IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2019-00763

IN THE MATTER OF THE ADMINISTRATION OF THE ESTATES ACT CHAP. 9:01 AS AMENDED

AND

IN THE MATTER OF THE ESTATE OF WALLY OLIVER OTHERWISE WALLY PETER OLIVER DECEASED LATE OF 6-9 SOVERALL ROAD OFF SCHOOL STREET CARENAGE, DIEGO MARTIN,

WHO DIED ON THE 16TH DAY OF JANUARY 2012, AT 592 SW PRATER AVENUE PORT ST. LUCIE, FLORIDA, UNITED STATES OF AMERICA

BETWEEN

NANIENO LA FLEUR

(The Legal Personal Representative of the estate of WALLY OLIVER otherwise WALLY PETER OLIVER, deceased)

Claimant

AND

CLINTON BREWSTER

First Defendant

MARION OLLIVERRE

Second Defendant

NADIA LYONS

Third Defendant

ANTHONY OLIVER

(One of the beneficiaries of the Estate of Wally Oliver otherwise Wally Peter Oliver, deceased)

Fourth Defendant

AND

OLGARENE EARLINGTON also known as OLGARENE OLIVER

First Defendant to the Counterclaim

AND

HUBERT OLIVER also known as SAMUEL OLIVER

Second Defendant to the Counterclaim

Before the Honourable Mr Justice Frank Seepersad

Date: 21 June 2021

Appearances:

1. Ms Dawn G Seecharan, Attorney-at-law for the Claimant.
2. Ms Raisa Caesar instructed by Ms Zelica Haynes-Soo Hon, Attorneys-at-law for First, Second, Third and the Fourth Defendants.
3. Ms Marielle Cooper-Leach, Attorney-at-law for the First Defendant to the Counterclaim and Second Defendant to the Counterclaim.

DECISION

1. Before the Court for its determination is the Claimant's Amended Fixed Date Claim Form and Amended Statement of Case filed on 30 April 2019 by virtue of which the Claimant sought the following relief :
    a. That the First, Second and Third Defendants do deliver up vacant possession of the following apartments to the Claimant within 30 days of the order of the Court, that is to say:
        i. That the First Named Defendant do deliver up vacant possession of Apartment #2, 6-9 Soverall Road, Off School Street, Carenage;
        ii. That the Second Named Defendant do deliver up vacant possession of Apartment #3, 6-9 Soverall Road, Off School Street, Carenage;
        iii. That the Third Named Defendant do deliver up vacant possession of Apartment #4, 6-9 Soverall Road, Off School Street, Carenage.

        The said apartments are situated on that piece of land situate in the Ward of Diego Martin in the Island of Trinidad and Tobago, comprising 9824 square feet be the same more or less delineated and coloured pink in the plan registered in Volume 1821 being portion of the lands described in the Certificate of Title in Volume 1573 Folio 411 and shown as Lot 2 in the General Plan filed in Volume 1821 Folio 229 and bounded on the North by Road Reserve 20 feet wide and on the South by lands of FB Masson now heirs of Savary on the East by Lot 6 of Alexandrine Roberts and on the West by Lot 1 ("the said lands").

b. That the Fourth Named Defendant do provide the Claimant with a Statement of Accounts of all income collected by him, his servants and or agents from tenants of the Deceased's apartments and all expenditure in relation to same from 16 January 2012 to present.
c. That the Fourth Named Defendant do provide the Claimant with copies of all tenancy agreement and receipts in respect of the rental of the Deceased's Apartments.
d. That the First, Second and Third Named Defendants do provide the Claimant with copies of all tenancy agreements and receipts in respect of their respective rental of the Deceased apartments.
e. That the Fourth Named Defendant do cause to be paid to the Claimant all sums due to the credit of the estate of the Deceased from the rental of the Deceased's apartments.
f. That the Defendants do jointly and severally pay the costs of this application to be taxed in default of agreement.
g. Further and/or other relief as the Court may deem just.

2. By way of counterclaim the Fourth Defendant claimed as against Olgarene Earlington also known as Olgarene Oliver ("Olgarene") and Hubert Oliver the following relief:
    a. A declaration that the 2010 will was obtained by fraud or undue influence and is a forgery.
    b. Alternatively, a declaration that at the time of executing the 2010 will, Wally Oliver deceased was not of sound mind, memory and understanding and/or did not know and approve its contents.
    c. Alternatively, a declaration that the 2010 will was not duly executed and/or that there are sufficient discrepancies and suspicious circumstances attendant upon the 2010 will that it would be unsafe and unjust to allow it to be continued to be probated.

d. A declaration that the Letters of Administration with will annexed granted in probate proceedings Nos. L-1618 of 2013 on 14 February 2014 and L-1732 of 2015 was obtained by fraud and is hereby revoked.
e. A declaration that the last will and testament of Wally Oliver deceased is the 2006 will.
f. An order pronouncing for the force and validity of the 2006 will in solemn form.
g. An order pronouncing against the force and validity of the 2010 will.
h. An order that the probate of the will of Wally Oliver dated 21 September 2006 be granted to the Fourth Named Defendant, the executor named therein.
i. A grant to the Fourth Named Defendant of Probate of the will dated 21 September 2006 in the estate of Wally Oliver, deceased.
j. An injunction restraining the Claimant and the and/or the Second Named Defendant to the Counterclaim whether by themselves, their 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 Wally Oliver, deceased.
k. An injunction restraining the Claimant and/or the Second Named Defendant to the Counterclaim whether by themselves, their servants, agents or otherwise howsoever from receiving or making any demand for rent, profits, dividends, interest or other sum accruing to or becoming due to the estate of Wally Oliver, deceased.
l. An account of all sums received by the Claimant and/or the Second Named Defendant to the Counterclaim on account of the Estate of Wally Oliver, deceased from the 16 January 2012.
m. Costs.
n. Such further and/or other relief as the Court may deem just or as the nature of the case may require.

The Claimant's Facts:

3. The Claimant was appointed as the lawful attorney of his uncle Samuel Oliver, otherwise Hubert Oliver ("Hubert"), by Power of Attorney dated 6 November 2014. Hubert was

named as the sole executor in the last will and testament of Wally Oliver otherwise Wally Peter Oliver ("the deceased") dated 31 August 2010 and the deceased died on 16 January 2012.

4. On 23 October 2015 the Claimant obtained a Grant of Letters of Administration with will annexed in the estate of the deceased for the use and benefit of Hubert until he is able to come in and apply for and obtain a grant of probate in the estate of the deceased.

5. At the time of his passing, the deceased was the owner of the said lands together with the buildings thereon and the property was subject to a mortgage in favour of First Citizens Bank Limited.

6. After obtaining the Grant of Letters of Administration with Will annexed, the Claimant made enquiries as to the occupants of the said lands and discovered that the First, Second and Third Defendants resided in various apartments in one of the buildings located on the said lands, pursuant to a tenancy agreement with the Fourth Defendant, who was also resident there.

7. Under the 2010 will, the deceased devised and bequeathed Apartment 1 to the Fourth Defendant and the Fourth Defendant had no right to enter into possession or tenant the entirety of the buildings on the said lands.

The Defendants' Facts:

8. The First, Second and Third Defendants pleaded that the apartments on the said lands were not numbered and that at various dates in 2016 and 2017 they entered into rental agreements with the Fourth Defendant and they remained in occupation as monthly tenants. The Fourth Defendant outlined that he is the named executor in the deceased's last and testament made in 2006.

9. The deceased was married to Sybil Oliver with whom he had Heather Oliver and the Fourth Defendant. He also had four other children outside the said marriage namely,

Hubert Oliver, Keith Oliver, Tressa Oliver and Laura Oliver-Friday (now deceased). At the time of his death, the deceased was remarried to Olgarene Oliver with whom he had no children.

10. The Fourth Defendant and his sister lived on the said lands with their parents until 1968. In 1979 the Fourth Defendant migrated to the USA where he lived with his mother. In 2004 the Fourth Defendant got married to Marilyn Oliver and he returned to this country and lived on the said lands with his family. The deceased often visited Trinidad and together with the Fourth Defendant, they took care of the said lands. In 2005 the deceased was injured by his son Keith and was flown to a hospital in the USA.

11. On 21 September 2006 the deceased executed his last will and testament which was witnessed by Mr Netram Kowlessar, Attorney-at-law and his secretary (the 2006 will). The deceased also executed a power of attorney on the 11 October 2006.

12. The Fourth Defendant remained in Trinidad between 2006 to 2009 during which time he expended monies for the renovation of the buildings upon said lands. In 2008, he together with the deceased, secured a mortgage for a period of 15 years with First Citizens Bank Limited and the Fourth Defendant was personally liable for the repayment of same.

13. In relation to the 2010 will the Fourth Defendant pleaded that it was obtained by undue influence or fraud and was not duly signed by the deceased. Furthermore, this defendant contends that at the time the 2010 will was executed, the deceased was not of sound mind, memory or understanding. He also pleaded that the deceased did not know or approve its contents and that it was signed under suspicious circumstances namely, *inter alia*, it was prepared in Trinidad but signed in the USA. He further pointed out that there are numerous errors in the will as names were referenced incorrectly and pointed to the fact that apartments which are housed in a building on the said lands were never numbered but the 2010 will referenced numbered apartments.

Fourth Defendant's Counterclaim against Olgarene Oliver and Hubert Oliver :

14. The Fourth Defendant contends that the last will and testament of the deceased is the 2006 will in which he was named as sole executor and he maintains that the 2010 will is invalid.

15. Prior to the purported execution of the 2010 will, the deceased was admitted to a hospital in Florida and was at all times in the care of Olgarene.

16. The deceased's daughter, Laura Friday (now deceased), obtained Letters of Administration with Will annexed in Probate proceedings L-1618 of 2013 for the use and benefit of Hubert Oliver but she died without administering the estate of the deceased which led to the Claimant's grant of Letters of Administration with will annexed in Probate Proceedings No. L-1732 of 2015. The Fourth Defendant claimed that both these letters of administration were obtained by fraud.

17. The Fourth Defendant alleged that the Defendants to the Counterclaim had knowledge that the deceased's signature on the 2010 will was forged. In addition they together with the Claimant had knowledge that the deceased was unduly influenced when the 2010 will was executed and at the time he was not of sound mind. The Fourth Defendant further noted that the Defendants to the counterclaim failed to obtain the requisite medical reports in relation to the deceased's mental health and outlined that the 2010 will was not read over to the deceased who did not understand or approve the contents of same.

Claimant's reply to the Fourth Defendant's Defence:

18. The Claimant pleaded that Mr Colin Cushnie, Attorney-at-law based in the USA indicated, by email, that the 2010 will was executed in his presence and that of his paralegal and that the deceased was of sound and disposing mind and memory. Furthermore, enquiries were made of Mr Mark Laquis, Attorney-at-law from the firm of Pollonais, Blanc, de la Bastide & Jacelon regarding the preparation of the 2010 will . By letter 3 September 2019 Mr Laquis stated that Olgarene wrote to his office on the advice of Mr Cushnie, forwarded a copy of the 2006 will and thereafter the deceased's daughter, Heather, contacted him and outlined that she discussed the 2006 will with the deceased and he agreed that it needed to

be changed. Instructions were issued and the 2010 will was prepared and subsequently sent to Mr Cushnie via FedEx courier, for execution.

The 2006 Will and the 2010 Will:

19. By the 2006 will the deceased outlined, *inter alia*, that Anthony Oliver, the Fourth Defendant, was the sole executor, or Heather was to be sole executrix in the event Anthony predeceased him. The properties on the said lands were bequeathed to both Anthony and Heather and the residual clause listed the other beneficiaries as "Hubert Oliver, Keith Oliver, Tressa Oliver, Laura Oliver-Friday and Gail Walker".

20. By the 2010 will the deceased provided *inter alia* : Samuel Oliver was appointed sole executor and trustee and in the event he predeceased the deceased, Heather Oliver Aaron was to be the sole executrix and trustee. The building on the said lands was to be distributed as follows: to "Anthony Oliver" (Apartment 1), "Keith Oliver and Laura LaFlare Oliver" (Apartment 2), "Gail Oliver and Trisha Oliver" (Apartment 3), Apartment 4 to his trustee and the family house was given to Heather for her absolute use and benefit.

The evidence:

21. The Court virtually heard evidence from the following persons namely, Mr Nanieno La Fleur, Mr Netram Kowlessar, Mr Glenn Parmassar, Ms Marylin Oliver, Mr Anthony Oliver, Mr Colin Cushnie and Ms Olgarene Oliver.

22. On 25 May 2021 a supplemental witness statement was filed by Olgarene Oliver however the Court disregarded its contents and the witness was not cross examined upon same.

Issues to be determined:

23. Based on the pleadings and the adduced evidence, there is no contest with respect to the execution and validity of the 2006 will but the Court has to resolve the following issues so as to determine whether the 2010 will ought to be propounded:
    a. Whether the execution of the 2010 will was the product of the undue influence of Olgarene Oliver, Heather and/or Hubert Oliver.
    b. Whether the circumstances and facts regarding the preparation and execution of the 2010 will gives rise to suspicion that the 2010 will did not express the will of the deceased or that same was not executed by him.
    c. Whether the deceased had the requisite testamentary capacity at the material time to execute the 2010 will.

Resolution of the issues:

Issue 1: Whether the execution of the 2010 will was the product of the undue influence of Olgarene Oliver ,Heather and/ or Hubert Oliver.

24. Wooding CJ (as he then was) in **Moonan v Moonan (1963) 7 WIR 420** confirmed that the burden to satisfy a court that a contested Will was lawfully executed rests upon the proponent of the Will and at page 421 Wooding CJ stated that:

> "It is a common place proposition of law that undue influence must not only be specifically alleged but also affirmatively proved. And the essence of undue influence is coercion - coercion inducing the making of the dispositions by the Will under challenge".

25. Hamel-Smith JA in **Jagoo v Jagoo (2000) 61 WIR 388** described undue influence as follows:

"According to Kerr on Fraud and Mistake (7th Edn) p 223, the principle on which the courts act is not confined to cases where fiduciary relations can be shown to exist. It extends to various relations where dominion may be exercised by one man over another, and applies to every case where influence is acquired and abuse, or where confidence is reposed and betrayed. In cases where a fiduciary relation does not subsist, presume confidence put and influence exerted; the confidence and influence must in such cases be proved extrinsically".

26. The Court also considered the approach taken by the English Court in **Edwards v Edwards [2007] EWHC 1119 (Ch)** where at paragraph 47 the Court stated, *inter alia*:

"47. …

(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' sake to do anything. A "drip drip" approach may be highly effective in sapping the will."

…

27. The evidence suggests that Olgarene and the deceased had a loving and healthy marriage. Under the 2010 will, the said lands and the buildings thereon were left for the deceased's children and Olgarene received no gift in relation to same. Olgarene testified that the deceased told Heather, in her presence, that he did not think he "did right in Trinidad" in relation to the 2006 will. The 2006 will named the Fourth Defendant and Heather as the

primary beneficiaries. Olgarene testified that it was the deceased who took the initiative to talk to his daughter about the will. She accepted however that she did express to the deceased, as she was entitled to, that she didn't think that the 2006 will was fair and that as a father, he should consider leaving something for all his children.

28. This witness instilled in the Court a feeling, that she was respectful of her husband's ability to dispose of his assets and based upon her disposition the Court felt that it was unlikely that she nagged her husband or demanded him to adopt her views. In fact the witness impressed the Court and it formed the view that she was as a traditional and forthright woman who loved and supported her husband. The Court having seen the witness and having reviewed the entirety of her evidence is resolute in its view that this spouse had neither the inclination nor capacity to exercise dominance over the deceased.

29. Around 2010 the deceased's health deteriorated but there is no evidence to suggest that he was incapacitated, weak, broken by infirmity or that his wife pressured him as she manipulated his condition so as to impose her will upon him or that he caved in to ensure his peace of mind. Olgarine's aura, calmness, candour, common sense, level headedness and empathy was patently evident. This witness seemed to be the model of decorum and "old fashion family values" and she instilled in the Court the feeling that she was not the type of wife who would overstep her bounds, pressure or sap her husband's will nor would she exploit or betray her husband's reliance upon her for support and comfort. Apart from her impressive demeanour, the Court also felt that it was unlikely that she exercised dominion over the deceased as the evidence suggests that the deceased was very much his own man. He travelled to Trinidad for extended times, without his wife and he did not include her in decisions such as the mortgage over the subject lands, possibly because same was seemingly not viewed as joint marital asset. The evidence revealed that Olgarene had no personal interest in the deceased's Trinidad properties and first saw same when she made her first visit to Trinidad after her husband's death as part of his last rites.

30. During the period leading up to the preparation and execution of the 2010 will, Heather was at a remote location and had no physical contact with the deceased and it is unlikely that she could have exercised any undue influence over the deceased and she did not have the required access to enable her to sap the deceased's will. There is also no evidence to suggest that Hubert exercised any undue influence over his father.

31. The evidence revealed that Olgarene and the deceased went to Mr Cushnie's office for him to prepare the deceased's will but when Mr Cushnie realized that the deceased's assets were in Trinidad he advised that a Trinidadian lawyer was needed. The evidence also established that the deceased did not know Mr Cushnie's contact information however, Mr Cushnie handled a previous personal injury matter for Olgarene and the deceased accompanied her to several appointments. Olgarene testified that Mr Cushnie subsequently moved his office and so she gave the deceased his contact information. She also testified that the deceased called the lawyer but she drove him to the appointment. The Court saw nothing wrong with this circumstance, as it is likely that an aging and ailing husband would discuss with his wife, his intentions for estate planning and it is understandable that one would seek out an attorney with whom one was familiar. The Court also formed the view that Olgarene's attendances at Mr Cushnie's office was due to her constant support of her husband especially since the deceased stopped driving after he fell ill in 2010 and she became his driver. In the circumstances the Court formed the view that her presence at Mr Cushnie's office was not indicative of any infliction of undue influence, by her, upon the deceased.

32. Consequently, this Court is resolute in its view the 2010 will was not the product of undue influence.

Issue 2: Whether the circumstances and facts regarding the preparation and execution of the 2010 will gives rise to suspicion that the 2010 will did not express the will of the deceased and or that same was not executed by the deceased.

33. In **Battan Singh and Ors v Amirchand and Others [1948] AC 161** at page 169 Lord Normand stated:

> ""Their Lordships are further of opinion that the principle enunciated in Parker v. Felgate (I) should be applied with the greatest caution and reserve when the testator does not himself give instructions to the solicitor who draws the will, **but to a lay intermediary who repeats them to the solicitor. The opportunities for error in transmission and of misunderstanding and of deception in such a situation are obvious, and the court ought to be strictly satisfied that there is no ground for suspicion, and that the instructions given to the intermediary were unambiguous and clearly understood, faithfully reported by him and rightly apprehended by the solicitor, before making any presumption in favour of validity**".

34. Mr Cushnie testified that he did an internet search and conveyed contact information for a suitable estate lawyer in Trinidad to Olgarene. Notably the deceased did not have a cell phone and he gave his wife's number to Mr Cushnie and he wrote down it down at their meeting about doing a new will. Olgarene testified that she wrote to Mr Laquis, Attorney-at-law as she was a better writer than the deceased but she was adamant that same was done on his instructions. She also said that the deceased gave Heather instructions to number the apartments 1 to 4, to set up a trust in his will and he directed that Hubert Oliver was to be named as sole executor. These instructions, according to Olgarene were verbal and were issued, by the deceased to Heather, over the telephone.

35. The Court considered the deceased's age at the time of the execution of the 2010 will and noted that his wife testified that he did not even own a cell phone. It is therefore quite likely that the deceased was not versed at using email messaging or comfortable with the use of computers. No evidence was adduced by the Fourth Defendant to establish that the deceased previously sent emails or letters to him or anyone else. As earlier outlined, the deceased and Olgarene were seemingly blessed with a loving 28 year marriage and it is natural and entirely plausible to conclude that he would have allowed his beloved wife

to write the letter to Mr Laquis on his behalf and that he would have also availed himself of Heather's help to liaise with the Trinidadian lawyers.

36. In relation to the references and difference in the spelling of the beneficiaries' names, the Claimant, when asked by the Court in cross-examination whether he had any doubt as to whom the beneficiaries were, responded "absolutely not". The Court accepted his articulated position as in the Court's mind, the differences in the names used were of no moment as the intended beneficiaries were readily identifiable. It is likely that given the deceased's age he may have referred to the beneficiaries by their "home names" and it is plausible to conclude that the instructions were conveyed to the lawyers in Trinidad in a form which mirrored verbatim, the deceased's instructions. The Court also formed the view that there was no contradiction between the instructions recorded in the 2010 will and the position reflected in Mr Cushnie's meeting notes which were put in evidence. Mr Cushnie stated that he never got to the stage of taking instructions as he advised that a Trinidadian lawyer was required and his notes were general in nature and recorded primarily contact information. Accordingly these matters did not arouse the Court's suspicion or lead it to conclude that the instructions did not emanate from the deceased.

37. During cross-examination, the US attorney, Mr Cushnie, reiterated that he had a telephone conversation with the deceased regarding the execution of the 2010 will. He also stated that on the day the will was executed he ensured that 3 criteria had to be satisfied namely that: 1) the deceased understood what he had 2) he knew who he wanted to get it and 3) he understood the document prepared by a Trinidadian lawyer and that same was reflective of his intent. Mr Cushnie stated that he went through the will with the deceased and the deceased approved the contents. This conversation occurred in Olgarene's presence but she made no contribution.

38. Mr Cushnie was asked whether he would be surprised to know that all correspondence to the Trinidadian lawyers, were generated either by Olgarene or Heather and he responded that he was not, as it was not uncommon when dealing with a family situation for other family members to be involved.

39. The Court asked Mr Cushnie if he would have done anything differently had he been aware that an intermediary conveyed the instructions for the preparation of the will and he responded that he didn't think so.

40. In **CV2017-02155 Marilyn Williams v La Toya Joseph** this Court addressed the role attorneys ought to play when conducting business with elderly clients. At paragraphs 44 and 45 this Court stated:

> "44. Attorneys-at-law have a fiduciary responsibility to their clients and they also have a social obligation so as to ensure that citizens, especially the elderly and vulnerable are not manipulated or disenfranchised by those with whom they interface. Consequently, a significant degree of caution ought to be exercised when dealing with such persons who are engaged in land transactions.
>
> 45. Mindful though that there are obligations of confidentiality which may arise, lawyers should ensure that elderly persons are thoroughly interviewed in the absence of the persons who may have brought them to the lawyer's office. If in the course of the interview, if it is discovered that there are other persons who share close familial bonds with the elderly client, then some inquiry should be made by the attorney as to whether careful thought and consideration has been given by the elderly person as to whether there is an real intent to disinherit those other relatives from benefiting from the elderly person's real or personal property. With almost mandatory rigidity these instructions should be reduced into writing and signed by the client".

41. The Court noted the nature of the bequests and recognised that the 2010 will provided for all of the deceased's children.

42. In the Court's view, Mr Cushnie was very thorough with the will execution process and he discharged his professional obligations in a stellar fashion. Prior to the execution the deceased read the will and then Mr Cushnie went over it with him. The Court found Mr Cushnie to be a compelling and persuasive witness and his evidence was characterized

with candour and plausibility. The Court therefore found as a fact that at the key moment of execution, the deceased was aware of and voluntarily approved and adopted the contents of the 2010 will and he executed same in Mr Cushnie's presence and that of his assistant.

43. The Court accepted Mr Cushnie's explanation as to the parting of ways with his Assistant and formed no adverse inference by her absence as a witness. In addition, the Court felt that Mr Cushnie's evidence was so poignant, compelling and convincing that there was no need for any corroboration.

44. Before the Court arrived at the aforesaid conclusion that the will was duly executed by the deceased, the Court considered the evidence and expert report generated by Mr Parmassar who concluded that there was an 80% probability that the 2010 will was not executed by the deceased.

45. Mr Parmassar, at page 1 of Report Appendix 2 stated, "it is normal for handwriting to possess variations for a number of reasons, including age and health, and this variation is taken into account in the assessment of any similarities and differences found. Variations do not constitute writing differences and is a normal feature of all writers".

46. During cross examination, Mr Parmassar accepted that as a person ages, it is possible for the signature to vary. Mr Parmassar did not have the benefit of any of the deceased's signatures written in or around 2010, either prior to or after he fell ill, to use as references in his analysis. The Court, in the circumstances, placed little reliance on Mr Parmassar's evidence and preferred Mr Cushnie's compelling evidence as to deceased's execution of the 2010 will.

47. The Court's suspicion was simply not aroused when it examined of all the attendant circumstances surrounding the preparation and execution of the 2010 will. The Court is therefore convinced that there were no errors in the transmission of the deceased's

instructions and there is no credible evidence to suggest that the deceased was manipulated or that the 2010 will was not executed by him and/ or that same was the product of fraud.

48. Accordingly the Court is resolute in its view that there are no suspicious circumstances surrounding the preparation and execution of the 2010 will.

Issue 3: Whether the deceased had the requisite testamentary capacity at the material time to execute the 2010 will.

49. This Court took guidance from the position articulated by the Court of Appeal in **Civ. App P-283-2015 Jimmy Wilson and others v Rosa Dardaine** where Jones JA stated:

> 18. … To succeed the Respondent is required to prove that at the time of the execution of the Will the Testator had the ***capacity*** to make the Will and ***knew and approved*** of its contents. Though similar in effect these comprise two distinct challenges to the validity of a will.
>
> 19. Testamentary capacity refers to the ability of a testator to make dispositions by way of a will. According to Cockburn CJ in Banks v Goodfellow (1870) LR 5 QB 549 at page 565:
>
> > "It is essential to the exercise of such a power 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."

20. The law presumes capacity and where on its face a will is rational and has been executed in accordance with the requirements of the law testamentary capacity is generally proved. Where however the testator's capacity is in doubt it is for the person propounding the will to establish and prove affirmatively that at the time of the execution of the will the testator was of competent understanding: Halsbury's Laws of England, Fourth Edition, volume 17 paragraph 903. See also Sutton v Sadler (1857) 5 WR 880.

21. "Once incapacity before the date of the will has been established the burden lies on the party propounding the will to show that it was made after recovery or during a lucid interval and therefore valid. In such a case the will should be regarded with great distrust and every presumption should in the first instance be made against it especially where the will is an inofficious one.": Halsbury Laws of England para 904…

22. With respect to knowledge and approval, in the absence of fraud, the fact that a will has been read over to a capable testator who executes it is sufficient evidence that the testator knew and approved its contents… In addition where the circumstances under which a will is prepared give rise to a well-founded suspicion that the will is not that of the testator or does not reflect the testator's intentions then a court ought not to pronounce in favor of the will until that suspicion is removed.

…

24. The rule is an evidential rule. It requires the court to be satisfied that the contents of the will truly represent the testator's wishes. The standard of proof required to be met here is the usual civil standard of a balance of probablities.

25. Following Barry v Butlin Peter Gibson LJ in Fuller v Strum [2002] 2 All ER 87 at page 97 paragraph 33 put it this way:

> "What is involved is simply the satisfaction of the test of knowledge and approval, but the court insists that, given that suspicion, it must be the more clearly shown that the deceased knew and approved the contents of the will so that the suspicion is dispelled. Suspicion may be aroused in varying degrees, depending on the circumstances, and what is needed to dispel the suspicion will vary accordingly. In the ordinary probate case knowledge and approval are established by the propounder of the will proving the testamentary capacity of the deceased and the due execution of the will, from which the court will infer that knowledge and approval. But in a case where the circumstances are such as to arouse the suspicion of the court the propounder must prove affirmatively that knowledge and approval so as to satisfy the court that the will represents the wishes of the deceased. All the relevant circumstances will be scrutinised by the court which will be 'vigilant and jealous' in examining the evidence in support of the will (Barry v Butlin (1838) 2 Moo PC 480 at 483, 12 ER 1089 at 1090 per Parke B)."

26. The presence of suspicious circumstances is therefore a subset of want of knowledge and approval. According to Halsbury: "Thus where a person propounds a will prepared by himself or on his instructions under which he benefits the onus is on him to prove the righteousness of the transaction and that the testator knew and approved of it. A similar onus is raised where there is some weakness in the testator which, although it does not amount to incapacity, renders him liable to be made an instrument of those around him; or where the testator is of extreme age; or where the knowledge of the contents of the will is not brought home to him or where the will was prepared on verbal instructions only; or was made by interrogatories; or where there was any concealment or misrepresentation or where the will is at variance with the testator's known affections or previous declarations or

dispositions in former wills or a general sense of propriety." Halsbury's Laws of England, Fourth Edition, Vol 17 paragraph 907.

27. The interplay between testamentary capacity and knowledge and approval was considered by Chadwick LJ in the case of Hoff and others v Atherton [2004] EWCA Civ. 1554. Here, as in the appeal before us, the will was being challenged on the basis that the testator lacked the requisite capacity and did not know and approve of the contents. In treating with a submission that conflated both grounds Chadwick LJ stated:

> "[62] That submission, as it seems to me, betrays a failure to appreciate that the requirements of testamentary capacity and knowledge and approval are conceptually distinct. A finding of capacity to understand is, of course, a prerequisite to a finding of knowledge and approval. A testator cannot be said to know and approve the contents of his will unless he is able to, and does, understand what he is doing and its effect. It is not enough that he knows what is written in the document which he signs. But if testamentary capacity – the ability to understand what is being done and its effect – is established, then it is open to the court to infer that a testator who does know what is written in the document which he signs does, in fact, understand what he is doing. And, where there is nothing to excite suspicion, the court may infer (without more) that a testator who signs a document as his will does know its contents. It would be surprising if he did not.
>
> [63] Whether those are inferences which should be drawn depends, of course, on the facts of the particular case. The fact that a beneficiary has been concerned in the instructions for, and preparation of, the will excites suspicion that the testator may not know the contents of the document which he signs – or may not know the whole of those contents. The degree of suspicion – and the evidence needed to dispel that suspicion – were considered by this Court in Fuller v Strum [2001] EWCA Civ. 1879, [2002]

2 All ER 87 paragraphs [32]–[36], [73], [77], [2002] 1 WLR 1097, 1107C-1109A, 1122A-C, 1122G-1123C.

[64] Further, it may well be that where there is evidence of a failing mind - and, a fortiori, where evidence of a failing mind is coupled with the fact that the beneficiary has been concerned in the instructions for the will - the court will require more than proof that the testator knew the contents of the document which he signed. If the court is to be satisfied that the testator did know and approve the contents of his will – that is to say, that he did understand what he was doing and its effect - it may require evidence that the effect of the document was explained, that the testator did know the extent of his property and that he did comprehend and appreciate the claims on his bounty to which he ought to give effect. But that is not because the court has doubts as to the testator's capacity to make a will. It is because the court accepts that the testator was able to understand what he was doing and its effect at the time when he signed the document, but needs to be satisfied that he did, in fact, know and approve the contents – in the wider sense to which I have referred.

50. In **CV2006-00305 Doreen Fernandes v Monica Ramjohn Nadeau, Ian Ramjohn, Marilyn Ramjohn et al**, Justice Stollmeyer, (as he then was), stated the following at pages 15, 16 & 17:

> ""The requirements for testamentary capacity and for knowledge and approval are separate…Testamentary capacity, which the Claimant must show in this case, requires the capacity to understand (in the sense of the ability to do so) certain important matters relating to a will namely: the nature of the act and its effects, and the extent of the property being disposed of. The testator must also be able to comprehend and appreciate the claims to which he might give effect…

If there is evidence of actual understanding then that proves the requisite capacity…Knowledge and approval requires proof of actual knowledge and approval of the contents of the will…

"Further, it may well be [per Chadwick JA at paragraph 64 of Hoff v. Atherton] that where there is evidence of a failing mind - - and, a fortiori where evidence of a failing mind is coupled with the facts that the beneficiary has been concerned in the instructions for the will - - the court will require more than proof that the testator knew the contents of the document which he signed. If the court is to be satisfied that a testator did know and approve the contents of his will - - that is to say, that he did understand what he was doing and its effect - - it may require evidence that the effect of the document was explained, that the testator did know the extent of his property and that he did comprehend and appreciate the claims on his bounty to which he ought to give effect. But that is not because the court has doubts as to the testator's capacity to make a will. It is because the court accepts that the testator was able to understand what he was doing and its effect at the time he signed the document, but needs to be satisfied that he did, in fact, know and approve the contents - - in the wider sense to which I have referred". (Emphasis Court's)

51. During cross examination the Fourth Defendant testified that during 2009 and 2010 the deceased called him numerous times a day and would speak to him as if it was the first time they were conversing for the particular day. The witness however admitted that he did not say this in his witness statement and he stated that he did not see any cause for concern. The Fourth Defendant seemingly wrote this alleged behavior off to the deceased's advanced age. Olgarene gave no evidence as to any mental ill health and only spoke about her husband slowing down after he fell ill. The evidence revealed that the deceased visited a geriatric doctor monthly and given his age, this visiting schedule did not strike the Court as odd or unusual. The Court formed the view that these regular doctor visits did not give rise to an operative scenario from which the Court could infer that the deceased had some

mental incapacity. Further the evidence that the deceased was advised, after he fell ill, not to travel to Trinidad cannot be used to infer that he was suffering from mental incapacity.

52. The Fourth Defendant was asked whether he harbored any doubt as to his father's state of mind when he visited him during his short hospitalization in 2010 and he responded that he was more concerned about his father's physical health than his mental health.

53. The Fourth Defendant alleged that the deceased suffered from serious illness however, no evidence was provided to the Court to support this. The Fourth Defendant also relied on *Jimmy Wilson* (supra) as an authority for the proposition that where evidence of testamentary capacity is inconclusive it must be decided against the propounder of the will. This Court is unable to treat this position as one of general applicability as the resolution of each case which involves these issues is very fact dependent. The facts in *Jimmy Wilson* (supra) are diametrically opposed to those of the instant case and in that case there was actual evidence that the testator suffered from mental illness and the trial judge heard evidence of a psychiatrist. On the factual matrix before this Court, there is no evidence that the deceased actually suffered from any form of mental illness and no mental incapacity was established.

54. The Court was disappointed by the submissions advanced by Attorneys for the Fourth Defendant where they argued that Olgarene deliberately delayed and objected to the production of the deceased's medical records and caused the medical records to become unavailable. The processes outlined for disclosure were properly engaged and this Court determined the Fourth Defendant's Notice of Application filed on 8 July 2020 which sought *inter alia* , an order that the medical records of the deceased be provided. This application was dismissed by way of a written decision delivered on 4 November 2020 and this ruling was appealed. Thereafter the documents, through no fault of the Claimant, were unavailable. Lawyers and in particular junior lawyers, at times, have a tendency to behave as if their clients have a monopoly on the truth and they may become very invested in the matter. It is unfortunate that this Court had a hear some commentary which was advanced via an unmuted mike, by one of the Fourth Defendant's Attorneys, after a witness was

cross examined. However lawyers may feel about a Judge, they must never forget that they have an obligation to uphold the administration of justice and their ultimate duty is to the Court. Consequently restraint of emotions and measured but respectful analysis of the evidence is required and expected.

55. Notwithstanding the absence of evidence which was capable of leading the Court to hold that the deceased lacked testamentary capacity, the Court afforded the Attorneys for the Fourth Defendant significant latitude to cross examine on this issue. Mr. Cushnie during cross examination expressed no concern as to the deceased's testamentary capacity. In fact Mr Cushnie saw and interacted with the deceased long before his 2010 illness and he convincingly maintained that the deceased understood and approved the contents of the 2010 will. He also confirmed that he observed no behavioral issue which led him to form any concern that the deceased was incapable of making a will.

56. In the circumstances, this Court categorically rejects the assertion that the deceased suffered from a failing mind or that he was unable to appreciate the contents of the 2010 will when he executed same.

57. Accordingly and based upon the reasons outlined, the counterclaim is hereby dismissed and the Court declares the validity of the 2010 will and pronounces in favour of force and the validity of the will dated 31 August 2010.

58. The Court also hereby orders as follows:

    a. The Fourth Defendant shall file a statement of account which shall reference the rents collected and the expenditure associated with the subject lands, supported by the requisite receipts and bank statements from 16 January 2012 to the date of judgment, within 42 days of the date of this judgement.
    b. The said account shall be certified and falsified before the Registrar of the Supreme Court.
    c. The Fourth Defendant shall thereafter pay to the Claimant on behalf of the deceased's Estate such sums found to be due and owing.

d. The First, Second and Third Defendants or any tenant or person currently in occupation of any apartment or portion of any building upon the subject lands shall deliver up vacant possession of same on or before the 31 July 2021. Alternatively any such who elects to remain in possession, shall pay the current monthly rent to the Claimant, with effect from the date of this judgment. Any such sums shall be held on behalf of the estate.

e. With effect from the date of this judgment, the Claimant acting on behalf of the deceased's estate shall be responsible for the payment of the existing mortgage for the said lands.

f. Costs in the sum of $14,000.00 shall be paid to the Claimant on the claim and costs in the sum of $14,000.00 shall be paid to the defendants on the counterclaim. These sums are to be paid by the deceased's estate.

…….
FRANK SEEPERSAD
JUDGE

Assisted by Mr Liam Labban

Judicial Research Counsel