge