

TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
(SAN FERNANDO)**

CV. 2006-00305

BETWEEN

**DOREEN FERNANDES
(also called Jade Doreen Collins
Executrix of The Last Will And Testament of
Eunice Ramjohn, Deceased)**

CLAIMANT

AND

**MONICA RAMJOHN NADEAU
IAN RAMJOHN
MARILYN RAMJOHN**

DEFENDANTS

Before The Honourable Mr. Justice Stollmeyer

Appearances:

Ms. S. Rampaul for the Claimant

Mr. D. Rambally for the Defendants

JUDGMENT

This claim is to have the will of the late Eunice Ramjohn dated 23rd August 1999 pronounced in solemn form.

The Defendants counterclaim that the will be pronounced against on two grounds: first, that it was not executed in accordance with the provisions of the Wills and Probate Act Chap. 9:03; and second, that Eunice Ramjohn was not of sound mind memory and understanding at the time the will was executed.

In essence, the Nature of the Case advanced by the Defendants is that Eunice Ramjohn was admitted to V's Rest Home on 6th December 1997 while suffering from Alzheimer's disease. She was cared for there and "When the deceased purportedly executed the will it was some two (2) years after her admittance... and at that time she was 84 years old, suffering from Alzheimer's disease and other complications which "...rendered her memory so defective that there was an almost total loss of memory of recent events and in particular she had forgotten and was frequently unable to recognise many of her closest relatives and friends".

Further, "At the time of the alleged execution of the purported will the deceased was in such a condition of mind and memory that she was unable to understand the nature of the act of making a will and its effects, or the extent of the property which she owned and could dispose of or to comprehend and appreciate the claims to which she ought to give effect".

Finally, "the Deceased at the time when the purported will was alleged to have been executed did not know and approve the contents thereof".

During closing submissions it was conceded on behalf of the Defendants that the issue of the will not having been executed in accordance with the provisions of the Act was effectively decided by the evidence of Mrs. Devi Ramnarine, the Attorney-at-law who prepared the will on Eunice Ramjohn's instructions. This left for my determination the issues of lack of testamentary capacity and knowledge and approval.

While it is correct to say that it fell to the Claimant to prove the necessary testamentary capacity because it was raised in the defence, and that the circumstances surrounding the preparation and execution of the will would raise the suspicions of the Court because Eunice Ramjohn was taken by her daughter, the Claimant, to the Claimant's Attorney-at-law for this purpose and by the will

she was appointed executrix and made the principal beneficiary, there are two observations that I need to make.

First, the evidence by and on behalf of the Defendants fell far short of what was set out in the nature of their case. Indeed, it emerged that Eunice Ramjohn made the will quite some time after having been discharged from V's Rest Home and not while living there. Second, the Defendants led no evidence to support that part of their case impugning Eunice Ramjohn's mental capacity at the time of her signing the will, nor of the events prior and subsequent to this event, except in two areas. First, the diagnosis of Dr. Perot when Eunice Ramjohn was admitted to V's Rest Home, and the cause of death he entered on Eunice Ramjohn's death certificate. He, however, died before the trial and gave no evidence. Second, the evidence of Vera LaVictoire and Marilyn Alexander, the owner/manager of V's Rest Home and a worker there respectively but neither of these persons knew anything of Eunice Ramjohn or her mental condition when she made the will. That apart, they rely on the evidence put forward by and on behalf of the Claimant to show that she has not discharged the burden on her necessary to have the will pronounced for in solemn form.

I now turn to the issue of testamentary capacity and knowledge and approval of the contents of the will at the time it was executed. In doing so, I will necessarily have to look at the evidence touching the preparation and execution of the will itself.

Background

The late Eunice Ramjohn lived on her own at Sutton Street, San Fernando. She was the mother of 12 children, including the Claimant (who is the tenth of these children) and the Defendants, and treated them all with equal affection, as did the children's father who had previously died in 1969.

The Claimant visited her mother regularly and took her on her errands.

On 6th December 1997 (when she would have been about 80 years old) Eunice Ramjohn was admitted to V's Rest Home. According to the first Defendant, Monica Ramjohn Nadeau, she had previously been ill and spent one week at Gulf View Medical Center under the care of Dr. Lalla, and when she returned home "...was not coping well by herself and refused to get help in the form of a live-in caretaker". As a consequence, another daughter, Gloria, who lived next door to Eunice Ramjohn at Sutton Street, took her to V's Rest Home and had her admitted. The Claimant was not consulted on this and only came to know of it after the event, saying in cross-examination that when she was told of her mother being admitted to V's Rest Home by Gloria, Gloria persuaded her that it was best for their mother. Gloria did not give evidence at the trial.

Veronica LaVictoire is a nurse of some 50 years experience. She is the owner and manager of V's Rest Home. She qualified as a nurse in England in 1959 and specialised as an operating theatre nurse. While in England she also earned qualifications in nutrition and dietetics and gained experience working with geriatric patients, in particular those suffering with Alzheimer's disease. She returned to Trinidad in 1969 as the operating theatre nurse at Victoria Nursing Home and stayed there until 1979 when she went to the United States of America where she nursed privately people who were recovering from surgery. She returned to Trinidad after some time and resumed her work at Victoria Nursing Home before opening V's Rest Home in April 1982. For some time she divided her time between Victoria Nursing Home and V's Rest Home before taking over the running of the home full-time in 1993. From inception, she says, the majority of the persons living at the home had been diagnosed with Alzheimer's disease.

In keeping with the policy of V's Rest Home its affiliated doctor, Dr. Ivan Perot, examined Eunice Ramjohn on 10th December 1997. According to Ms. LaVictoire he diagnosed Alzheimers. A copy of the note he made on that day came into

evidence but is of little assistance. This was after he had sat with Mrs. Ramjohn for "...about half an hour. He would usually sit with the patient and ask some questions, see what their memory was like". Dr. Perot did not see Eunice Ramjohn again before she left in April 1998. Regrettably, as I have said, Dr. Perot died some time before the trial so that this evidence was untested and must be treated with some care.

Vera LaVictoire says that on admission Eunice Ramjohn spoke mostly of her family but that she was hard to understand because she was not coherent, and that while at V's Rest Home she exhibited the classical behaviour of Alzheimer's Disease. She was not at all pliable, meaning that she was stubborn, and for example had to be coaxed to have her daily bath; remained in bed for most of the day; was fidgety when she got out of bed; never sat in one place for long; wandered around; became confused as to the location of her room; and had difficulty sleeping at night.

In cross-examination she said that when admitted she was not in any discomfort but "...was in a forgetful state" and that Gloria told her that her mother "...was a bit forgetful and afraid of going to the kitchen because she would leave the cooker on".

She also said that Gloria and her children visited Eunice Ramjohn regularly and that Eunice Ramjohn would implore them to take her home. This evidence, and that of Marilyn Alexander in similar vein, is contrary to what is said in the nature of the case. Eunice Ramjohn eventually went home in April 1998.

Marilyn Alexander, who worked at V's Rest Home since it started operation (and still does) helped to look after Eunice Ramjohn while she was there. She describes Eunice Ramjohn as being strongwilled and wanting to return to her home, eventually persuading Gloria to do so in April 1998. While at V's Rest Home she was disoriented and often confused, and complained about the tenant

renting her house. According to Marilyn Alexander, Eunice Ramjohn described this person as her son, who on occasion stole her money. He also wanted to take away her house.

In the event, Eunice Ramjohn left V's Rest Home in April 1998 and returned to her home at Sutton Street where she continued to live on her own. As she had done previously, she continued to do her own groceries and her own banking and although the Claimant would drive her on occasion, she was also known to walk around San Fernando going about her chores and business. There is nothing to suggest that she had any difficulty in doing any of this.

At sometime around the end of July or in early August 1999 Eunice Ramjohn asked the Claimant to take her to a lawyer because she wanted to make a will. This was about 16 months after leaving V's Rest Home, and again contradicts the nature of the case put forward by the Defendants. The Claimant suggested Mrs. Ramnarine who had previously acted for her in her divorce proceedings. This was because Eunice Ramjohn said that she had a disagreement with her own lawyer.

The Claimant took her mother to Mrs. Ramnarine's office and introduced them to each other. Her mother said to Mrs. Ramnarine that she wanted to make a will and that the Claimant was to have everything. The Claimant says that she then told her mother that she could not do that, and was not cross-examined on this. Mrs. Ramnarine told the Claimant to wait outside in the waiting-room because she wanted to speak to Eunice Ramjohn alone.

Mrs. Ramnarine then explained to Eunice Ramjohn that the will that she wanted Mrs. Ramnarine to prepare on her behalf was to set out her, Eunice Ramjohn's, wishes. She questioned Eunice Ramjohn in an effort to ascertain whether she was acting under duress or the influence of any person and was satisfied this was not so. Mrs. Ramnarine was satisfied this Eunice Ramjohn was fully cognisant of

what she wanted to do, and was clear as to the gifts which she wished to make in her will and her reasons for doing so. Eunice Ramjohn was insistent in her explanations to Mrs. Ramnarine why she wanted to give the Claimant all of her property, despite Mrs. Ramnarine saying to her that it was not necessary for her (Mrs. Ramnarine) to know the reasons.

Eunice Ramjohn continued, saying that the Claimant was the only one of her children who looked after her in her old age and that even her daughter who lived next door to her (Gloria), and was "well off", did not even send food for her. The Claimant, on the other hand, would bring food for her, come to see her, and take her out. She would take her to the doctor, the grocery and to the market when she needed to go. She said to Mrs. Ramnarine that the Claimant deserved to benefit from the property because she was only one of her children who took a real interest in her, and that her sons would have to see about themselves. Also, that she had a little money that she wanted all of her daughters to share.

Mrs. Ramnarine also informed Eunice Ramjohn that anything said to her (Mrs. Ramnarine) was confidential and would not be disclosed to anybody else, and that the original will when prepared would not be given or disclosed to anyone apart from Eunice Ramjohn. She also said to Mrs. Ramjohn that given her age (Mrs. Ramnarine said that Mrs. Ramjohn appeared to her to be at least 80 years old) she would require a medical report from her doctor assuring Mrs. Ramnarine of Eunice Ramjohn's capacity to provide instructions for and to execute a will. This conversation took perhaps some 40 minutes.

She then took Mrs. Ramjohn to the waiting-room where they joined the Claimant. Mrs. Ramnarine repeated to Mrs. Ramjohn in the Claimant's presence the need for a medical report from a doctor. She went on to say that when this report had been obtained an appointment could be made for Mrs. Ramjohn to see her again so that Mrs. Ramnarine could take specific instructions as to the will. She asked for this report because of Mrs. Ramjohn's age and although she did not (then or

subsequently) "take instructions" from her as to her health, she did ask in the course of conversation whether she was on medication and if it would affect her ability to give instructions. She also asked if the medication made her sleepy and was told that it did not. It is reasonable to infer that the response to the first of these enquiries was also in the negative, since it is hardly likely that Mrs. Ramnarine would have otherwise proceeded to take instructions for the will.

Either 14th August 1999 or 17th August 1999 (it is ultimately of little consequence) Eunice Ramjohn returned to Mrs. Ramnarine's office and gave to her secretary Dr. Clyde Lalla's report of 11th August 2008. This report came into evidence but only for the purpose of proving that Mrs. Ramnarine had received it. Dr. Lalla did not give evidence. Mrs. Ramnarine, however, was satisfied based upon this report that Eunice Ramjohn had the capacity to make a will. Mrs. Ramnarine referred to the report saying that "...it was sufficient..." to come to that conclusion. She was not cross-examined on this. There is some doubt in Mrs. Ramnarine's evidence as to the date of the report and of the date on which it was delivered, but she was clear and firm that she had it when Eunice Ramjohn came back to her on 23rd August 1999.

On that day Eunice Ramjohn was again brought to Mrs. Ramnarine's office by the Claimant, but on this occasion she (the Claimant) did not meet with Mrs. Ramnarine. Eunice Ramjohn went into Mrs. Ramnarine's office on her own and the latter's secretary brought in Dr. Lalla's report and the Will Book. Mrs. Ramnarine then took Eunice Ramjohn's instructions for the will, recording these in her Will Book. This took about 30 to 35 minutes according to Mrs. Ramnarine, after which Eunice Ramjohn went back to the waiting-room where the Claimant was sitting. She sat there while the will was being typed.

Mrs. Ramnarine was cross-examined at length about what took place during the 30-35 minutes that Eunice Ramjohn spent with her in her office. Her examination-in-chief was that she explained to Eunice Ramjohn that she (Mrs.

Ramnarine) did not need to be told the reasons for the gifts being made, but that Eunice Ramjohn repeated that the Claimant was the only one of her children who looked after her in her old age, who took her to the doctor, to the grocery, and to the market. She was the only child who took a real interest in her and she deserved to get all her property.

Mrs. Ramnarine once again explained that whatever she was told would be held in the strictest confidence and it would not be discussed with anyone else. She also said to Eunice Ramjohn that the will must express only her wishes and desires. Eunice Ramjohn "...firmly stated to me..." that she wanted the Claimant to get all of her property "...and for all of her daughters to share up the money she had in the bank equally". The residue was to go to the Claimant.

Mrs. Ramnarine asked Eunice Ramjohn if she wanted to give anything to any of her other children and was told that the Claimant was the one who looked after her, paid attention to her, visited her regularly and that she wanted the Claimant to have the bulk of her property. Also, she did not see that her sons needed to benefit in anyway.

Mrs. Ramnarine was not shaken on any of her examination-in-chief. She said that she asked Eunice Ramjohn if she had any children other than the Claimant, and what were her intentions with regard to them, but she did not ask Eunice Ramjohn whether she had any grandchildren. She did not know that there were 12 children, although she knew that some of the children were boys. This she obviously would have found out on enquiry of Eunice Ramjohn. She asked whether there were any other assets and was told that there were none, but she did not make any extensive enquiries.

Mrs. Ramnarine also said that she saw her duty as being to ascertain Eunice Ramjohn's intentions and put them onto paper, in response to a question in cross-examination as to whether she thought it her duty to find out if Eunice Ramjohn

had responsibilities to other persons. She did not ask Eunice Ramjohn how much money was in the bank account, but was told that it was a small amount. She did not ask if there were other bank accounts.

In cross-examination she was asked whether she considered the person being appointed as executor as well as the person who stood to benefit from all the property was her client. Her response was "that is how it happened. I don't think there was anything to consider".

In several respects cross-examination was directed towards Mrs. Ramnarine's duties as an attorney-at-law preparing a will, but it is no part of the Defendant's case that she was in breach of her duty. Although it might be said that Mrs. Ramnarine should have explored Eunice Ramjohn's affairs in more detail, I do not think that it was necessary to do so given Eunice Ramjohn's clear instructions and the responses to her questions.

Mrs. Ramnarine then instructed her secretary to prepare a draft will. This was done and brought to her and she then went through it with Eunice Ramjohn in her office. The will was then printed in final form and given to Eunice Ramjohn to read while she sat alone with Mrs. Ramnarine in her office. Mrs. Ramnarine said that she confirmed the final form was in the same terms as the draft and that Eunice Ramjohn confirmed that it was in conformity with her instructions. Mrs. Ramnarine made an endorsement in the Will Book that it was read and complied with her instructions. Mrs. Ramjohn was asked to sign that sheet in the Will Book confirming the instructions and that she had read the will. Mrs. Ramnarine then ask her secretary to witness the will together with her and explained to Eunice Ramjohn the requirement in law of having two witnesses present when she signed the will and that those witnesses must then sign the will in her presence and the presence of each other. Mrs. Ramjohn signed her will in the presence of both Mrs. Ramnarine and her secretary and Mrs. Ramnarine then signed it. Her secretary then did so as well, after which she left the office with the executed will

to make a copy for Mrs. Ramnarine's records. The photocopy was made and the original given to Eunice Ramjohn who left Mrs. Ramnarine's office with the will.

Perhaps a week later Eunice Ramjohn returned to Mrs. Ramnarine's office asking her advice on how to register the will. Mrs. Ramnarine informed her that it would have to be deposited at the Probate Registry but would need to make enquiries as to the procedure for doing so. Mrs. Ramnarine made those enquiries and telephoned Eunice Ramjohn giving her the details whereupon Eunice Ramjohn "...indicated to me quite firmly that she would not want to undertake that long journey for that purpose alone and she prevailed on me to keep the original Will at the offices of Mrs. Ramnarine & Persad for safekeeping, as she did not want to misplace same". Mrs. Ramnarine agreed to do so and Eunice Ramjohn came to her office on 15th September with the original will which Mrs. Ramnarine agreed to keep. That was the last occasion on which she saw Eunice Ramjohn.

Mrs. Ramnarine was firm that at no time during her dealings with Eunice Ramjohn did she get the impression that she was incapable of understanding the nature and effect of the will. She appreciated that she was old, but did not ascertain any deficiency of understanding on her part. She was at all their meetings lucid and clear in the expression of her intention for the disposition of her assets and at no time did it appear to Mrs. Ramnarine that there was anything wrong with Eunice Ramjohn, physically or mentally, so as to negatively affect the giving of instructions and the due execution of the will. She was not shaken on any of this in cross-examination.

If there is a difficulty in accepting any of the evidence of Mrs. Ramnarine it might arise from the failure of Saty Ramdial, her secretary, to appear at the trial for cross-examination. No reason was given for her failure to attend despite efforts having been made to locate her. Consequently, her witness statement was not admitted and it is open to a court to draw an adverse inference from her failure to give evidence. I have considered this aspect of the matter, and while it is proper

to draw such an inference, and I do so, it does not to my mind affect negatively the weight of Mrs. Ramnarine's evidence, or at least affect it to such an extent that her credibility is called in to question and her evidence as to the discussions and events that took place between herself and Eunice Ramjohn is affected adversely.

Eunice Ramjohn continued living at her home on Sutton Street until 2nd July 2000 when she returned to V's Rest Home. Dr. Perot examined her on 17th July 2000 and issued a report which is regrettably illegible. It does not, however, appear to make any mention of Alzheimers, which can be discerned easily in his report of 10th December 1997. Again, Dr. Perot having died before the trial, there was no evidence as to what form or how long the examination of Eunice Ramjohn lasted. On that day he prescribed Largactil which Vera LaVictoire in cross-examination said in her experience is one medication prescribed for Alzheimers patients, for restlessness or sleeplessness, as a tranquilizer. On the other hand, she went on to say in relation to the prescribing of Largactil "I just work with the doctor. Whatever he says". Also, in cross-examination she said that she was not aware of Largactil being prescribed for conditions such as nausea or vomiting, but could not refute that was so.

In cross-examination Vera LaVictoire also said that in July 2000 Eunice Ramjohn's condition had deteriorated since 1998 and that her condition continued to worsen. Marilyn Alexander says that after admission in July 2000 Eunice Ramjohn was weaker and less coherent than in 1998.

Eunice Ramjohn died on 12th April 2001 at V's Rest Home and Dr. Perot's note on that date shows or says "(1) Alzheimer's; (2) pneumonia". The cause of death on her death certificate is given as (1) Pnuemonia; (2) Alzheimers.

Monica Ramjohn Nadeau's evidence in cross-examination is that in August 1999 around the time of making the will her mother did her own banking, went to the grocery, walked to church and (perhaps more significantly), when asked if her

mother was active and coherent at all times in August 1999, she said " you don't know my mother. She had days when she could not get up. She may have had a good day and she may have done what she did". It is of interest that Mrs. Nadeau was not in Trinidad during August 1999, but her evidence is indicative of her mother's ability to look after her own affairs.

The Claimant gave no evidence about her mother's physical and mental health in examination-in-chief and was asked nothing about this in cross-examination. Neither Vera LaVictoire nor Marilyn Alexander saw or spoke with Eunice Ramjohn in August 1999 or at anytime other than when she was at V's Rest Home.

The burden of proving the will falls to the Claimant. The issue of the will not being executed in accordance with the Wills and Probate Ordinance can be decided based on the evidence of Mrs. Ramnarine, as Mr. Rambally agreed on enquiry from me during his closing submissions. He also agreed that due execution had been proved.

It is in this setting that the issues of testamentary capacity and knowledge and approval of the will must be decided. There is little or no medical evidence to assist in deciding the issue which turns to a very great extent on the apparent diagnosis of Alzheimers Disease. Dr. Perot has died, and there are no notes of his supporting either his initial diagnosis or the ultimate cause of death. Similarly, there is nothing to support the medical certificate given to Mrs. Ramnarine, although it is to be noted in this context that Eunice Ramjohn had at least once previously been a patient of Dr. Lalla and had been under his care for about one week in 1997. Also it was of interest that the evidence of both the Claimant and Mrs. Nadeau that they did not know that their mother had been diagnosed with Alzheimers in December 1997.

The result is that the core issues are to be decided based upon non-medical evidence in the main, except perhaps for that of Vera LaVictoire, but her evidence is for the most part of recounting of her recollections of events taking place on the occasions when Eunice Ramjohn was at V's Rest Home. There is similar evidence from Marilyn Alexander.

I turn first to the will being prepared by an Attorney-at-Law who had previously acted for the Claimant, at the suggestion of the Claimant, and the Claimant being the principal beneficiary of the will. The issue is whether the Claimant has dispelled any suspicions of the Court that may arise flowing from this.

In my view, the Claimant had done so. First, there is no allegation nor suggestion that the Claimant influenced her mother in anyway. Second, there is nothing to suggest that the Claimant had anything to do with the actual preparation and finalising of the will except for taking her mother to Mrs. Ramnarine's office on two occasions. Having done so, she took no part in any discussions and provided no further input whatever. Indeed, on the first occasion when she took her mother to Mrs. Ramnarine's office Mrs. Ramnarine ask her to leave so that she could discuss the matter of the will alone with her mother. Third, Mrs. Ramnarine's enquiries of Eunice Ramjohn, and the discussions with her that she detailed in her evidence, point clearly to an independent mind on the part of Eunice Ramjohn. The degree of suspicion was in my view not very high. It would be in the low side of the median. I am satisfied that the will reflects the intentions and wishes she made known to Mrs. Ramnarine.

I turn now to the principal issues of testamentary capacity and knowledge of approval. In essence, this requires weighing the evidence relating to Eunice Ramjohn's mental condition, and the diagnosis of Alzheimers Disease, against the evidence of Mrs. Ramnarine as to the discussions and events that took place between herself and Eunice Ramjohn.

I have been unable to find any previous decision of the courts of this country in which the will of a testator suffering from Alzheimers Disease has been called into question, but the English judgments in *Special Trustees for Great Ormond Street Hospital for Children v. Rushin* [2001] WTLR 1137 and of the Court of Appeal in *Hoff v. Atherton* [2004] EWCA Civ 1554 are of assistance.

I have no medical evidence on the subject of Alzheimers Disease, but it is well known and accepted (and I take judicial notice of this) that it is one of several forms of dementia. Care must be taken in diagnosis to ensure that the symptoms are not in fact indicative of other forms of dementia. It is a progressive condition manifesting itself in the form of continuing decline of what is called cognitive function *e.g.* the ability to recall events (initially move frequently of recent events) names of persons and personal details; the ability to perform day-to-day tasks; and the ability to reason. The person undergoes personality changes. While the decline is progressive and may extend over a considerable period of time, there are intervals and occasions prior to the late stages of the condition when the person functions with no, or little, impairment. Ultimately, the person gets to the stage of requiring full-time care and attention, losing all touch with reality and the ability to look after themselves.

Testamentary Capacity; Knowledge and Approval

The requirements for testamentary capacity and for knowledge and approval are separate (see *Hoff v. Atherton* paragraphs 33 and 62). 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 (*Hoff v. Atherton* paragraphs 33 and 34, referring to *Banks v. Goodfellow* (1870) LR 5QB 549 at 565).

"If there is evidence of actual understanding then that proves the requisite capacity. If not, then a court must look at all the evidence to see what inferences can properly be drawn as to capacity. Such evidence may relate to the execution of the will but it may also relate to prior or subsequent events. It would be absurd for the law to insist in every case on proof of actual understanding at the time of execution".

Knowledge and approval requires proof of actual knowledge and approval of the contents of the will (*Hoff v. Atherton* paragraph 33). This is a further and a separate test (*Hoff v. Atherton* at paragraph 27). There will be cases in which a testator will not be found to have testamentary capacity in the absence of an explanation to him of the requirements for testamentary capacity, or at least the requirement that he comprehend and appreciate the claims to which he might give effect.

"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".

The evidence is that Eunice Ramjohn was diagnosed as suffering from Alzheimers Disease in December 1997, but there is no evidence in any form as to how Dr. Perot arrived at this diagnosis. There is nothing to indicate the stage to which it had progressed at this time. I am therefore constrained to treat it with caution.

There is then the evidence of Vera LaVictoire and Marilyn Alexander. Vera LaVictoire says that when admitted Eunice Ramjohn spoke of her family but was hard to understand because she was not coherent. She was stubborn, had to be coaxed to have her daily bath; remained in bed for most of the day, was fidgety when she got out of bed; never sat in one place for long; wandered around; became confused as to the location of her room; had difficulties sleeping at night. She was not in any discomfort, and her daughter said to Vera LaVictoire that her mother was a bit forgetful and afraid of going to the kitchen because she would leave the cooker on.

Marilyn Alexander described Eunice Ramjohn as being strong-willed and wanting to go home. She was disoriented and often confused. She complained about her tenant, who she also said was her son, who stole her money and wanted to take away her house.

This evidence is at odds with the evidence of the events after Eunice Ramjohn left V's Rest Home in April 1998. She continued to do her groceries, her banking, her own chores and business. On occasion she walked around San Fernando to do so. There is no suggestion that from April 1998 onwards there were any of the symptoms (if I may use that expression) described by Vera LaVictoire and Marilyn Alexander, save perhaps for Mrs. Nadeau saying that in

August 1999 her mother had days when she could not get up, while adding that she may have had a good day and done what she did *i.e.* make the will.

I note that no medication for treatment of Alzheimers Disease was prescribed for Eunice Ramjohn during this stay at V's Rest Home.

It is very possible, perhaps probable, that given Eunice Ramjohn's age and the evidence of Vera LaVictoire and Marilyn Alexander she suffered some form of dementia, and that the dementia was Alzheimers Disease. At the time she left V's Rest Home in April 1998, however, I would not think that her dementia was such that she could not function physically and mentally on her own. She was able to get about San Fernando by herself and do her chores and her business. There is nothing to suggest her getting lost or that she was improperly dressed when she went out. I acknowledge at the same time that there was some confusion about the person living in her house. As to whether coming to blows with him is evidence of mood swing, which is a symptom of dementia or Alzheimers, or annoyance or frustration with his behaviour is not clear. It could be either.

There is then the evidence concerning the preparation and execution of the will. There is Dr. Lalla's certificate on which Mrs. Ramnarine relied, and it is reasonable to infer that this certificate was to the effect that Eunice Ramjohn was capable of making a will. Certainly the terms of its wording allowed Mrs. Ramnarine to say that she was satisfied with it and could proceed. Eunice Ramjohn, it should be noted, had been under the care of Dr. Lalla on at least one previous occasion, and that was for about a week in 1997. It is also reasonable to infer, therefore, that he was in a position to opine as to her mental condition in August 1999 having seen and treated her previously.

There is no doubt that Eunice Ramjohn went to Mrs. Ramnarine at the Claimant's suggestion, and that Mrs. Ramnarine had previously acted for the

Claimant. The evidence is very clear, however, that the Claimant had nothing to do with the preparation of the will, or giving instructions for its preparation. She was not present with Eunice Ramjohn whenever the latter met with Mrs. Ramnarine to discuss her will. It is of great importance that no allegation or suggestion is made that the Claimant attempted in any way to influence her mother in the making of this will.

On the first visit, Mrs. Ramnarine made it clear to Eunice Ramjohn that the will was to reflect her wishes. Mrs. Ramnarine established that Eunice Ramjohn was not acting under duress or the influence of anyone. Eunice Ramjohn was insistent that the Claimant get all of her property because she was the only child who looked after her. Her daughter Gloria was well-off and did not even bring food for her. Her sons, she said, would see about themselves. Mrs. Ramnarine required a medical report given Eunice Ramjohn's age and because, or so it would appear, she was on medication although she said this did not make her sleepy. Mrs. Ramnarine made this known to both Eunice Ramjohn and the Claimant. This visit lasted some 40 minutes and it is reasonable to conclude that the discussion must have been at least fairly comprehensive.

On the second visit Mrs. Ramnarine took about 30-35 minutes taking instructions from Eunice Ramjohn in relation to the will and recording those instructions in her Will Book. Eunice Ramjohn repeated her reasons for the Claimant inheriting all (or the great bulk) of her property, that all her daughters were to share equally the money in the bank, and that her sons need not benefit. Eunice Ramjohn knew that the amount of money in the bank was "small". Mrs. Ramnarine asked Eunice Ramjohn if she had other children and what were "her intentions" with respect to them. She asked if there were any other assets and was told that there were none.

From this it is clear that from the outset Eunice Ramjohn knew what she wanted to do and that she never wavered from this position. She understood what a will

was about and what would be the effect of it. She knew the extent of her property and how it was being disposed of. She understood and appreciated that there were children other than the Claimant and that they had been considered. The daughters she provided for, albeit in a minor way compared to the Claimant, but she did not provide for her sons – she considered that they did not need anything. No one "prompted" her as to what she should say to Mrs. Ramnarine.

The will was then typed in draft and Mrs. Ramnarine "checked" it with Eunice Ramjohn. It reflected what Eunice Ramjohn wanted and was then printed in final form. Eunice Ramjohn read this, said that she was satisfied with it, and signed and dated the instructions in the Will Book at Mrs. Ramnarine's request. She then signed the will and it was witnessed by Mrs. Ramnarine and her secretary. There is no doubt that it was signed in conformity with the requirements of the Wills and Probate Act. The original will was given to Eunice Ramjohn who left Mrs. Ramnarine's office with it.

Perhaps a week later Eunice Ramjohn contacted Mrs. Ramnarine about "registering" the will i.e. placing it in the Depository of Wills in the High Court. After the requirements for doing so had been explained to her, she decided not to proceed and persuaded Mrs. Ramnarine to keep it for her. Her reasons for doing this are clear and understandable. They reveal a clear mind, as well as clarity and logic of thought process.

Eunice Ramjohn subsequently returned to V's Rest Home in July 2000. Both Vera LaVictoire and Marilyn Alexander described the condition as having deteriorated, and according to Marilyn Alexander, she was weak and less coherent. Strangely perhaps, Dr. Perot makes no note as to Alzheimers disease when he examined her on 17th July, but her condition continued to deteriorate until her death on 12th April 2001. Again, there is nothing to indicate the stage

to which her condition had progressed. I am not told, for example, that she was totally incapable of looking after herself at this time.

I have considered all of this. I have come to the conclusion that there may have been some impairment of Eunice Ramjohn's mind by dementia based on the evidence as to Dr. Perot's findings and the evidence of Vera LaVictoire and Marilyn Alexander. The former must be treated with caution, and there is nothing to demonstrate the stage to which the dementia (Alzheimers Disease) had progressed. The latter I have to weigh against the evidence of what Eunice Ramjohn actually did and when she did it. That degree of impairment, however, was in my view not sufficient in August 1999 to deprive her of testamentary capacity. She knew what she was doing, and why she was doing it. She knew what her assets were and she knew and appreciated that there were others for whom she might provide other than the Claimant. She chose not to do so. No one influenced her in that decision.

Further, I am satisfied that she knew and approved of the contents of the will at the time of the execution. She understood what she was doing and the effect of what she was doing.

I do not think that in all the circumstances an explanation was required.

Consequently, there will be judgment for the Claimant on the claim. The counterclaim is dismissed.

As to the question of costs, Mr. Rambally submits that the Defendants were justified in defending the claim and if there is no real blame to be attached to the Claimant, in the conduct of these proceedings, then their respective costs should be payable out of the estate. Ms. Rampaul agrees. Attorneys-at-Law also agreed that the prescribed costs of the claim and the counterclaim should be assessed on the basis of each being valued at \$50,000.00.

Mr. Rambally then submitted that the costs should be payable on an indemnity basis and refers me to the judgment in *Osmond McKenzie and Harvey McKenzie v. George McKenzie* CV2006-04038 in support of this submission.

The Civil Proceedings Rules ("CPR") Part 66 deals with the power of the Court to make orders for the payment of costs, including about to make orders requiring one person to pay the costs of another person arising out of or related to all or any part of any proceedings. The general rule is that an unsuccessful party pays the costs of the party succeeding on its claim, but a court always has the discretion to order otherwise.

The CPR Part 67.3(b) provides for the quantification of costs. They are to be either "fixed costs", "prescribed costs", "budgeted costs" or, where neither prescribed nor budgeted costs are appropriate, they are to be assessed in accordance with Rules 67.1 and 67.12. Neither of the latter rules made provision for costs to be paid on an indemnity basis. Rule 67.12 sets out the procedure where costs are to be assessed.

Order 62 Rule 6 of the Rules of the Supreme Court 1975 ("RSC") is in essence a reproduction of Order 62 Rule 6 in England, and the latter replaced what was Order LXV r.1 as it existed in 1926.

Order LXV r.1 was the subject of discussion in the *Estate of William Plant (deceased) Wild v. Plant* [1926] P.139, and the latter made reference to the decision in *Turner v. Hancock* 20 Ch D303, 305.

In *Turner* (at page 305) it was held that as between trustees and the author of the trust there is a contract that entitles the trustees, as between themselves and their beneficiaries, to be paid out of the trust all their proper costs incident to the execution of the trust. Further, those rights can only be lost or curtailed by such inequitable conduct on the part of the trustees as amounts to a violation or culpable neglect of their duty under the contract.

In *Wild* it was held that Order LXV r.1 governs the case of bare executors who reasonably propound a will, but the same does not apply to the executors who fail to prove a will. Having established the validity of the will, and made good their position as to the testator's executors, they are entitled to their costs of the litigation out of the estate as between solicitor and client and can only be deprived of that right if they have acted culpably or unreasonably (see Headnote).

A clear distinction is drawn between an executor who succeeds in proving a will and an executor who does not. The latter has acted at his own risk (*Page v. Williamson* [1902] P. 92) and must pay since he has no contractual right having failed to prove the will (*Re: Barlow* [1919] P.131).

Additionally, a party opposing a will is not in the same position as a successful executor. There is no contract and while both parties were awarded their costs on a solicitor and client basis in *Re: Love, Hill v. Spurgeon* [1885] Ch 29 349, it was because both of them were executors and trustees.

Order 62 Rule 6 of the RSC (as did the English Rules I have referred to) set out this position in a codified form – it did not introduce a new provision relating to costs and merely reflected the position in law.

The CPR contain no equivalent provision, but Part 66 gives a court the discretion to order the costs be paid otherwise than by an unsuccessful party to the party succeeding on its claim.

The Courts have also held that where a party – or the parties – to a probate action are not at fault, then their costs will generally be payable out of the estate. In my view that is appropriate here. It is a variation or departure from the general rule that a party succeeded in trial should have his costs paid by the losing party. The burden of paying the costs moves from the losing party to the estate where it can be often

reduce the inheritance of the party who succeeded simply because the net value of the estate is reduced by the amount of costs which have to be paid.

It is, however, only the Claimant in the present case who is entitled to have her costs paid out of the estate on a "solicitor and client" basis, and that is by virtue of her "office". The Defendants are not similarly entitled. Neither the case nor law the former Rules (either here or in England) so provide.

As to whether the costs should be taxed on an indemnity basis, however, the decisions such as in *Wild* order that they be taxed on a "solicitor client" basis and, as Lucky J. (as he then was) pointed out in *Ramharry Garibdass & Ors. v. Gobin Singh & Anor.* HCA S2263 of 1988 (see pages 19-21), there is no indemnity basis of taxation in Trinidad & Tobago. Nor am I persuaded, as Lucky J. opined, that there is (or was) taxation on a "trustee basis" under the provisions of Order 62 Rule 31 (2) of the RSC.

Order 62 Rule 31(2) has its equivalent in the English Order 62 Rule 14, and relates to what a trustee or personal representative is entitled to recover – it does not allow recovery of moneys spent outside, or contrary to, the duties of a trustee or personal representative.

It is in assessing those costs that the appropriate basis of taxation is considered.

The correct basis is "Solicitor and own client", or what is now more appropriately deferred to as "Attorney and own client". This is defined in RSC Order 62 Rule 29 (1) and is the same as the definition of "indemnity basis" in the English Order 62 Rule 12 (2). The Claimant's costs will therefore be assessed on an Attorney and own client basis, but only in relation to those items of expenditure incurred or paid in accordance with the scope of her duties as a legal personal representative.

I have considered the Defendants' position with a view to making similar orders for their costs but I am not persuaded that it would be appropriate in this case. Unlike the Claimant's costs, the Defendants are to be paid prescribed costs based on a value of \$50,000.00 in accordance with the Provisions of Rule 67.5 (2) (iii), no application for a value of the claim to be fixed having been made under Rule 67.6, or a budgeted costs order made under Rule 67.8. The provisions for fixed costs under Rule 67.4 are clearly not applicable. I assess those prescribed costs in the amount of \$14,000.00.

In summary, there will be judgment for the Claimant on the claim, pronouncement in solemn form of the last will and testament of Eunice Ramjohn, deceased, dated 23rd August 1999, and an order that a grant of probate of same issue to Doreen Fernandes the executrix named therein. The counterclaim is dismissed.

The Claimant's costs of the claim and counterclaim are to be paid out of the estate. Those costs are to be paid on an Attorney-at-Law and client basis and are to be assessed by the Registrar. A detailed bill is to be filed for that purpose. The Defendant's costs are also to be paid out of the estate and I assess those costs in the amount of \$14,000.00.

The file in probate proceedings L2479/01 which was admitted into evidence at the trial is to be returned to the Registrar.

20th February 2009

C.V.H. Stollmeyer
Judge