THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2010 -04871

IN THE MATTER OF THE ESTATE OF BONAFICIO MELONEY OTHERWISE BONIFACIO MELONIE OTHERWISE BONIFACIO MALONEY, DECEASED

AND

IN THE MATTER OF THE ADMINISTRATION OF ESTATES ORDINACE CHAPTER 8 NUMBER 2

BETWEEN

DIANE BOUCAUD ALSO CALLED DELPHINUS DIANE BOUCAUD (LEGAL PERSONAL REPRESENTATIVE OF MARY BOUCAUS, DECEASED)

CLAIMANT

AND

SIMEONA COA (LEGAL PERSONAL REPRESENTATIVE OF BONAFICIO MELONEY OTHEWISE BONIFACIO MELONIE OTHERWISE BONIFACIO MALONEY, DECEASED

DEFENDANT

Before the Honourable Mr. Justice A. des Vignes

Appearances:

Mr. Kweku Wilson for the Claimant

Ms. Leandra Ramcharan for the Defendant

JUDGMENT

1. Bonifacio Maloney (hereinafter referred to as "the deceased") died on 25th May 2001. However, no steps were taken to apply for probate or letters of administration of his estate until 2006 when his sister, Simeona Coa, (hereinafter referred to as "Ms. Coa") applied, as next of kin of the deceased, for a Grant of Letters of Administration of his estate on the basis

that he died intestate. There being no opposition to this application, the same was granted by the Registrar of the Supreme Court on 24th July 2009.

2. Mary Boucaud was the sister of the deceased who died on 28th November 2001 and a Grant of Letters of Administration of her estate was granted to her daughter, Diane Boucaud, (hereinafter referred to as "Ms. Boucaud"), on 25th September 2009 by the Registrar of the Supreme Court.

3. On 24th November 2010, Ms. Boucaud commenced this action, as the Administratrix of the estate of Mary Boucaud, against Ms. Coa claiming, *inter alia*, declarations that the last Will and Testament of the deceased dated 18th October 1993 (hereinafter referred to as "the alleged Will") was valid and admissible and that Ms. Boucaud was entitled to a Grant of Probate of the alleged Will in solemn form and an order revoking the Grant of Letters of Administration made in favour of Ms. Coa. Ms. Boucaud also sought an injunction to prevent Ms. Coa from acting under the letters of administration granted to her.

4. By the terms of the alleged Will, the deceased appointed Mary Boucaud to be the sole executor thereof and devised and bequeathed to her his one half undivided share in a parcel of land situate at Malabar Road, Arima comprising two acres and ten perches more or less for her own use absolutely. He also gave, devised and bequeathed to her all the rest of his real and personal property for her own use absolutely.

5. However, Mary Boucaud died without having applied for probate of the alleged Will.

6. Ms. Boucaud claims to be entitled to the reliefs sought on the following grounds:
    (a) The alleged Will was validly executed by the deceased on 18th October 1993, without undue influence and/or coercion and was a true reflection of his last wishes;
    (b) Ms. Coa applied for letters of administration of the deceased although she had prior knowledge of the alleged Will.

7. Ms. Coa resists this claim on the following grounds:

(a) Ms. Boucaud had the alleged Will in her possession since 15th August 2007 but she took no steps to propound the Will or prevent the issue of the Grant of Letters of Administration to Ms. Coa on 24th July 2009;

(b) The alleged Will was a forgery since the signature on the purported Will was materially different from the signature of the deceased on other documents signed by him and the deceased, an illiterate, had been using his thumb prints to transact business and execute documents for several years prior to the date of the alleged Will;

(c) On the date of the alleged Will, the deceased was in the company of Ms. Boucaud and others and did not attend at the premises of Attorneys at any time on that date.

Issues

8. The following issues arise for determination in this matter:

   (i) Is Ms. Boucaud entitled, as administratrix of the estate of Mary Boucaud, to apply for probate of the Will of the deceased and for revocation of the grant of letters of administration?

   (ii) Is Ms. Boucaud entitled to an order of revocation on the basis that Ms. Coa applied for letters of administration although she had prior knowledge of the alleged Will?

   (iii) Is Ms. Boucaud entitled to an order of revocation on the basis that the Will is a valid Will or is the alleged Will a forgery?

The Evidence

9. Ms Boucaud, Ms Susan Vincent and Mr. Farzan Hosein gave evidence in support of Ms. Boucaud's case while Ms Coa gave evidence in support of her defence. Mr. Glenn Parmassar was called to give expert evidence as a Forensic Document Examiner.

Analysis of the issues

I. Is Ms. Boucaud entitled, as administratrix of the estate of Mary Boucaud, to apply for probate of the Will of the deceased and for revocation of the grant of letters of administration?

10. It is not in dispute that by the terms of the alleged Will, Mary Boucaud was appointed the sole executrix and that she did not apply for probate thereof prior to her death on 28th November 2001. It is also not in dispute that Ms. Boucaud obtained a Grant of Letters of Administration of Mary Boucaud's estate and that she has brought this action in her capacity as Administratrix of Mary Boucaud's estate

11. There are several sections of the Wills and Probate Act[1] (hereinafter referred to as "the Act") which I consider relevant to the determination of this issue.

12. Firstly, section 12 provides as follows:

> "*Where a person appointed executor by a Will—*
>
> *(a) Survives the testator but dies without having taken out probate of the Will; or*
>
> *(b) ....*
>
> *(c) ....*
>
> *his rights in respect of the executorship shall wholly cease and the representation to the testator and the administration of his estate shall devolve and be committed in like manner as if that person had not been appointed executor."*

13. Section 14 also expressly provides that "*an executor of a sole or last surviving executor of a testator is the executor of that testator"* but also provides that *"the chain of representation is broken by an intestacy".*

14. Then, section 21 provides as follows:

> *"No will of any person deceased shall have any effect whatsoever, either in law or in equity, or shall pass any right, title or interest whatever, until the same has been duly proved in accordance with the provisions of this Act."*

[1] Chap. 9:03

15. Further, section 25 provides that "*where any person shall..... have appointed an executor but such appointment shall fail, administration in respect of such estate shall be granted to the person entitled thereto*"

16. Section 30 also provides that:

> "*Applications for administration may be made by the following persons, as of course, and in the following order of preference:*
>
> *(a)* ....
>
> *(b)* *where no executor has been appointed, or the executor is absent from Trinidad and Tobago, or is unable or unwilling to act—*
>
> > *(i)* *a residuary devisee or residuary legatee;*
> >
> > *(ii)* *a devisee or legatee;*
> >
> > *(iii)* *the next of kin;*
> >
> > *(iv)* *the Administrator General.*

17. These provisions impact on the claim of Ms. Boucaud in several respects:

    (i) Since Mary Boucaud was appointed the sole executor of the Will of the deceased, that Will had no effect whatsoever, either in law or in equity until it was proved in accordance with the Act;

    (ii) Mary Boucaud survived the deceased but died in November 2001 without having taken out probate of the Will. Therefore, the rights of Mary Boucaud to executorship wholly ceased and representation to and the administration of the estate of the deceased devolved as if Mary Boucaud had not been appointed executor;

    (iii) If Mary Boucaud had left a Will, her executor would be entitled to apply for probate of the estate of the deceased. However, she died intestate and therefore, the chain of representation was broken by her intestacy.

    (iv) Since Mary Boucaud was appointed the executor of the Will of the deceased but that appointment failed, administration of the deceased's estate could be granted to the person entitled thereto.

(v) By virtue of the letters of administration of the estate of Mary Boucaud granted to Ms. Boucaud, all her real and personal estate, including chattels real, vested in Ms. Boucaud, including her beneficial interests in the estate of the deceased, as provided for in the alleged Will, as devisee of his one half undivided share in the said parcel of land comprising two acres and 10 perches and as residuary devisee of the rest of his real and personal property.[2]

(vi) Therefore, pursuant to the order of preference set out in section 30 of the Act, Ms. Boucaud, in her capacity of Administratrix of estate of Mary Boucaud, was and is entitled to apply for administration of the estate of the deceased in priority to Ms. Coa who was one of the next of kin of the deceased.

18. Accordingly, I am of the view that Ms. Boucaud, as Administratrix of the estate of Mary Boucaud, is entitled to apply for probate of the alleged Will of the deceased and to apply for a revocation of the Grant of Letters of Administration granted to Ms. Coa.

II. Is Ms. Boucaud entitled to an order of revocation on the basis that Ms. Coa knowingly applied for letters of administration although she had prior knowledge of the alleged Will?

19. Section 3 of the Act speaks to the jurisdiction of the court regarding revocation and provides that:

> *"The Court shall have jurisdiction to determine the validity and admissibility to probate of the Will or the granting of administration of the estate of any person domiciled in Trinidad and Tobago...dying seised or possessed thereof or entitled thereto, and to revoke any probate or administration in any suit instituted either by an executor or administrator or any person claiming under a Will to have it established ... or by any person claiming adversely to a Will or administration to*

[2] S. 10 (3) of the Administration of Estates Act Chap 9:01

have it declared void, and the registration of it prevented or recalled, or claiming to have administration revoked."

20. Section 26 of the Wills and Probate Act provides that:

    "All letters of administration granted at a time when there shall be an executor who has not proved the Will shall be voidable and not void; but such administration shall become void when and so soon as a Will of the person of whose estate such administration shall have been granted shall be duly proved by any executor or when such administrator shall be revoked by order of the Court."

21. A grant may be revoked where it has been obtained upon a false suggestion, whether made fraudulently or in ignorance where the false suggestion obscures a defect in the title to the grant or where if allowed to subsist it would prevent the due administration of the estate. Also, where a Will has been discovered after a Grant of Letters of Administration, the grant may be revoked.[3] However, where administration has been duly granted according to statute, it cannot be revoked without just cause.[4]

22. At paragraph 7 (b) of the Statement of Case, Ms. Boucaud alleged that Ms. Coa "*knowingly applied for a grant of Letters of Administration although she had prior knowledge of the last will and testament of the testator."* However, in her witness statement, she failed to give any evidence in support of this allegation. Accordingly, insofar as Ms. Boucaud sought to raise the issue of false suggestion on the part of Ms. Coa to support her claim for revocation, she could not reasonably contend that Ms. Coa made a false suggestion in her application for a Grant of Letters of Administration that would justify an order of revocation.

23. The undisputed evidence in this matter reveals that despite the death of the deceased in May 2001 and the death of Mary Boucaud in November 2001, no steps were taken by Ms. Boucaud to apply for administration of the estate of her mother until 2008 or to apply for administration of the estate of the deceased until November 2010, when this action was filed.

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[3] Halsbury's Laws of England (4th Ed.) Vol. 17 para. 1058-1059
[4] Price v. Parker (1666) 83 ER 347; Offley v. Best (1666) 83 ER 361

24. According to Ms. Boucaud's evidence, she first became aware of the existence of a Will made by the deceased before he died. She stated that after the deceased died in May 2001, Mary Boucaud instructed Keith Scott, Attorney-at-Law to apply for probate of the deceased's Will and she gave the will and the deed for his land to Mr. Scott. Sometime after the death of Mary Boucaud in November 2001, she collected the alleged Will from Mr. Scott but he refused to give her the deed. She then asked her Attorney, Mr. Vincent to write to Mr. Scott for the deed but he was not successful in retrieving the deed.

25. This evidence, insofar as it referred to Mary Boucaud instructing Mr. Scott to apply for probate, is clearly hearsay and inadmissible for its truth and Mr. Scott was not called to give evidence at the trial. Further, Ms. Boucaud's evidence about when she actually collected the Will from Mr. Scott was quite vague and she failed to provide any reasons for not applying for administration of the estates of Mary Boucaud and the deceased between 2001 and 2006.[5]

26. However, on the evidence of a letter written by Mr. Vincent on the 8th August 2007, it is clear that by mid-2007, Ms. Boucaud had secured possession of the Will and that she was aware that Ms. Coa had already applied for letters of administration of the deceased's estate on the basis that he had died intestate. Under cross-examination, she sought to explain that the reason for her delay in taking steps to oppose Ms. Coa's application was that she could not afford to retain an Attorney and her brothers and sisters were unable or unwilling to contribute to the legal costs to fight the matter.

27. While I have no reason to doubt that Ms. Boucaud may have been experiencing financial difficulties, the fact is that the Non-Contentious Business Rules set out a simple procedure for opposing the application of Ms. Coa for a Grant of Letters of Administration. The Rules permit the entry of a caveat either personally or by an Attorney-at-Law and once a caveat has been entered, it remains in force for six months and may be renewed from time to time. Once a caveat has been entered, the Registrar cannot issue a grant. There is also a procedure for

[5] Rule 7 of the Non-Contentious Business Rules requires an applicant for probate or administration made after a lapse of more than three years from the death of the deceased to satisfy the Registrar as to the reasons for the delay.

advertising applications for grants of probate and administration in a local daily newspaper for at least two weeks and once in the Gazette to ensure that a pending application is well publicised and persons who wish to oppose such a grant are given every opportunity to step forward to lodge a caveat, if necessary.

28. It was incumbent upon Ms. Boucaud, therefore, either personally or through her Attorney-at-Law, to lodge a caveat against the issue of a grant to Ms. Coa if she intended to contend that the deceased did not die intestate and that he had made a valid Will. Despite her alleged impecuniosity, Ms. Boucaud had retained Mr. Vincent by August 2007 to write on her behalf to Ms. Coa calling on her to withdraw her application. She gave evidence that she instructed her Attorney to lodge a caveat but no such caveat was lodged and no explanation has been given by Ms. Boucaud or her Attorney for the failure to lodge a caveat against the grant between 2007 and 2009.

29. On the facts of this case, Ms. Boucaud was well aware of the existence of the Will before Ms. Coa's application was made and she had the Will in her possession since August 2007. In the circumstances, this is not a situation where a Will has been discovered after a Grant of Letters of Administration. With the Will in the possession of her Attorney, she stood by for almost two years without objection and then she delayed for a further year after the grant had been issued to Ms. Coa before bringing this action to seek a revocation of the grant.

30. Ms. Boucaud admitted that she had the Will in her possession before the Grant of Letters of Administration to Ms. Coa and yet she failed to lodge a caveat to oppose her application in accordance with the Non-Contentious Business Rules of the Wills and Probate Act or to make an application for probate of the alleged Will. The mere writing of a letter in August 2007 by her Attorney, Mr. Vincent did not impose upon Ms. Coa an obligation to withdraw her application for letters of administration. The procedure available to Ms. Boucaud was to lodge a caveat and she failed to comply with that procedure.

31. Therefore, the grant of letters of administration to Ms. Coa having been issued by the Registrar of the Supreme Court in accordance with the procedure set out in the Wills and

Probate Act, the burden lay upon Ms. Boucaud to show just cause why that grant should now be revoked.

32. In my opinion, Ms. Boucaud has failed to prove that Ms. Coa's application for a Grant of Letters of Administration was based on a false suggestion or fraud. Accordingly, insofar as her claim for revocation was based on the actions of Ms. Coa in applying for a Grant of Letters of Administration, she has failed to show just cause why the grant to Ms. Coa should be revoked by this Court.

III Is Ms. Boucaud entitled to an order of revocation on the basis that the Will is a valid Will or is the alleged Will a forgery?

33. The Court has jurisdiction to determine the validity and admissibility to probate of the Will and to revoke any administration in any suit instituted by an executor or administrator or any person claiming under a Will to have it established.

34. Ms. Boucaud's case is based on her assertion that the alleged Will was validly executed by by the deceased on 18th October 1993, without undue influence and/or coercion and was a true reflection of his last wishes. Ms. Coa resists the claim on the grounds that the alleged Will was a forgery. According to her Defence, the signature on the alleged Will was materially different from the signature of the deceased on other documents signed by him and the deceased, an illiterate, had been using his thumb prints to transact business and execute documents for several years prior to the date of the alleged Will.

<u>The Law</u>

35. For a testamentary instrument to take effect according to its terms, the court must be "satisfied that the contents do truly represent the testator's intentions" ***Fuller v Strum*** **[2001] EWCA Civ 1879, [2002] 2 All ER 87, [2002] 1 WLR 1097**, at para 65. In order for the court to find that a Will is that of the testator which is valid, the court must be satisfied of three requirements:

    1) Due execution of the Will
    2) Testamentary Capacity

3) Knowledge and approval

36. With regards to **<u>due execution</u>**, the party propounding a Will must prove[6] on a balance of probabilities[7], that the Will was duly executed by the deceased in accordance with the **section 42** of the **Wills and Probate Act Chap. 9:03,** which provides that:

    (i) The Will must be in writing and made by the Deceased;
    (ii) The Will must be signed at the foot or end of it by the Deceased or by some other person in his presence and by his direction;
    (iii) The signature must be made by the Deceased or acknowledged by him in the presence of two or more witnesses;
    (iv) The witnesses must be present at the time the Deceased affixed his signature and they attested and signed the Will in the presence of the Deceased and of each other.

37. Stollmeyer J. (as he then was) summarised the principles relevant to due execution in **Marilyn Lucky v Maureen Elizabeth Thomas-Vailloo, HCA No. 1936 of 1996** as follows:

    a) *There is a presumption of due execution if the Will is, ex facie, duly executed;*

    b) *The force of the presumption varies depending upon the circumstances. The presumption might be very strong if the document is entirely regular in form, but where it is irregular or unusual in form, the maxim omnia praesemuntur rite esse acta cannot apply with the same force, as for example, would be the case where the attestation clause is incomplete.*

    c) *The party seeking to propound a Will must establish a prima facie case by proving due execution;*

[6] Alvarez v Chandler (1962) 5 WIR 226
[7] Fuller v Strum [2002] 2 All ER 87

38. If a Will is not irregular or irrational, or not drawn by a person propounding the Will and benefiting under it, then this onus will have been discharged. However, even if the party propounding the Will leads evidence as to due execution, there is still the question of whether the vigilance and suspicions of the court are aroused. If so, then the burden once again reverts to the party seeking to propound it. In **Visham Lalla v. Suruj John Lalla Civ App No. 102 of 2003** the Honourable Mendonca JA held (at paragraph 59) that:

    "…Where there are circumstances which excite the suspicion of the Court, the Court ought not to pronounce in favour of the Will unless the suspicion is removed so that the Court is satisfied that the Will propounded does express the true Will of the deceased (see Barry v Butlin 2 Moo P. C. 480)."

39. In **Lalla v. Lalla** it was further explained that *"...the circumstances which have been held to excite suspicion, include the intrinsic terms and the circumstances of the preparation and execution of the Will"* and regard must be had to the circumstances primarily existing at the time when the Will was executed, although subsequent events could be relevant.

40. **Testamentary capacity** requires the capacity to understand 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". (**Hoff v. Atherton [2004] EWCA Civ 1554 paragraph 33**, referring to **Banks v. Goodfellow (1870) LR 5QB 549 at 565**.)

41. In **Banks v Goodfellow (1870) L.R. 5 Q.B. 549, 564-565,** Cockburn CJ said: "*...that no disorder of the mind shall poison his affections, pervert his sense of right, or pervert 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."*

42. With respect to the burden of proof when the question of testamentary capacity arises, Briggs J in **Key v Key [2010] 1 WLR 2020** para 97A-B, identified the following principles:
    (i) While the burden starts with the propounder of a Will to establish capacity, where the Will is duly executed and appears rational on its face, then the court will presume capacity;
    (ii) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity;
    (iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity nonetheless.

43. **Knowledge and approval** requires proof of actual knowledge and approval of the contents of the Will. In **Lalla v. Lalla,** Mendonca J.A., emphasised that the burden of proof of the Testator's knowledge and approval of the Will lies on the party setting up the Will. The burden may be discharged by positive evidence that the testator read and approved the Will but it is not necessary that there be such evidence, since the burden may be discharged *prima facie* by the presumption which arises by proof of the capacity of the Testatrix and due execution of a Will regular on the face of it. From these knowledge and approval of the Will are presumed.[8].

44. Generally, the Court will adopt a two stage approach whenever the question of knowledge and approval arises. Firstly, it will ask whether the circumstances are such as to "excite suspicion" on the part of the Court. If the Court finds that there are such circumstances that excite suspicion, then it is for the propounder of the Will, to establish, on a balance of probabilities[9] that the testator knew and approved the contents of the Will. In the case of **In the_Estate of Fuld (1968) 1 P. 675**, Mr. Justice Scarman said that the weight of the burden will vary with the weight of the suspicion to be dispelled. In **Wintle v Nye [1959] 1 WLR 284 @ 291**, Viscount Simonds said: "*The degree of suspicion will vary with the circumstances of the case. It may be slight and easily dispelled. It may, on the other hand, be*

[8] **In the Estate of Musgrove, Davis v Mayhew [1927] P. 264; Lucky v Tewari (1965) 8 W.I.R.363**
[9] **Fuller v Strum [2002] 2 All ER 87**

so grave that it can hardly be removed". The circumstances which are held to excite the suspicion of the Court must be circumstances relating to the preparation and execution of the Will[10] although it may also relate to the testamentary capacity of the deceased or to a plea of undue influence[11].

45. If the circumstances are such that the suspicion of the Court is not excited, then the Court presumes knowledge and approval in the case of a Will which has been duly executed by a testator who has testamentary capacity[12]: **Cowderoy v Cranfield [2011] EWHC 1616 (Ch) @ Para 139 per Morgan J.**

The evidence

46. Although Ms. Boucaud failed to put the original Will into evidence, the original was shown to her during her cross examination and she was able to identify the date thereon. Further, the trial proceeded on the basis that the copy of the alleged Will annexed to the witness statement of Ms. Boucaud was a true copy of the original. In the circumstances, notwithstanding Ms. Boucaud's non-compliance with Part 72.5, I do not consider that the failure to put the original into evidence is fatal to the claim herein and I am prepared to distinguish this case on its facts from the decision of Justice Jones in **Lee King v. Martinez, Martinez and Lambert, CV 2012-03303.**

47. Ms. Boucaud relied on the evidence of Susan Vincent to prove due execution of the Will. She gave evidence that she was present on 18th October 1993, together with Simon Vincent, the attorney who prepared the Will, when the deceased signed the alleged Will. She confirmed that the signature at the foot of page 1 of the alleged Will was the true and proper handwriting of the deceased and that the signatures of "S.D. Vincent" and "Susan Vincent" to the said Will were the true and proper handwriting of Simon Vincent and of herself.

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[10] Re R [1950] 2 All ER 117 @ 121 per Willmer J

[11] *Ibid*

[12] See also *Re Morris (deceased); Lloyds Bank Ltd. v Peake and others* [1970] 1 All ER 1057, which held that the fact that a testator read and executed a document raised a prima facie inference that he knew and approved its contents but that there was no rule precluding the court from considering all the evidence in order to arrive at the truth whether fraud or merely mistake was suggested.

48. Under cross-examination, Ms. Vincent gave evidence that the Will was read over to the deceased by Mr. Vincent and the deceased said it was what he wanted and then he signed it at the bottom of page 1 in her presence and in the presence of Mr. Simon Vincent. She also said she believed that she signed on the same page.

49. Ms. Coa disputed the due execution of the alleged Will on the basis that the signature of the deceased thereon was materially different from the signature of the deceased on other documents signed by him and the deceased had been using his thumb prints to transact business and execute documents for several years prior to the date of the alleged Will.

50. In her witness statement, she stated that, to her knowledge, the deceased suffered from debilitating arthritis and had stopped signing his name before 1993. She also stated that it was well known to everyone that he signed for his pension, at the Bank and everywhere else with his thumb print from about 1990 as his hands had become twisted and deformed.

51. Under cross-examination, however, Ms. Coa contradicted this evidence when she responded as follows:

    "*In 1993 he was good. He used to walk around. He had arthritis in knee. His hand was good then. I used to visit him in 1993 all the time. I did not see him reading him newspaper. He could read. I don't recall seeing him sketching things on newspaper. I know he could write. He had use of his hands in 1993.*"

52. Further, she indicated that she never dealt with her brother's pension and cheques and she had no personal knowledge of him using his thumb print.

53. The Court also had the benefit of the evidence of Mr. Glenn Parmassar who prepared a Forensic Document Examination Report dated 30th May 2012 which was tendered into evidence. Having compared the signature on the alleged Will with five other specimen signatures of the deceased, Mr. Parmassar concluded in his Report that " *it is probable that the questioned signature "Bonifacio Meloney" on Exhibit Q 1 may not have been executed by the K1-K5 specimen writer. The evidence found in this regard, however, remains far from*

conclusive. The nature of the questioned signature itself and the lack of additional specimen signatures as discussed above prevent a more conclusive forensic handwriting determination form being reached"

54. Under cross-examination by Counsel for Ms. Boucaud, Mr. Parmassar gave evidence that handwriting may change over time and it would not be surprising to find differences between the signature of the deceased in 1993 and signatures made twenty years earlier. He also accepted that the possibility existed that the deceased could have signed the alleged Will.

55. After considering the evidence of Ms. Vincent, Ms. Coa and Mr. Parmassar, I am inclined to believe the testimony of Susan Vincent, who was not shaken in cross-examination. Accordingly, I find, on a balance of probabilities, that the alleged Will was duly executed by the deceased in accordance with Section 42 of the Wills and Probate Act.

56. In her witness statement, Ms. Coa disputed the testamentary capacity of the deceased when she stated at paragraph 15 that "*the Second Defendant (deceased) had become progressively more senile from about the same time and so it appeared that the signature on the Will was a forgery and the date on the Will was simply chosen as a time when he was still mentally competent."*

57. However, in answer to questions posed by this Court, Ms. Coa gave the following evidence which completely contradicted that paragraph:

> *"In 1993 he used to speak to me and he understood what was going on. He was not senile. What I said in paragraph 15 is not true. He was not senile in 1993. I have no reason why I told an untruth. I don't have any evidence about him not having mental capacity."*

58. The burden lies upon Ms. Boucaud as the propounder of the alleged Will to establish capacity. However, since I have found that the Will was duly executed and the Will appears rational on its face, I am entitled to presume capacity, unless there is evidence from Ms. Coa to raise real doubt about the deceased's capacity as at the date of the Will.

59. In my opinion, Ms. Coa has failed to raise any real doubt as to the deceased's testamentary capacity and she actually conceded that he was not senile in 1993 and that she had not given truthful evidence in her witness statement. Accordingly, I am satisfied that the deceased had testamentary capacity at the time of execution of the alleged Will.

60. Ms. Boucaud alleged in her Statement of Case that the alleged Will was "*a true reflection of his last testamentary desires and wishes."* However, in her witness statement, she did not give any evidence in support of this allegation. Further, Ms. Vincent gave no evidence in her witness statement about the deceased's knowledge and approval of the contents of the Will and unfortunately, I did not have the benefit of evidence from Mr. Simon Vincent, who prepared the alleged Will.

61. However, under cross-examination, Ms. Vincent gave evidence that the deceased asked Mr. Vincent to read the Will to him, which he did, and the deceased then said in broken English, "*That is what I want*."

62. On the other hand, Ms. Coa asserted in her witness statement that the deceased had not at any time mentioned to her that he ever signed a document such as a Will and that in her view he would not have even thought about a Will for himself. Under cross-examination, however, she gave the following evidence that undermined her credibility on this aspect of her evidence:

> *"I said he was close to Mary Boucaud. They were closer than he and I. It is possible and reasonable that he would have mentioned will to her and not me. The fact that he never mentioned it to me was strange because my sister would have told me that there was a will. It was strange that he did not mention it to me. He never told me he made visits to office of Attorney, Mr. Vincent in Arima. I was not living with him but he was in habit of telling me where he was going all the time. He would not have gone out without mentioning it to me. He would go with his sister or somebody else. He would inform his sister where he was going. I was not living with him. He would not necessarily inform me where he was going. It is*

possible that he would go to lawyer's office and not tell me. I said that I was of view that he would not have thought of a will. He was not a man thinking about business. He had land there but he would not think about a will. I grow with him and I know how he used to move. That is my opinion of him. It is not based on something he said to me."

63. Further, Ms. Coa alleged in her Defence that "*on the date of the purported Will the Deceased was in the company of the Claimant and others and did not attend at the premises of attorneys at any time on that said date"*. However, in her witness statement, she did not give any evidence in support of this allegation.

64. In the circumstances, in the absence of any evidence to excite the suspicion of the Court, the Court is entitled to presume that the deceased knew and approved of the contents of the Will based on the fact that the Will was duly executed and that the deceased had testamentary capacity. Accordingly, I find that the deceased knew and approved of the contents of the alleged Will.

65. This court is cognisant of the fact that in all cases, the paramount consideration is the ascertainment of the real wishes of the testator. In light of the finding that the alleged Will reflects the true intention of the deceased, the court is of the view that it must endeavour to give effect to the testamentary wishes of Mr. Maloney. Despite the failure of Ms. Boucaud to file a caveat objecting to the Grant of Letters of Administration, the court is of the opinion that the procedural default on the part of Ms. Boucaud is insufficient to preclude her from obtaining the reliefs as prayed. The Claimant is seeking to propound the Will in solemn form. The basis upon which the Defendant attempts to impeach the Will do not stand up to scrutiny and as such the court finds that the Will expresses the wishes of the Testator in a manner which is consonant with the law. The court is therefore constrained to give effect to the Will of the deceased, and pronounce in favour of its validity.

<u>Disposition</u>

66. In the light of my findings that the alleged Will was duly executed by the deceased, that he had the requisite testamentary capacity and that he knew and approved of the contents of the Will, I will grant the following reliefs sought by the Claimant:

(i) A declaration that the last Will and testament of Bonifacio Meloney otherwise Bonifacio Melonie otherwise Bonifacio Maloney, deceased dated 18th October 1993 is valid;

(ii) A declaration that the Claimant is entitled to a Grant of Letters of Administration with will annexed in respect of the said last Will and Testament of Bonifacio Meloney, otherwise Bonifacio Melonie, otherwise Bonifacio Maloney, deceased;

(iii) An Order that the said Will be admitted to administration in solemn form of law;

(iv) An Order revoking the Grant of Letters of Administration No. L. 2485 of 2006 made in favour of the Defendant on 24th July 2009;

(v) An order directing the Defendant to lodge the grant of Letters of Administration No. L. 2485 of 2006 made in her favour with the Registrar within fourteen (14) days of the date of this Order;

(vi) An injunction restraining the Defendant, whether by herself or by her servants and/or agents from acting under the Letters of Administration No. L. 2485 of 2006 made in favour of the Defendant;

Costs

67. Having regard to the fact that the Claimant failed to take steps to apply for probate of the said Will for almost nine (9) years after the death of Bonifacio Maloney and that she failed to follow the simple procedure set out in the Non-Contentious Business Rules for opposing the Defendant's application for letters of administration, I am of the view that I ought not to follow the general rule that a successful party is entitled to an order for costs. In all the circumstances of this case, I am of the view that a more appropriate Order is that each party should bear their own costs of this action.

Dated the 18th day of November, 2013

André des Vignes
Judge.