

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

C.V. No. 3431 of 2015

IN THE MATTER OF THE WILLS AND PROBATE ACT CHAPTER 9:03

AND

IN THE MATTER OF THE SUCCESSION ACT CHAPTER 9:02

AND

IN THE MATTER OF THE DISTRIBUTION

OF ESTATES ACT NO. 28 OF 2000

AND

IN THE MATTER OF the Estate of **STEPHEN MARCANO** also known as **STEPHEN BERTIE MARCANO**, late of 39 Windsor Road, Valsayn North, Valsayn, in the Republic of Trinidad and Tobago, who died on the 12th day of December, 2014 at 39 Windsor Road, Valsayn North, Valsayn, in the said Republic, deceased (No.L1720 of 2015)

Between

SONIA MARCANO

Claimant

And

SANDRA MARCANO

Defendant

Before The Hon. Madam Justice C. Gobin

Appearances:

Mr. B. Dolsingh and Ms. Tamara Dolsingh instructed by Mr. Chris Seelochan for the Claimant

Ms. L. Green for the Defendant instructed by Ms. Dennis Wilson

JUDGMENT

Background facts:

Mr. Marcano and his daughters /family history

1. The testator, Mr. Stephen Marcano a retired businessman and contractor died on 14th December 2014 at the age of 76. He was a divorcee who had never remarried though he had separated decades before from his wife, the mother of his three daughters. Of the three Sandra, the defendant is the eldest, Rosanna is the middle child and the youngest, the claimant, is Sonia.
2. The separation notwithstanding, Mr. Marcano maintained a close relationship with his three daughters. During their minority they lived with their mother but visited their father, spent weekends with him and he met all his financial obligations. He was caring, and though he was not the doting, over-indulgent, over generous father, if they asked for something and he was persuaded, he would assist. So he assisted them in the purchase of their respective homes, funded Sandra's wedding, assisted Rosanna with legal costs when they arose.
3. Mr. Marcano treated his daughters fairly and equally, though it was known that Rosanna was his favourite. It was also accepted that Rosanna's daughter Caitlan who is now about 20 years old, was the apple of his eye. He loved her above everyone else. He had formed a close bond with her. He sent money to meet her schooling expenses, her general needs and he paid for her to travel to Trinidad every July to spend the vacation here, at his home at 39 Windsor Road, Valsayn.

4. Rosanna migrated from Trinidad in 1987 and Sandra left permanently in 1990. Sonia on the other hand remained for the most part here, although she did reside abroad for limited periods. The physical distance after they left made no difference to the relationship between Mr. Marcano and his daughters. He remained in communication with them. He was in close contact even with his own siblings, especially his sisters Marion Mapp and Phyllis Marcano Langaigne, whom he visited for Sunday lunch regularly. He consulted them on his personal affairs and matters relating to his daughters. His sisters remained devoted to him to the end.

Mr. Marcano – the person

5. As for Mr. Marcano's personality, he was described as strongwilled, stubborn and independent. He did not take kindly to advice, it seems, either in relation to his business or his personal affairs. He was a self made man who enjoyed the rewards of what was at some point a thriving business. He had begun with a paint shop in 1969, then expanded into supplying wall coverings, blinds, carpets and other decorative products items and eventually he incorporated a company "Decorators and Contractors Ltd". By the time he had done so, the business had evolved. Mr. Marcano had become a contractor providing more general services. He secured contracts with private banks, homes, and from the Government.
6. At some point or other, all three of the daughters had been involved in the business. In the case of Rosanna and Sandra their involvement, though not continuous, would have ceased upon their leaving Trinidad to reside abroad permanently. Sonia, on the other hand, save for the periods when she was away, spent many

years in its day to day operations until 2012. She was always an employee and was paid for her work. Working with her father was difficult. In an email to Sandra after his death Sonia described him as “the defiant heartless, walking, talking, womanizing, boss as Daddy, for 20 years”.

7. Mr. Marcano lived well. He had a beautiful home on sprawling grounds at No. 39 Windsor Road, Valsayn. He loved to socialize, he loved the company of women and to be seen with beautiful women. He lavished attention and spent freely on them. According to Sonia, “when he dated it wasn’t just dinner – he bought a car paid for a home”. He was well built, no doubt physically attractive and took great pride in his appearance. He dressed well. He was one of a party crowd. He threw fetes at his home and allowed friends and other party promoters to use his premises for big events especially at Carnival time. I imagine that he would have been a well known and popular figure in his circles.

Relationship with Cylma/effects on family

8. For about five to seven years prior to the end of 2013, Mr. Marcano was involved in a relationship with a woman Cylma. She was about 25 years his junior, closer to Sonia’s age. For a part of that time Cylma cohabited with him at the Valsayn home with her children. Sonia had her doubts about the genuineness of Cylma’s affections for her father. This was not helped by reports that Cylma had made comments in the presence of persons who repeated them to Sonia that she (Cylma) “had found a cow and was milking the relationship”. When Sonia reported this her father was not pleased. He did not believe it.

9. Sonia claimed that while his romantic relationship with Cylma lasted, the relationship with all the sisters and the father would be strained from time to time. They were all concerned about the influence she had assumed over him and the effect on his business affairs and what they perceived as her efforts to drive a wedge between their father and themselves. Indeed in those five years or so, Mr. Marcano had put Cylma on a company salary, though she was not employed there, he bought her a house, he would pay her credit card bills, he was prepared to provide one of his properties as a bond to secure bail for her son who had found himself in some trouble. It was rumoured he had bought a house for Cylma's mother as well.

10. A particular event occurred sometime in 2012 which caused a serious break in the relationship between Sonia and her father. It was at a time when Cylma was on the scene. Mr. Marcano had been hospitalized for a serious infection. Upon his discharge from the hospital according to Sonia, it appeared that Cylma had made some complaints about matters affecting her position in his home, which had occurred during the period of his hospitalization. Mr. Marcano was furious. He called a meeting with his sisters Marion Mapp, Phyllis Marcano, together with Cylma and Sonia. He reminded that what went on in his house was his business, especially matters concerning Cylma. Sonia retorted that if that were the position he should not involve her in his business when he wanted to track Cylma. This was a reference to private requests Mr. Marcano had made of Sonia to get information about Cylma's whereabouts when she went out on her own.

11. The response would understandably have embarrassed and humiliated him. He threatened to cut ties with all his daughters, but with Sonia who was here and who had made the statement, he was unforgiving for some time. Sandra and her witnesses have insisted that the relationship was never restored before the father's death. Sonia claimed otherwise. Mr. Marcano and Cylma had in fact separated before he fell ill in November 2013. That quarrel and the effect on the relationship was seized upon by the defendant to justify the failure of Mr. Marcano to make any provision in his Will for Sonia.

Financial Woes

12. By 2012, the business was in dire financial straits. Even so, Mr. Marcano continued to make personal drawings on the company accounts to sustain his lavish lifestyle, ignoring his creditors who had begun to call in their debts. By the end of 2013, the business was failing and he had entered into negotiations with his bankers as to how substantial debts could be liquidated. Mr. Marcano had a few pieces of what might have been considered valuable real estate. The negotiations contemplated the sale of some of those assets, but he was particularly concerned to preserve his Valsayn home. The unhealthy state of the finances of Contractors and Decorators Ltd was known to his three daughters as well as his trusted employees including his friend of long-standing, Ms. Jennifer Durity, who was a Project Manager in his employ.

Mr. Marcano/illness

13. That situation with the finances notwithstanding, Mr. Marcano continued attending work and continued to be very much in charge of the business. He appeared to be in his usual robust physical health until November 2013 when suddenly and without warning, a terminal illness struck with devastating consequences. Mr. Marcano arrived at work and complained that while driving, he suddenly had something flash across his eye, then he realized he could not see. He sought medical attention and certain diagnosis were made. His daughters were notified. By mid-December Sandra took him to Florida where she lived. On his visit to doctors there he was diagnosed as having terminal cancer – a tumour had been discovered in the orbital area of the brain.

14. Mr. Marcano was told of his diagnosis. The prognosis was not good. He was given about eight months to live. Surgery was not going to help. He returned to Trinidad with Sandra. According to Ms. Durity he visited the office on only about three occasions after his return. He would call however on a regular basis to find out about the running of the business. By January 2014, the daughters, Sonia and Sandra had taken a decision to close down the operations of Contractors and Decorators. Sonia had been added as a director on the advice of Mr. John Tang Nian a director when Mr. Marcano became ill. Sandra was added as a signatory to the company's account to facilitate the closing off. Only three employees Mr. Dudley James, Mr. Cleophus de Leon and Ms. Durity were to remain until April 2014 – to complete projects. I formed the impression that insofar as the future of the finances and the company were concerned, there was agreement on the part of

the family as to what should happen. The priority was to conclude the negotiations and to do what was necessary to reduce liability.

15. Mr. Marcano passed away on 14th December 2014 just about one year after his diagnosis. A photograph which was produced in evidence which was taken by Sonia on 14th November showed him lying on a couch with his eyes closed. His body was withered, the outline of his rib cage was clearly visibly even under his shirt or top he was wearing. This man had been described as well built and well nourished by doctors who had seen him about one year before. The cancer had ravaged his body and rendered him very frail.

The November 2014 Will

16. After his death, Sandra produced a Will which had been prepared by attorney at law Mr. Chad Allain, and which her father had allegedly executed at the Valsayn home on 12th November 2014, exactly one month before he died. Under the terms of the Will, Sandra was named as his Executor and sole beneficiary. Sandra claimed to have known nothing of the Will until she was contacted by Mr. Allain after her father's death. Mr. Allain had also on 12th November 2014, taken execution of a power of attorney which appointed Sandra, his Attorney. That power of attorney was registered on 18th November 2014.

17. Sonia had grave doubts as to her father's mental capacity to make a Will in November 2014. She alleged that the driving force behind that Will had to be Sandra. She was subsequently informed that her father had an earlier Will dated 1st November 1999. It had been prepared by attorney at law, and Counsel in this

case, Mr. Bindra Dolsingh, who was described as a friend of the testator. The terms were very different. In that earlier Will Mr. Marcano divided his estate among his three daughters equally and had made provision for their mother to have a life interest in the home she had been occupying at some time.

The Proceedings

18. On 25th June 2015, Sandra applied for probate of the November 2014 Will. Sonia filed a caveat. On 15th October 2015 she commenced this action seeking a declaration that the 2014 Will was invalid on the ground that her father was not of sound mind at the time of the purported execution of it, that he did not know and approve of the contents of it and alternatively that it was procured by Sandra's undue influence. She further sought probate of the 1999 Will which it was claimed was executed when her father was in good health and mentally capable.
19. She alleged too that Sandra had assumed control of the Valsayn property. She was permitting the hosting of functions and parties for which she was collecting money and refusing to account. She claimed that Sandra was dissipating other assets of the business. These allegations and the failure to settle their issues through amicable discussions precipitated this probate action and claims for injunctive reliefs. Mr. Marcano's liabilities did not end with his untimely passing. The banks remained anxious to conclude their agreements for the liquidation of the debts. The parties were anxious to have the matter determined to protect the estate from any other actions on the part of the creditors. This caused a measure of fast tracking in the management of the case.

20. On the morning of the trial the claimant indicated that she did not intend to try to establish the 1999 Will because an original could not be found. She intended only to put the defendant to proof of the validity of November Will. In those circumstances, the defendant was called upon to begin. The claim of undue influence was eventually not pursued.

The family relationships

21. This litigation has unfortunately divided a family that was once very close. The sisters, Sandra, Rosanna and Sonia appear to have gotten along well enough until their father returned from Florida in January 2014. Sonia has given an account of what led to a serious disagreement between herself and Sandra which Sandra has denied, but it is clear that the relationship had been strained by the time of his death. Before that, although the girls did not live in the same country, they were in regular contact especially over matters concerning their father, both personal and business. When Sandra visited Trinidad she stayed with Sonia. It was only after he became ill that she began to stay with her father.

22. No reason was given in the witness statements by either side for any estrangement between Rosanna and Sandra. Rosanna did not give evidence. However, in the course of Sandra's cross-examination it emerged that Caitlan (Rosanna's daughter) had lived with Sandra in Florida for two years, and that she had looked after her as one would a child of the family. No details were given as to how this arose, but Sandra claimed that after she had treated her so well – an allegation was made that she had abused Caitlan. Whatever the claims and counterclaims on this issue, this

must have deeply hurt Sandra as well as Rosanna. The parties have sought to keep this issue hazy so I can find no more. But Sandra and Rosanna had been away from Trinidad for many years while Sonia was the one who remained and interacted more frequently with her father. She would have been the one they relied on to report on how he was, how and what he was doing.

23. I have found that Sonia looked after what they considered to be the “family interest” in the father’s business. Sonia said that her father always said it was going to be theirs, and that is not hard to believe. He had never remarried, he loved his daughters and was close to them in his own way. He loved Caitlan. While the immigration status of the two in the U.S.A. did not allow them to visit regularly the girls considered themselves part of a family unit. In other words, there was never any thought that the father had been abandoned by the two who were resident abroad. Sandra was still regarded as the eldest who could be relied on to look after others, if they needed to go to Florida for example, it was accepted that she would accommodate them, make arrangements etc.

24. In the email to which I referred earlier Sonia referred to the words she used to use to describe her sister Sandra, “her rock, her hero. More than a sister you have at times even been a mother and a father.” Sandra was also recognised as the one of the three who could “handle” their stubborn egotistical father, in situations where he needed to be “managed”; she could be relied upon to implement the required diplomacy.

25. Sonia on the other hand was outspoken, more like him, strongwilled and independent in her views. Her personality unlike Sandra's preferred more direct confrontation on matters, and this led to a somewhat turbulent relationship. This notwithstanding, Mr. Marcano loved her as he did the others and in the business (until she left in 2012) he no doubt relied upon her and had regard for her abilities and input. He had requested Ms. Durity to ask her to manage the Tobago project even after the row over Cylma. He wanted her full time, but she could not commit to that. Even so, in these proceedings, Sonia has not suggested that because she remained here and, was in terms of the number of years, the one who mostly associated with the business, that she was the closest to him. Her appraisal of him and their relationship was more realistic.

26. The other family members who have had to find themselves on one side or other and they chose for some reason to take Sandra's side are two elderly sisters of his, Mrs. Mapp and Mrs. Languigne. These are the paternal aunts of the parties. They must have shared a close relationship with their three nieces. It is a matter of regret that these proceedings have affected that relationship and I can only hope that in the future there will be some mending.

The Legal Issues

27. The issues which arose on the pleadings and the evidence were mental capacity and want of knowledge and approval of the contents of the 2014 Will which Sandra seeks to uphold. It is settled that the basic legal requirements for validity of a Will are that people are mentally capable of understanding what they are doing when

they make their Will and that what is in the Will truly reflects what they freely wish to be done with their estate on their death (*Burgess v. Hawes [2013] EWCA Civ. 74 Mummery LJ*).

Mental incapacity

28. Sonia claimed that at the time of the alleged execution of the Will her father was mentally incapable of making a Will. He was of unsound memory and understanding. A psychiatrist Dr. Iqbal Ghany had diagnosed him several months prior to the date of the Will – in March, as suffering from a “moderate category of Alzheimer Type Dementia.” She and her witnesses gave evidence of a rapid decline in his mental health between the time of the diagnosis and his return to Trinidad in February and about the month of September 2014.
29. Sandra on the other hand and her witnesses, the aunts and a niece who were very much involved in his day to day care till his death, painted a different picture. They accepted that he had lost a tremendous amount of weight and had become frail, but they claimed he never lost his memory, he remained clear in his thinking, he retained his sense of humour and was able to understand what he wanted and what he was doing.
30. I have closely considered the evidence of the witnesses on this critical issue in the case, the resolution of which turned on my assessment of their credibility. In the end I have preferred the evidence of the claimant and in particular her witnesses whom I have found to be more independent. I have also accepted the evidence of

the expert Dr. Ghany which has supported the claimant's case on as to lack of mental capacity. The burden of proof of capacity at all times rested on the defendant. I have found that she failed to discharge the burden.

Evidence /Mental health pre November 2013

31. I turn to the evidence on the issue. Until Mr. Marcano's first symptom of illness – that is the moment when while driving to work lost his vision that morning in November 2013, he had appeared to be in generally good physical health. While the way he was using the company's finances, given the state of it, might have raised questions about his judgment, they could not arise. He was his own man, and the business was his. It turns out however, that even before the unfortunate event in November 2013, there had been some indication that all was not too well and there may have been some early signs of impairment. At the time, it seems no one thought too much of it. The evidence that raised questions as to his pre November 2013 mental state came from both sides.

32. On Sandra's side significantly it emerged in her own cross-examination when she volunteered that even before the eye problem in 2013 she had observed that the testator was "lapsing in his memory way before that". She further accepted that "he did not know what he was doing all of the time". She did try to resile from the answer at some point in her cross-examination, but I was not impressed by her attempt to do so. On the claimant's case, it came from a source that I considered to be independent, Mr. Marcano's project manager, Ms. Jennifer Durity. She enjoyed an equally good relationship with both the claimant and the defendant.

She was an old and trusted friend of the testator. She visited him until about October 2014 when she could no longer stomach looking at what he had become. Sandra has suggested no reason for her to take sides in this matter. Ms. Durity has no interest financial or otherwise.

33. Ms. Durity gave evidence that in 2013 she noticed that Mr. Marcano had begun forgetting things. On one occasion they had gone to Tobago to conduct company business. While there he made certain decisions. Upon his return to Trinidad sometime later he was unable to recall making those decisions. More specifically Ms. Durity recalled that sometime in mid 2013, Mr. Marcano asked her to make arrangements to house an employee for a project in Tobago. When she found out what it would cost to rent – she considered it expensive, she discussed it with him. He insisted that she should proceed to make the arrangements, the cost notwithstanding. Subsequently when they received the encashed cheques, he queried the cost of the accommodation. He seemed to have forgotten that he had specifically discussed and approved it.

Post November 2013 – In the course of his visit to Florida

34. Mr. Marcano proceeded to Florida in December 2013. He saw several doctors with various specialities. The medical reports of those visits were produced in evidence. It is clear from them that all doctors noted some cognitive impairment. The relevant extracts are set out:-

- (1) On 29th December 2013 –after the diagnosis had been made – Dr. Michael Samuels MD (Radiation Oncology) noted – page 4. Neurological: He is alert and oriented to person, place and time. Then in bold type he notes – signs of early dementia apparent during interview. The patient was already on Donepezil (Aricept);
- (2) Jacque Morcos MD (Neurosurgery) saw him on referral from Dr. Tse. He assessed Stephen Marcano, 77 years old, male with mild cognitive impairment. There is no record of the basis of this evaluation. There was a physical examination and review of imaging and medical records.
- (3) Notes of 15th January 2013 – Dr. Jose Ruiz-Otolaryngology repeats note of Dr. Morcos – that Dr. Morcos noted mild cognitive impairment.
- (4) 20th November 2013 – Dr. Lilliam Guyman – he is alert and oriented to person, place, time – Psychiatric he has a normal mood and affect. Judgment and thought content normal assessment – memory impairment, behaviour is normal, mild short term memory impairment- psa mini mental exam show only mild cognitive impairment.
- (5) On a visit on January 22, 2014 – Dr. Khaled Tolba MD, Assistant Professor of Medicine. Hematology Oncology saw Mr. Marcano from the notes it appears that Sandra was present. He noted under Impression and Plan:

A 77 year old male with significant degree of dementia, presenting with progressive gradual loss of vision in the left

*eye with the finding of invasive high-grade adenocarcinoma tumor occupying the left orbit with invasion into the skull base. It is unclear at this point whether the patient is going to proceed with surgical removal of the tumor, which will involve left orbital exenteration versus definitive combined modality chemoradiation. **The patient obviously cannot make any decision since he has advanced degree of dementia. The daughter who will probably have the power of attorney was a fairly bad mood and did not feel that this was the time to discuss that, so we will give her a follow-up appointment in a couple of weeks to gather all the information, whether he will go for surgery or not and then we will also obtain a whole** body PET scan to evaluate the possibility of a distant metastasis or whether this has started somewhere else and metastasized to the orbit, and once this information is available and the decision was made whether he will undergo surgical resection or not, we will see him back in 2 weeks and have a more definitive answer at that time.*

35. I have emphasised the observations of Dr. Tolba. Sandra was the person who at all times accompanied her father and who would have obtained the notes and reports. She would have shared the information that was contained in them upon her return to Trinidad with her father, with the family including Sonia. She would have had sight of Dr. Tolba's notes. She took no issue with the contents until the issue of his mental capacity arose in these proceedings. She then sought to have the record of Dr. Tolba's impressions amended. She made a formal request to the hospital. That request was not placed in evidence before me, but the response of Dr. Gustavo Fernando Castro M.D. (Hematology and Oncology) was tendered. Dr.

Fernando Castro was very careful in his language – he was “providing the addendum at the request of the family who claim there was a mistake in documentation”. He had not seen the patient, at the date of his addendum, Dr. Tolba was no longer at that hospital and he could not talk to him. Dr. Castro attempted to correct Dr. Tolba’s “impression” and then proceeded to highlight the portions of the notes which pointed to “mild cognitive impairment”. Dr. Castro concluded that from the record there was no neurological assessment of Mr. Marcano’s mental state that could support the note made by Dr. Tolba of a “significant degree of dementia”.

Weight to be attached to Florida Medical records

36. While the testator’s medical records from his December/January visit to Florida were put into evidence, none of the doctors was presented as a witness. There was no opportunity to see them or to test the reliability of their records on any of the matters they had noted. It is true that Dr. Tolba’s note is at variance with what the other doctors noted, but he was careful to note that this was “his impression” from a meeting with Mr. Marcano at which Sandra was present. Sandra sought to correct the “impression”, only after these proceedings were filed and well after she would have relied on this assessment to inform a course of action in relation to control of her father’s business affairs, at a family meeting which was held within weeks of the testator’s return in February 2014, to Trinidad. I shall return to the family meeting because my rejection of the credibility of Sandra and her witnesses in a large measure has arisen as a result of that meeting.

37. What is glaring too, is that while Sandra sought to correct what Dr. Tolba noted as “his impression” in that specific regard, she left unchanged his other observations on that record which included a reference to the likelihood of her being the one to have a Power of Attorney. This information, which is consistent with the understanding of the family generally, could only have come from Sandra. It is hard to imagine that a discussion on the subject would have arisen if her father was suffering only “mild cognitive impairment”. Dr. Tolba’s also described Sandra’s reaction to the diagnosis and the need to give her (Sandra), (as opposed to the patient), an appointment to gather all the information to then discuss whether he would do surgery or not. This to my mind supports the reliability of doctor’s observation. Even after the “amendment of Dr. Guzman” that part of the record of Dr. Tolba’s “impression” remained, unchanged.

38. I have considered what weight I should attach to the medical records from the Florida doctors. While the contents insofar as they relate to the mental capacity are material, the doctors have not been made available to the Court as witnesses. I believe and it would be expected, that in the course of the consultations with them, routine assessments were made of Mr. Marcano’s appearance and mental condition. In one instance a mini mental state exercise was done. But I am not satisfied that there was at any time a sufficiently thorough investigation of Mr. Marcano’s mental health. It is not unreasonable to assume that between 20th December and 29th January that the main focus of attention of the doctors in Florida would have been the investigation relating to the cancer diagnosis. The medical

reports do not indicate that there was any specific neurological assessment by a specialist.

39. In those circumstances, it is sufficient for me to find that some degree of cognitive impairment was fairly obvious, though the extent of it may not have been firmly established by any in depth investigation by anyone there. As to the “amendment” of Dr. Gustano, I am not inclined to reject the “impression” that Dr. Tolba noted on Mr. Marcano’s visit of 29th January 2014. Given what remained after the “amendment”, his impression did not seem to be inaccurate.

Family Meeting

40. It is the evidence of the meeting, which was called by Mr. Marcano’s family mere weeks after his return from Florida, and what transpired at it and the course of action that was agreed and followed, that has provided the most compelling evidence of the state of Mr. Marcano’s mental health.

41. It was held at the home of Mrs. Mapp. The persons in attendance were, Mrs. Mapp, her brother Michael, sister Phyllis, niece Michelle who was visiting from the U.S.A. and daughters Sandra and Sonia. At the trial the parties proffered different reasons for the holding of it. Sonia’s evidence which I accept, was that the meeting was called to update the family with what had happened and what should happen from here on, since in her words “Daddy was forgetting so badly”. While the relationship with Cylma was over, and she was no longer living there, the entire family was concerned that she would take advantage of Mr. Marcano’s illness. Even before Sonia had gotten to the meeting at her aunt’s home, she knew that a

psychiatric evaluation of her father was going to be discussed. It had also been agreed that steps would be taken, if it was found to be necessary, to make an application to the Court to have someone put in control of his affairs. That “someone” was going to be Sandra. Sonia took no issue with that decision even when it was being contemplated. Given Sandra’s role in the family that was almost a given.

42. Sandra on the other hand and her witnesses claimed that the meeting was called because her father was not accepting the diagnosis of his terminal illness and he was not taking his medication. She attempted to down play her role in that meeting and to distance herself from the decision that was eventually taken to have her father assessed by a psychiatrist. She insisted that the meeting had nothing to do with his mental health. She was therefore hard pressed to explain the events which followed including her visit to Dr. Ghany first with Ms. Mapp and then with her father. These were more readily explained by Sonia’s account of what had been decided and support the claimant’s account of the state of mental decline which must have been fairly rapid.

43. Mrs. Mapp and Mrs. Langaigne mentioned nothing of the meeting in their witness statements. They were cross-examined on it. Their evidence of the purpose of the meeting and the reason for the decision to take their brother to a doctor was riddled with inconsistencies. Mrs. Mapp said Cylma was not discussed at the meeting there was no discussion about Court and taking over control of his affairs. She did not know about a decision to take him to a psychiatrist. They talked about

another doctor because he was not accepting the cancer diagnosis. Mrs. Mapp who accompanied Sandra on the first visit to Dr. Ghany went so far as to say that she did not know that Dr. Ghany was a psychiatrist. She explained how Dr. Ghany's visit came about.

44. She was a client of Mr. Bindra Dolsingh. On a visit to his offices on an unrelated matter he asked about Steve. She described his condition. Whatever she said caused Mr. Dolsingh to give her contact information for Dr. Ghany. She would have discussed this with the family and arranged the follow up with Sandra. This came after the family meeting, after the decision had been taken to have a psychiatric evaluation. I reject Mrs. Mapp's attempt to establish that she was unaware that Dr. Ghany was a psychiatrist. If she were in any doubt or under any misapprehension about the purpose of the visit it would have been made clear during her meeting with Dr. Ghany. I find that she was simply not being truthful. Her sister, Phyllis Languigne who was there accepted that the meeting discussed a psychiatric evaluation and Roxanne Christian-George the testator's niece was aware of concerns about Mr. Marcano's behaviour. She came to know about the family meeting and the fact that subsequent to it he had seen a psychiatrist.

45. The attempt to justify the need for the meeting and a discussion about a Court intervention on the basis of denial of his terminal illness, is rejected. Even the concerns about Cylma's influence, could not warrant such a drastic step. Not all of Sandra's evidence/witnesses accepted there was a discussion about Cylma. Mr. Marcano was stubborn, self centred, very proud man, he was private about his

business affairs and resented any attempt to interfere in his relationship with Cylma. This was the reason his relationship with Sonia had cooled for sometime. The family could hardly have decided to remove his business from his control – only because of “concerns” about Cylma. For them even to have contemplated a Court application as I believe they did, suggests to me that Mr. Marcano was obviously and significantly mentally impaired. There had to be more and that included an unreliable judgment in dealing with his affairs.

Dr. Ghany’s visit/report

46. Pursuant to the family’s decision taken at that meeting Sandra and Marion attended the office of Dr. Ghany, Consultant Forensic Psychiatrist. They gave him certain information. An appointment was made for Sandra to return with Mr. Marcano. She claimed she tricked her father into going with her. Dr. Ghany examined Mr. Marcano and conducted a mini mental state examination. Based on the testator’s scores he placed him in a moderate category of Alzheimer. According to Dr. Ghany, this diagnosis would leave the testator to experience difficulties in carrying out cognitive functions. There would be loss of memory, inability to hold a conversation, inability to identify situations and persons clearly. The effect of this kind of disease would not necessarily be reflected in the physical appearance of the patient. This finding was more consistent with Sonia’s description of her father’s mental state and with the evidence of her witnesses whom I have considered to be independent.

47. As I said before, my consideration and assessment of the evidence of the meeting and the decision by the family members to have Mr. Marciano evaluated and the reason for it was central to my finding on the issue of mental capacity. During the course of Defence Counsel's address and only after several questions were posed by the Court as to how I should treat the evidence of the meeting, Counsel stated **"there is no doubt that after the meeting a decision had been taken by the family to have Mr. Marciano declared mentally unfit."** This concession came somewhat late in the day. It did however, confirmed my view that Mr. Marciano, consistent with the impression noted by Dr. Tolba, and with the finding of Dr. Ghany, had suffered an appreciable and obvious loss of his mental functioning. If this were not so, it would mean that the family members including Sandra had conspired to wrongly take control of his affairs even while he remained capable. I would be slow to come to such a conclusion. If at the end of the day that is what Sandra wished me to conclude, it would hardly have improve her credibility. In that event, the effect on her credibility and that of the family members who have supported her account on that issue, would have been even more devastating.

48. After his examination Dr. Ghany concluded that Mr. Marciano did not possess the mental capacity to conduct his own business and look after himself. Dr. Ghany made a recommendation that Sandra be appointed his receiver to conduct his affairs. His report read as follows:

"When I saw Mr. Marciano on March 20, 2014 he did not know where he was and he did not know the date nor the month. He was aware of his memory impairment, he could not say what he had consumed for breakfast or lunch on that day and he

could not recall the names of his children. He was not aware of the full extent of his properties and he could not say who his beneficiaries were. He admitted that he did not prepare a Will and he was not prepared to do so in the near future. He admitted to consuming too much alcohol at and that he did not trust people. He stated that many persons were working against him, he tended to blame people when he could not find his belongings. I asked him to draw the face of a clock and to insert the hands at ten and two, he could not do this properly. I tested him with the Mini Mental State Examination (MMSE) and he scored 18 and this placed him the moderate category of Alzheimer Type Dementia: because of his Dementia and paranoid development, in my opinion Mr. Marcano does not possess the mental capacity to transact business and to look after himself. I will recommend that his daughter Sandra Bovell be appointed a committee to look after his affairs.”

49. I repeat that Dr. Ghany’s conclusion set out in the report were entirely consistent with Sonia’s evidence as to what the family meeting had been arranged to consider. The specific recommendation that Sandra be appointed a Committee could only have been made after the doctor heard from either Sandra or Mrs. Mapp or both that this was what the family had agreed. It must have been requested in contemplation of Court proceedings. Further it is of significance that it is consistent with the questioned report of Dr. Tolba. Dr. Ghany found that he was definitely mentally impaired with a significantly worsening effect. He reported, *“in this condition at the date of the examination Mr. Marcano would not have been able to possess the mental facilities to appreciate the contents of a Will.”*

50. Dr. Ghany was cross-examined and gave this evidence. He had seen the patient’s medical reports from the Florida doctors. He had noted diagnoses of cognitive impairment including Dr. Tolba’s of severe dementia, but he was not influenced

by them. He had relied on his own assessment. Alzheimer's is initially a slow progressing disease – but it can become much more severe. When it was suggested that the results may have been skewed because Mr. Marcano recognised that he was being evaluated and had then become uncooperative (Sandra's story), Dr. Ghany answered that that did not happen.

51. The doctor continued; the disorder leads to a loss of insight – the patient does not know what is going on. He said that in any case Mr. Marcano was quite cooperative throughout. He was asked whether he prescribed medication. He did not because Mr. Marcano had already been prescribed Donapazil in Florida. He said this drug is commonly used in the treatment of Alzheimer's and dementia. His evidence on this was not challenged. The doctor explained that dementia is loss of cognitive functioning, the ability to make proper judgments and to assess situations.

52. In answer to whether the testator said anything about making a Will, the doctor said Mr. Marcano did not want to discuss his future. He said he had psychotic symptoms, he was paranoid – which is a symptom of the later stage of the disease. He confirmed too that Sandra herself had told him on her first visit that her father had cancer and was not mentally well. I accepted the evidence of Dr. Ghany as contained in his report and his findings. I find that Sandra was well aware of the mental incapacity to which she alerted Dr. Ghany and which she sought to and did in fact confirm. She had sought the consultation and report because she and all the family considered it necessary. When Dr. Ghany's report was eventually received,

Mr. Dolsingh wrote to her formally giving advice as to the steps which could be taken. He also indicated a fee. I find that Sandra took no further steps pursuant to the attorney's advice because she considered the cost too high.

Evidence of Alwyn Teddy Mohammed and Jennifer Durity/Incapacity

53. I accepted the evidence of Mr. Teddy Mohammed and his impression of the mental state of Mr. Marcano. Mr. Mohammed was the testator's close personal friend of thirty years. In December 2013, Mr. Marcano informed him he was not well and that he was going to Florida. Even at that time, Mr. Mohammed began to note that Mr. Marcano was having difficulty in fluency, there was delay in communicating he was forgetting and repeating things. By May 2014, he observed his friend's condition. He thought something was drastically wrong. Mr. Marcano's conversations had become less coherent. So moved was he – he caused Sandra to take a photograph which he exhibited. He noticed that his friend had begun to lose a significant amount of weight.

54. In August he took him for a drive to Santa Cruz where the testator had some lands which he had planned to develop. Mr. Mohammed noticed severe deterioration. He said it was impossible to carry on dialogue. By September, Mr. Mohammed recalled that he was unable to leave his bedroom. He described him as skin and bone. He was only mumbling. On one visit Mr. Mohammed sat at his bed side for about 10 minutes. There was no communication. He described it as heart breaking to see him in that condition. By October his condition was worsening and there was even further deterioration in November. Based on his observation Mr.

Mohammed concluded that the deceased was incapable of communication or of appreciating or understanding his deeds or actions.

55. Mr. Mohammed was cross-examined. He confirmed that he had a good relationship with Sandra. He had lived on the same street as Mr. Marcano for many years. When he saw Mr. Marcano in May, Sandra assisted him with his walking stick to come out to sit with him. From August to October his condition deteriorated. He last visited his friend in October 2014. He was all “skin and bone”. He refused to take a picture because he did not want to remember him like that. On that visit Mr. Marcano did not even know him. Sandra tried to wake him up and tell him, “Teddy” was, here but Mr. Marcano could not communicate. As far as he was concerned it was not because he was just sleeping. Mr. Mohammed was shown the photo that was taken 14th November 2014. His emotional pain when he was forced to look at it, was obvious. He said this was how his friend appeared in October 2014. He reiterated he knew both Sonia and Sandra and had no problem with either of them. I considered Mr. Mohammed to be an independent witness. No good reason has been proffered for my rejecting his evidence.

56. I also accepted the evidence of Jennifer Durity as independent. She had no interest to serve, has equal regard for the daughters of Mr. Marcano and nothing to gain from this. She had known him for over 30 years and had been employed by him since 1997. She remained a trusted and loyal employee and a friend until his death. Mr. Marcano discussed his personal and family life with her including his

relationship with his daughters. She was aware they had their ups and downs. She knew Rosanna to be his favourite daughter and her (Rosanna's) daughter Caitlan to be his favourite grandchild, whom he wanted to inherit the Valsayn property. She was clear however in her position that Mr. Marcano was on equally good terms with all his daughters including Sonia, even after his illness and in the later months of his life. He had never expressed any preference for Sandra any intention to benefit her solely or to the exclusion of the others.

57. Because she had worked so closely with him, I considered her evidence as to his mental health to be reliable. She had noticed some lapsing in memory since mid 2013. After the worrisome experience in November 2013, Mr. Marcano told her he had found out he had a tumor in his eye and that he was proceeding abroad. When he returned he did not regularly attend the office. In the early weeks he would call and he actually visited on about three occasions between the end of January and April of 2014. On those visits he appeared to be losing weight and was visibly weaker in his movements.

58. After the closure of the business Ms. Durity said she would visit Mr. Marcano at home. By June 2014, she noticed during her visits he would sit and gaze and talk about things that did not make much sense. He spoke about jobs long completed in some cases as many as 4 to 5 years before – as if he believed they were still ongoing. He asked about an HDC project which had been completed 4 years before. He “instructed” he wanted a cleaner Monica to go to do some cleaning on that site. He asked about renovation works which she had completed at her home

two years prior to that time. He said he had to visit her home to check on the workers. She concluded he was losing his memory. By the month of July, he was staring vacantly. He said he had been visited by another former employee Tricia when to her knowledge this was not true.

59. Between August to September 2014 Ms. Durity visited Mr. Marcano. She was accompanied by his former secretary, Jennifer Sargeant. She said “his words were even fewer and feebler.” She claimed that on one of those visits Sandra informed her that Cylma and her mother had been to see him and the deceased had not recognised her and was asking her (Cylma) “if she was a woman from Point”. This was not denied by Sandra, nor was it suggested to Ms. Durity that it was not true. In September 2014 during a visit she had to help feed him as he was too weak to feed himself. On another visit she and Ms. Sargeant were accompanied by a Mr. Huntley. He was a former business associate of Mr. Marcano’s and someone who was at some time closely associated with him. During the visit it was clear that Mr. Marcano did not recognise Mr. Huntley.

60. On her last visit in October he was only saying “yes” or “no” or “okay”, even then his responses were incorrect. Ms. Durity considered that his deterioration by that time had rendered him “mentally subnormal.” The last time she saw him in October 2014, he was lying on his bed and unable to speak. She did not return to his home after that, as she could not bear to see what he had become. When she heard that Mr. Marcano had made a Will in November 2014, she was shocked. Based on her observations of his condition she concluded he was simply not able

mentally or physically to express an intention or even to dictate a document. The cross examination of Ms. Durity was uneventful. Her testimony, as Mr. Mohammed's, was generally unshaken. There was no suggestion that she was anything but unbiased. She considered herself on equally good terms with Mr. Marcano's three daughters.

Evidence of witnesses of defendant/capacity

61. The evidence of the defendant to establish capacity other than her's and his family members came from Mr. Chad Allain who prepared the Will and Power of Attorney, Ms. Irena Paynter partner in the firm of J.D. Sellier and Company who took execution of a deed on the very day of the alleged execution of the Will and via a statement from Dr. Peter Bovell who saw him on 7th February 2014 at the Cancer Treatment Centre. Mr. Marcano also allegedly signed a document authorizing Dr. Nunes to sell a property they jointly owned on 12th November 2014. Also, it was not in dispute that on a date subsequent to the alleged date of the Will, Sonia the claimant, signed a document as a witness to her father's signature which concerned the sale of property.

62. I shall now indicate my findings of these. The statement of Dr. Bovell is dated 15th January 2016. It was made after these proceedings were started. In it Dr. Bovell said he saw Mr. Marcano on 7th March 2014 when he had just returned from Miami where he had been diagnosed. The doctor noted he was "alert and totally oriented in time, place and person, fully Compos Mentis". He believed that "Mr. Marcano

understood clearly the severity of his illness and he requested that he would like to be referred for treatment at the National Radiotherapy Centre”.

63. I have attached little weight to this statement, first, because the doctor has not provided a witness statement and in the circumstances the reliability of it has not been tested. Further, the assessment of Dr. Bovell does not fit with the defendant’s case and her evidence and that of Mr. Marcano’s sisters that Mr. Marcano was denying his illness and not accepting the terminal nature of his illness. It provides even less assistance to the defendant on the issue of the reason for the family meeting. In other words if as Dr. Bovell states Mr. Marcano was *compos mentis*, on 7th March 2014, then the evidence of the family meeting at the end of which a decision was taken to go to Court to have him declared mentally unfit, as defence counsel eventually conceded, simply makes no sense. The inconsistency is inexplicable.

64. I turn to the evidence of Ms. Irena Paynter, who saw Mr. Marcano on the very day that the alleged Will was executed when he attended the firm office’s to execute a deed of conveyance. He was driven there by Sandra. Ms. Paynter went down to the car to take execution. He was so frail he could not come into the building. In an attempt to deny the inference that he was too weak even to walk out of the car Sandra had stated that the lift was not working, but that was not true. Ms. Paynter spoke to him and explained what she was about to sign, she read it, she believed he understood what he was explaining, when she was finished she asked if he had understood it and he answered in the affirmative. Mr. Marcano had difficulty

holding the pen in the correct place but after several minutes of trying to place the pen in the correct position he manage to sign. She had dealt with Mr. Marcano on six previous occasions, the last of them being in or about 2005/2006.

65. Ms. Paynter had been asked to take execution of a deed on behalf of her colleague Mr. Villian who had prepared it, but was unavailable to do so. At all times the firm was acting on behalf of the purchasers. Mr. Marcano was the vendor. Ms. Paynter recognised that Mr. Marcano was very frail, it was obvious that this body was “shrivelled” and body mass was lacking. She had some conversation but the time was spent on the pen on positioning it. She said Sandra had to physically assist him. Both she and Sandra were pointing because he couldn’t see very well.

66. Ms. Paynter recalled speaking with him and that he was coherent, his speech was not slurred. She could not honestly remember the specifics of the conversation and one can well understand that. I should be surprised if other than to recall that execution took place in the car park, that she read the deed and he responded in the affirmative, Ms. Paynter could recall much more. Even in Mr. Marcano’s advanced state of mental decline, I believe he may have been capable of one word answers “yes”, “no” “ok”, etc, as Ms. Durity accepted he could do up to her last visit in October.

67. In assessing her evidence I have born in mind that Ms. Paynter was completely unaware of any mental incapacity. Sandra who was aware of it and of the previous observations of doctors in Florida 10 months earlier and of Dr. Ghany’s report, did not bring it to her attention. But more importantly, it has to be remembered that

the parties to this action have not sought in any way to impeach the deed which Mr. Marcano executed on 12th November 2014. Indeed it is accepted that he before his diagnosis Mr. Marcano himself and subsequent to it, his daughters on his behalf, had been engaged in negotiations for the sale of some of his real estate to liquidate his debts. At all times, both Sonia and Sandra were focussed on completing the negotiations with the bank and pushing forward with the agreements that had previously been entered into to clear the indebtedness.

68. I think it is fair to say that the daughters had this as a common goal. None of them was benefitting personally from concluding these transactions. They facilitated the arrangements when their father could no longer negotiate on his own. Not surprisingly therefore, concerns about his mental health, notwithstanding, the need to have the deed executed and the proceeds applied to the debt would have prevailed. Indeed the email sent on 14th January 2015 by Ms. Delia Clark-Ali confirms that the proceeds of the sale for the property which had been conveyed by that deed were applied to reduction of Mr. Marcano's over draft.

69. This provides a credible explanation as to why Sonia attended the offices of J.D. Sellier at the request of Mr. Villian to attest to her father's signature as a witness after the date of the agreement for sale and even after the date of the execution of the deed. It was all in an effort to follow through with the commitments to the bank. When Sandra introduced the document which showed that Sonia had witnessed her father's signature at a time when she (Sonia) claimed he was unable to transact business she sought to use it to establish that contrary to Sonia's claim

her father was in fact able to do so. When she was asked specifically whether she would have signed at Mr. Villian's request she agreed she would have done the same and I believe she would have done so, whatever the state of his understanding.

70. As to the authorisation to Mr. Nunes to sell, Sandra produced this document as further evidence that Mr. Marcano was *compos mentis* on the day that he executed the Will. The circumstances of the visit of Mr. Nunes as explained by her were that just after Mr. Allain the attorney had taken execution and left, Mr. Nunes and his wife visited. After some chit chat Mr. Nunes disclosed that he wanted Mr. Marcano to sign an authorisation to allow him to put a parcel of land that they jointly owned for sale. The first observation on that authorisation is that while the Will was allegedly executed on 12th November 2014 – the authorisation is dated 14th November 2014. This obvious discrepancy has not been explained. It leaves unanswered questions about whether Mr. Nunes did in fact visit on the day of the alleged execution.

71. I find it significant that Mr. Nunes a close friend of the testator who was relying on the authorisation for the sale, failed to provide a witness statement on the critical issue as to the testator's capacity on 12th November 2014. I am inclined to infer in the circumstances that there was no visit by the Nunes on 12th November 2014. The Republic Bank letter of Delia Clark-Ali dated 5th February 2014 which set out the liabilities of the company as well as Mr. Marcano's personally – did in fact refer to Mr. Marcano's indebtedness under the joint mortgage facility with Mr.

Harold Nunes. It is not difficult to imagine that consistent with the agreement to liquidate assets, Sandra would have facilitated the execution of the document.

72. Against this background the authorisation does not provide sufficient or any evidence of Mr. Marcano's mental capacity. I view it as a document which all concerned needed to procure, and again the parties have taken no issue with it or any transaction it may have been intended to facilitate. In a further attempt to persuade that Mr. Marcano was capable of transacting his business on his own, Sandra produced a document dated 7th July 2014 which she claimed was a power of attorney which the Republic Bank had caused her to sign in order for her to act on behalf of her father and to gain access to his accounts.

73. The document bore Sandra's signature and what she would have identified as her father's. The document is of no effect in this jurisdiction. On the face of it, it appeared to be in a form that is probably used elsewhere. She claimed that she had this power of attorney which the bank had produced for her but that she never used it. It is not surprising she did not use it – she could not legally do so. The parts of the form that required a signature of the Bank were not filled in by anyone. Sandra's reliance on this document and her evidence that she could have used it that the Bank requested and approved it did not improve her credibility. Yet another document signed by Mr. Marcano authorised the sale of part of a parcel of his Santa Cruz lands to repay his loans. This would have been in keeping with the general plan to liquidate the debts to Republic Bank. No issue was taken on his capacity in this regard.

Evidence of Attorney at law

74. Mr. Chad Allain who prepared the disputed Will also gave evidence of his assessment of Mr. Marciano's capacity. Mr. Allain had not known the Testator prior to 22nd October 2014 when he said Mr. Marciano was brought to an appointment by Mr. David Bovell, for a consultation at his home office. His account is that Mr. Bovell remained outside. Mr. Marciano walked in with him – he seemed to be a “little frail”, but he put that to aging although he believed that he was terminally ill from what he was told by his assistant earlier. Mr. Marciano in his words however, “was clear of purpose and did not hesitate in what he wanted or how he wanted it”. He had walked with his documents. “He presented a businessman's presence – he was attentive when needed and spoke authoritatively when he wanted to make a strong point. He wanted him to prepare a Will and a power of attorney. His voice was strong and clear. He said the deceased instructions were simple and clear. His legal responsibility was to make certain he had “animus testandi”. He found him to be lucid of mind and intention. He understood the extent of his estate and who his beneficiaries (potential or actually) were. He made brief notes while speaking to him.”

75. On 12th November 2014 he attended the testator's home at Valsayn with Kristy Alfonso his assistant. The gate was opened by Mr. Bovell – who came out and escorted them inside. The deceased sat up very upright at a round dining table.

One of his eyes was almost shut. He commented that he had just had his dinner. There was some light conversation with the defendant, who then disappeared into some other part of the house.

76. Mr. Allain said he reminded the deceased about his assistant and the reason for her presence. He gave the Will to the deceased and kept a copy which he read out to him. As he read the testator followed from the original. Mr. Marcano being satisfied that his instructions were followed – executed the Will in the presence of himself and his assistance. Thereafter he read out the power of attorney and the deceased executed it. He also gave the deceased certain legal advice based on his instructions and they left. Mr. Allain was very surprised when he heard the defendant called in about 12th December 2014 to say that the deceased had passed away. Prior to that date however the defendant had collected a certified copy of the power of attorney. He thought on 12th November 2014 that he looked physically a little frail, but he had looked so alert and business like. He really did not look so close to death.

77. Mr. Allain was cross-examined. Sometime in July 2015, Mr. Dolsingh had written a letter to Mr. Allain concerning the Will in which Mr. Dolsingh referred to a conversation which he allegedly had with him and to specific matters. Mr. Dolsingh's letter referred to an alleged statement by Mr. Allain that he was "unaware of any mental capacity". In detailed response dated 7th August 2015, Mr. Allain answered denying most of the allegations. He reiterated that when Mr. Marcano executed his Will and power of attorney he was conversational, coherent

and a bit humorous and that in his opinion he understood everything he was doing and it was consistent with his wishes and instructions.

78. It is on the issue of mental incapacity that Mr. Allain's response (which is not in dispute) is most material. He had this to say.

“When I interacted with Mr. Marciano I was never aware or had any reason to believe there was any mental incapacity. Mr. Marciano though ill seemed to be of sound mind when I interacted with him at the execution of the documents and before when I took his instructions. It is also my considered view that the genesis, circumstances, motivation and purpose of attempting to bring Mr. Marciano's mental capacity into question for some time now is itself questionable. I am informed that Mr. Marciano had strongly objected to that approach and had also expressed his disapproval and displeasure of the proposed process but co-operated due to the urging of his daughter Mrs. Marciano – Bovell whom he trusted.”

79. Sandra's evidence was that she was doing what the family wanted when she took her father to Dr. Ghany under false pretences. Indeed her father clammed up when Dr. Ghany started questioning him. He was uncooperative and further only after they had left the doctor's office he said “I know what you are trying to do”. In the circumstances, Mr. Allain's statement about the father's co-operation of “the proposed process” raises serious questions. If any issue of mental capacity had not been known to him at the date of the Will it would seem to me that the information highlighted in his response above could only have come from Sandra. It raises a further question as to whether and why he felt it necessary to confer with Sandra on her father's mental capacity before he responded to Mr. Dolsingh's letter and

the inconsistency in Sandra's story, if she did provide the one to the attorney which informed his response, this time with her father going along with the "proposed" process, only compounds her lack of credibility.

80. Under cross examination Mr. Allain said he knew Mr. Marcano was terminally ill. He looked frail and weak. He said he recalled his assets although a comparison between the note that he took and the inventory in the probate application filed by Sandra, and the details of the assets set out by Sonia in her evidence, disclose several omissions. He made no mention about Caitlan. Mr. Allain produced the notes he took during his meeting. He questioned Mr. Marcano about one eye that was shut, but the testator assured him he could see through the other. He placed his signature on the documents, he had a firm grip – he seemed normal.

81. Mr. Allain said he was unaware of the Florida medical notes which indicated memory impairment and mild cognitive impairment. When he was shown Dr. Ghany's report, he accepted that had he known of it before he took instructions from Mr. Marcano he would have considered the issue of mental capacity.

In answer to the Court when he was asked to explain why at page (2) of the Instructions, which read as follows:-

***“Sandra Marcano – Bovell – sole beneficiary –
“she will do everything he wants”***

He was as whether he knew what Mr. Marcano wanted –

In the course of his answer Mr. Allain said,

“He would have indicated to me that he had no dislike and had no intention to disinherit anyone”.

The effect of the Will is indeed, as has happened, to disinherit Rosanna and Sonia.

His note also reads at No. (4)

Sandra has been helping him manage finances/debts want her to have everything to be able to deal with his situation.

82. Mr. Allain’s evidence comes closest to an attempt on the part of the defendant to elicit positive evidence to establish his mental capacity. I am very slow to come to a finding that I must reject this attorney’s evidence but I prefer the compelling evidence of Ms. Durity, Mr. Teddy Mohammed and Dr. Ghany as to the loss of mental capacity. The description of Mr. Marcano walking in and out without assistance into Mr. Allain’s office, given what I have found to be his extreme frail physical condition is less credible as is the evidence that Mr. Marcano could have sat up and given instructions as Mr. Allain has described.

83. The instructions which were produced during cross-examination and the specific statement from Mr. Allain that Mr. Marcano did not want to disinherit his daughters raised about as to whether he understood what appeared in the notes or what he was saying. The Will does in fact disinherit his daughters. But I shall deal with this in more detail when I come to consider the issue of want of knowledge and approval of the contents of the Will.

84. The Will was allegedly executed on 12th November 2014 sometime in the evening. By that time Mr. Marcano would have already had a trip down to the offices of Sellier and Company to execute the deed. As Ms. Paynter confirmed he could not even get out of the car. She facilitated him by taking execution in the car park. He could not focus properly to sign the deed. Placing his hand on the document for his signature took some time – in fact Ms. Paynter candidly agreed, it took most of the time, Sandra had to physically hold his hand with the pen and place it on the spot. The photograph which was taken two days later shows the extent of the physical frailty. I accept the evidence of Sonia that he could barely open his eyes or communicate on that day as well as the evidence of Ms. Durity and Mr. Mohammed that neither of them could bear to see him because of the decline and what he had become by October.

85. Against this I have the evidence of Mr. Allain, first that Mr. Marcano walked on his own at his home, when he first visited him on 22nd October and that he was able to communicate his instructions. Further that he went to the home on 14th November met him sitting upright at the table, he said he had just had dinner, laughing and chatting. It just seems incredible. What is even more incredible is the description of Mr. Marcano signing “normally”. This too is completely inconsistent with the picture described by Ms. Paynter, of what transpired earlier that day on the signing of the deed. While it is true that he was seated in a car, it was never suggested that any hesitation or awkwardness arose from his position in

the car. Ms. Paynter was clear that it took him quite a while to see where he was to sign – some minutes. He had difficulty in holding the pen.

86. Mr. Allain's and the defendant's credibility on this issue has not been helped by attempt to establish that on the very night he signed the authorisation to sell in Mr. Nunes favour which I reject. This was really a case of too much. I do not believe Mr. Marcano was able to read any document on his own on 12th November 2014 or to follow and understand it while it was being read. In her anxiety to show that he signed yet another document on the very night after Mr. Allain's visit, the obvious discrepancy of the date of the document seems to have escaped the defendant. In the absence of any explanation for it, I inclined to infer that Mr. Marcano's signature was procured at some time because this document was considered necessary to meet the bank's demands. I emphasize no issue is taken with that. I have come to the conclusion that Sandra's evidence of yet another visit and business transaction on 12th November 2014 was intended only to embellish her story regarding her father's capacity.

87. I find that Mr. Marcano was not mentally capable of giving instructions for a Will on 22nd October 2014 and that he did not have testamentary capacity well before that time. I find that on 12th November 2014 there is the clearest evidence of lack of capacity and unsoundness of mind by reason of his illness.

Want of knowledge and approval

88. The other issue raised in this matter is the testator's want of knowledge and approval of the contents of the Will. It follows that if Mr. Marcano lacked mental

capacity he could not have known and approved of the contents of his Will. I shall treat this issue separately in the event that I am found to be wrong on the issue of mental capacity.

89. The principles of law which were enunciated in *Barry v. Bultin (1838) 2 Moo PCC 480* and *Fulton v Andrew (1875) LR 7 HL 448* and *Tyrrell v. Painton (1895) 1 Q.B. 202* have long been accepted and applied in our jurisdiction in the case of *Moonan v. Moonan (1963) 7 WIR 420*. The basic propositions as they apply in this case are: -

- (1) The burden lies on Sandra to satisfy the conscience of the Court that the Will dated 12th December 2014 was indeed the last Will of her father who was a free and capable testator. The standard of proof is the civil standard;
- (2) If it is found that Sandra was instrumental in the framing of the Will of 12th December 2014 in which she is not just a beneficiary but a sole beneficiary, there is a further burden on her. She has to demonstrate the righteousness of the transaction;
- (3) In any case even if she was not instrumental in or concerned in the preparation of the Will, if there are circumstances which excite the suspicion of the Court, then it is for Sandra to remove the suspicion and to prove affirmatively that her father knew and approved the contents of the Will.
- (4) Wherever a Will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the

testator, the Court ought not to pronounce in favour of it unless the suspicion is removed.

90. I have said before that I found that Mr. Marcano to be suffering from such impairment of his memory and understanding that he was incapable of making a Will. But short of such a finding of mental incapacity I am satisfied that there was sufficient weakness in Mr. Marcano caused by his terminal illness and extreme frailty. He died one month to the day after the alleged execution of the Will. The proximity of the two events is a circumstance which raises suspicion. He was obviously critically ill at the time of the execution. He was generally confined to his home, his personal needs were being attended to by his sisters and caregivers. By about June he was in disposable diapers. Following his diagnosis Sandra who resided abroad, began to return more frequently to Trinidad. She began to stay at the home with him with the tacit agreement of her sisters and to assume control over his care and business affairs. This was expected under their family arrangements. But those circumstances too have further excited my suspicion. She, clearly of the sisters, had the most access to him.

91. While she attempted to distance herself from the preparation and execution of the Will, I was not impressed. On the evidence I found that she was very much concerned and indeed instrumental in the production of the Will. Sandra is the person who called Mr. Allain, an attorney who had no previous dealings with her father. Mr. Marcano was a business man who had until November 2014 had dealings with Sellier and Company in the completion of the sale of his lands. According to Ms. Durity, his usual lawyers, were his friend Mr. Dolsingh and Mr.

Al Roberts and he would generally use lawyers in Port of Spain. Sandra claimed that her father had asked her to find a lawyer because he wanted to “sort out his affairs”. When she was pressed about why she did not take him to his regular lawyers, she said he wanted a different lawyer. I was not convinced.

92. The defendant failed to dispel the suspicion of the Court and the following demonstrate how the suspicion only grew. Mr. Allain gave evidence of his meeting with the testator. He said he had been brought to the appointment by Sandra’s brother-in-law who remained in his vehicle. In the course of his cross examination Mr. Allain for the first time produced the brief notes of the instructions he allegedly took during the consultation. The production of this document did not dispel the suspicion. The notepaper is dated 22nd October 2014, the day of the meeting. The first paragraph referred retrospectively to the circumstances of the referral which had allegedly taken place two days earlier and which for some reason referred to the previous advice that had been given “to walk with identifications and all relevant documents”. This raised a question in my mind as to why this would have been necessary if Mr. Marcano had indeed attended with his documents on 22nd October 2014. The note reflects instructions to prepare a Will and a Power of Attorney.

93. Mr. Allain stated in his evidence in chief that: -

“it was only during our meeting that I noticed that something was wrong with one of his eye. One of his eyes (cannot recall which one) was almost shut. The deceased did seem to me a little frail, but I put that to aging although

I believed that he was terminally ill from what I was told by my assistant. (para 9).

I have in the past dealt with terminally ill clients and knew that many felt offended if you tried to explore their illness or make any issue of it whatsoever.

This left the impression that there was no discussion with the testator about his health.

94. At the second paragraph or section of Mr. Allain's note, he wrote: -

***"Has cancer which has affected one eye."
Further on he wrote "plagued by ill health and financial problems."***

If he did not pry because he did not want to offend Mr. Marcano – and if he had only been told by Kristy that the client was terminally ill, this information in the note that cancer had affected his eye and that he was plagued by ill health could not have found its way in the contemporaneous note. It is more likely that it came from Sandra

95. Mr. Allain was asked in cross examination about the fee he was going to charge Mr. Marcano. He said he offered to do it "pro-bono" because he empathised with Mr. Marcano and felt moved to assist him. Indeed he said he was so moved that he said he did not eventually charge a fee. He was then referred to paragraph 17 of his witness statement in which he gave the impression that on the day of the execution the "deceased completed the transactions by making a payment."

Indeed at page (3) of the note he had written pro-bono. But then a note appeared on a separate sheet:

“\$5000 received from Mr. Marciano and an office copy of POA collected.”

In answer to the Court, Mr. Allain then said that when he had attended his office on 20th October 2013 he had indicated that a fee for such services would be \$4500 to \$5000. He then said when he went to take execution he was told by Mr. Marciano that arrangements would be made for the payment of his fees.

96. So careful was Sandra to distance herself from the preparation of the deed and the Power of Attorney, that according to her story she was unaware of what transpired when Mr. Allain visited the testator on 12th December 2014. She did not know of the Will nor of the Power of Attorney, under which she was to assume control of her father’s affairs. The secrecy in relation to the power of attorney has not been explained. I consider that this was taking the attempt to distance herself from the preparation of the documents too far.

97. When Mr. Allain was confronted with the note that he received \$5000.00 from Mr. Marciano he answered that Sandra called the office, enquired if he was there, she dropped off a package and it contained \$5000.00. She also collected the office copy of the POA. This, when she maintained she knew nothing about the Will or the POA until after her father’s death. I consider the inconsistency between the

evidence of Mr. Allain and Sandra on this matter of payment for the legal services, the Will and the POA and the lack of clarity as to when and how this fee was fixed and paid, raised further suspicion that it was more likely that Sandra was the one who paid for the documents as they were prepared on her instructions.

98. The evidence established, and Sandra admitted that at a meeting in January 2015 with Sonia and Mr. John Tang Nian when she was asked if she knew Mr. Allain she said that she did not. I accept Sonia's evidence that she said too that she had no contact number or address for the attorney and that their father was taken away from his home to an unknown destination and she did not know who had made the arrangements for the Will. In her response on that allegation Sandra explained why she said she did not know Mr. Allain which I reject. What she failed to deny and it is significant is the rest of what Sonia claimed in that conversation that is that in effect she was unaware of how and where he could have met with the lawyer to give instructions. This is completely inconsistent with her case that she had been referred to Mr. Allain by Ms. Boodoosingh who called his office, greeted and received him at Valsayn on 12th November 2014 and with his evidence that she visited his office to pay \$5000.00 and collected the office copy of the POA which he had prepared. Her reaction when she was first confronted with the Will and Mr. Allain's involvement and her attempt to distance herself further excited the suspicion that this was not a transaction that could withstand scrutiny. Why if Mr. Allain had prepared a POA on the same day of the Will would she hide the fact that she had collected an office copy of it and had paid money on her father's behalf.

99. Sandra did not tell Mr. Allain or alert him to the diagnoses that had been made regarding her father's memory impairment nor indeed to the fact that she had herself taken him to Dr. Ghany for a psychiatric assessment. Given the extent of her participation in the family meeting and what followed, I consider her failure to alert Mr. Allain to be another suspicious circumstance.

100. Several questions were asked by me on his note. When he was asked what did the "sole beneficiary" along with the words "she will do everything he wants" mean, Mr. Allain said specifically that Mr. Marcano expressed no dislike nor did he get the impression that there was any intention to disinherit anyone. He said nothing about his other daughters other than that Rosanna was abroad and could not assist and Sonia was the youngest. He mentioned nothing about anyone of them treating him badly, nor did he give any reason for favouring Sandra. If Mr. Marcano did indeed give instructions, the note and Mr. Allain's evidence raises a question as to whether the testator was clear on the difference between putting Sandra in charge and giving her everything. Mr. Allain said he wanted Sandra to have everything to deal with his situation, to manage his affairs. He was very concerned that he could lose the Valsayn home.

101. This leads to the question of the terms of the Will itself. It makes provision for Sandra only. In that regard it is so much at variance with his previous declarations and known affections. Neither the Will nor Mr. Allain's notes makes mention of his granddaughter Caitlan whom it is known was the love of his life. According to Ms. Durity he had always said the Valsayn property was to be left

for her. The Will was made after there had been a falling out over allegations that Sandra had been abusive to Caitlan. The omission to make provision is more consistent with Sandra's feeling toward her, than her grandfather's toward Caitlan.

102. Mr. Marcano loved his daughters and though Rosanna was known to be his favourite, no provision was made even for her. I reject the attempts, belated as they are, to explain this omission on the basis of some break in the relationship because she did not visit her father during the period of his illness. I believe that Mr. Marcano would have known that Rosanna's immigration situation did not allow her to return to Trinidad since she left. I accept the evidence of Jennifer Durity that during his illness Sonia visited him till the final month. I have rejected the attempt by Sandra and the aunts to exaggerate the effects of the quarrel with her father in 2012 over Cylma.

103. The failure to make provision for the three girls and Caitlan is inconsistent with his known affections even on the evidence of Sandra's witnesses. Under cross examination Roxanne George claimed to know of breakdown in relationship between Sonia and her father, but had no knowledge of anything regarding Rosanna. At the Radiology centre on one occasion he asked her who should be in charge of his business. She understood Sandra was going to be in charge of his business. Marion Mapp accepted Stephen was very fond of Caitlan and supported her financially. Mrs. Mapp said Stephen talked about making a Will in September. From what he said she understood Sandra would be in charge of his business and the other sisters would not be left out.

104. The terms of the Will also depart from the early Will which made equal provision for the three daughters. Significantly that Will also made provision of a life interest in a certain property for Mr. Marcano's former wife from whom he would have been separated over fifteen years before. This reflects on the kind of man that Mr. Marcano was under the exterior. Against this evidence and that of her own witnesses, Sandra has fallen far short of establishing the righteousness of the provisions of the November Will.

Disposition /Order

105. The Court declares that Stephen Bertie Marcano was not of sound mind, memory and understanding at the time of the purported execution of the Will dated 12th November, 2014, alternatively the Court declares that the testator did not know and approve the contents of the said Will.

IT IS ORDERED THAT

1. Probate of the Will dated 12th November, 2014 is refused.

2. The Defendant is personally to pay the costs of the trial on the prescribed basis on the value of the claim which is to be taken on the inventory of the estate in the sum of Eleven Million Nine Hundred and Forty Five Thousand dollars (\$11,945,000.00).

3. The injunction granted on 28th October, 2015 restraining the Defendant whether by herself her servants and/or agents from disposing of, using for her personal benefit or otherwise dealing with the property of the estate of the deceased STEPHEN MARCANO also known as STEPHEN BERTIE MARCANO, late of 39 Windsor Road, Valsayn North, Valsayn, in the Republic of Trinidad and Tobago, who died on the 12th day of December 2014 at 39 Windsor Road, Valsayn North, Valsayn, in the said Republic, hereinafter referred to as ("the deceased") is to continue.
 - a) The Defendant shall provide a full account of all assets of the estate of the deceased (including but not limited to all assets and stocks of Contractors and Decorators Ltd., and the proceeds of sale of motor vehicle bearing registration number TCJ 3119).
 - b) The Defendant shall allow the Claimant to have full and free access to the property situate at No 39 Windsor Road, Valsayn North, Valsayn.

FURTHER ORDERS

IT IS ORDERED that Paragraph 2 of the order dated 6th February, 2017 is amended to read as follows:

4. The Defendant is personally to pay 40% of the costs of the action on the prescribed basis value of the claim which is to be taken as the estate on the

inventory in the sum of Eleven Million Nine Hundred and Forty Five Thousand dollars (\$11,945,00.00).

IT IS ALSO ORDERED that the Defendant is to pay the costs of the application for the injunction filed on 15th October, 2015 and granted on the 28th October, 2015 to be assessed by this Court in default of agreement.

Dated this 9th day of February 2017

**JUDGE
Carol Gobin**