**COMMONWEALTH OF THE BAHAMAS**
**IN THE SUPREME COURT**
**COMMON LAW AND EQUITY DIVISION**
**2019/Pro/cpr/00009**

**BETWEEN**

**IN THE MATTER of the Grant of Probate issued on 14th September A.D. 2018 in action No.Pro/npr/00217 of 2017 to Sonia Moncur and Deneria Butler in the Estate of Phillip Alexander Moncur Sr.**

**PHILLIP MONCUR JR.**

**First Plaintiff**

**AND**

**MARIO MONCUR**

**Second Plaintiff**

**AND**

**SONIA MONCUR**

**First Defendant**

**AND**

**DENERIA BUTLER**

**Second Defendant**

**Before:** **Madam Justice G. Diane Stewart**

**Appearances:** **Mrs. Tanya Wright for the Plaintiffs**
**Ms. Glenda Roker for the Defendants**

**Judgment Date:** **January 20th, 2023**

**JUDGMENT**

1. By a Specially Endorsed Writ of Summons filed 22nd January 2019, the Plaintiffs sought an order setting aside the Grant of Probate issued in Pro/npr/00217 of 2017 to the Defendants. They also sought declarations that the Last Will and Testament of Phillip Alexander Moncur Sr. dated 22nd January 2013 **(the "Will")** and the Deed of Assent from Sonia Moncur to Deneria Butler to Sonia Moncur dated 25th September 2018 be declared null and void so that it would result in his having died intestate and for an order made for the equal distribution of his estate amongst the Plaintiffs and the First Defendant.

2. The Plaintiffs also sought injunctions restraining the First Defendant from evicting the Plaintiffs and from disposing or otherwise encumbering the subject property until the matter was determined.

3. The Plaintiffs claim was based on their relationship with their and the First Defendant's father, Phillip Alexander Moncur Sr. **(the "Deceased")**, and specifically the relationship surrounding the family home situate No. 8 Rolle Avenue in the Eastern District of New

Providence **(the "Family Home")**. They claim that the Second Plaintiff assisted with the rebuilding of the Family Home and that while the First Defendant provided two hundred dollars towards its reconstruction, she eventually moved out, and later took the Deceased to live with her and allegedly ensured the alienation of the Deceased from the Plaintiffs. Additionally, the Deceased had several medical conditions which would have prevented him from creating the Will.

4. The Defendants claim that the Deceased alone was responsible for the construction of the Family Home. The First Defendant's contribution exceeded the amount claimed by the Plaintiffs and that she also contributed toward the Deceased's upkeep. They denied alienating the Deceased or that his health was in disrepute. By Counterclaim, the First Defendant sought an eviction order against the Plaintiffs from the Family Home in addition to damages stemming from the loss of use and enjoyment of the Family Home from the date of the grant of probate up to the determination of the matter.

## ISSUES

5. The issues for the Court's determination are:_
    i. Did the First and Second Defendant exert undue influence and pressure over the Deceased in the execution of his Will?
    ii. Did the Defendants possess a relationship of confidentiality in relation to which a presumption of undue influence would arise?
    iii. Was the execution of the Will attended by suspicious circumstances such that the Deceased was in such a condition of mind that he was unable to understand the nature of the act and its effect or to comprehend and appreciate matters to which he ought to give effect?
    iv. Does the manner in which the Will was executed at the office of the Second Defendant excite suspicion?
    v. Was there a free and voluntary exercise of free will by the Deceased in the execution of the Will?
    vi. Whether the First Defendant should be granted an order evicting the Plaintiffs from the Family Home and be awarded damages for the loss of use and enjoyment of the Family Home.

## EVIDENCE

### Plaintiff's Evidence

6. The First Plaintiff, the eldest son of the Deceased, averred that the Deceased was employed as a warehouse manager with JBR Building Supplies **("JBR")** until his retirement in 2011 due to a diabetic condition which ultimately resulted in the amputation of two toes on his left foot. The Deceased and the Second Plaintiff almost singlehandedly built the Family Home. The First Defendant's only contribution was two hundred dollars towards some masonry work to one of the rooms.

7. The water and electricity supplies to the Family home were both disconnected in 2016 after he and the First Defendant had failed to make the required payments. Once the First Defendant vacated the Family Home, she and her two children never returned. The Second Plaintiff was the primary caretaker for the Deceased and was trained to take care of his wounds. He and the Second Plaintiff were listed as the Deceased's next of kin after his two discharges from the hospital.

8. In January 2012 the First Defendant removed the Deceased from the Family Home and promised to return him in a few days. However, she refused to return him and they would visit him by the First Defendant and take money to him from time to time. The Deceased only spoke about the past and never the present. At times he could not remember his children and his speech would be labored. He had suffered a series of heart attacks and although he could walk he was mostly bedridden. Prior to his illness, the Deceased told him that the Family Home was for all of his children.

9. The Deceased would not have been able to read the contents of the Will as his eyesight had been poor since childhood. Leaving everything to the First Defendant was contrary to his previously expressed intentions. During his mother's lifetime, the Deceased would utilize Carolyn Lightbourn to make legal and other formal arrangements for him as she was a legal secretary. However, the Deceased retained the law firm where the Second Defendant was employed to prepare the Will.

10. During cross examination the First Plaintiff admitted that they currently did not have any electricity at the Family Home. In 2016 he could not recall if the Deceased resided at the Family Home but he knew that the First Defendant was not there. The arguments between himself and the First Defendant were the usual arguments you would expect from a brother and a sister.

11. In 2011 the Deceased was not completely blind, but thereafter he could not understand what was going on around him and he was not the same person. On one of the occasions he was released from the hospital, the Second Plaintiff's wife took him home because he was at work. He worked shifts and would usually work nights. They would let him know what was needed and he would provide it. He would visit the Deceased 'plenty' while he was living with the First Defendant as a result he did not need to call. He added that the First Defendant was not always at home. He agreed that there was no evidence of mental incapacity between 2nd April 2013 and 14th January 2016.

12. During re-examination he explained that the Second Defendant was a family friend but that she only remained in the car when she visited the Deceased at the Family Home. He did not know what the Second Defendant did at Davis & Co. He did not have any proof that the First Defendant pressured his father. After the passing of Hurricane Matthew the Second Plaintiff told the First Defendant to return home but she did not. He was aware that his father was at the Yellow Elder Home.

13. The First Plaintiff stated that the Deceased would always call his aunt, Carolyn Lightbourn when he needed a legal opinion and that all of his legal documents were handled by her.

14. The Second Plaintiff, the second son of the Deceased, averred that he and the Deceased completed the substantial construction and improvements to the Family Home. He, his wife and their two sons presently live in the Family Home. He and the Deceased paid the reconnection fee for the water and electricity after the First Plaintiff and the First Defendant failed to make payments. Around that same time, his father's condition worsened and he became primarily responsible for his care. He suffered from diabetes which resulted in his having two toes amputated.

15. The First Defendant removed his father from the Family Home in 2012. Their father told

both him and the First Plaintiff many times that he wished to return home. The First Defendant would deny them visitation, making up excuses as to why they could not visit their father, or why they could not pick him up. Due to the Deceased's age and medical conditions, including his poor eyesight he would not have been able to read the contents of the Will on his own without assistance. The Deceased had expressed distrust for members of their mother's adoptive family which included the Second Defendant and warned them never to trust them with family matters. The First Defendant made all the arrangements for the preparation of the Will. They were never made aware of the existence of the Will until after the Deceased's death.

16. The Defendants asserted undue influence over the Deceased in the execution of the Will.

17. During cross-examination he stated that a friend of theirs did the electrical work on the Family Home along with a plumber and another man who completed the roofing. There was a contractor who would instruct them on what to do. The First Defendant had shut off the electricity in the Family Home and collected the deposit so they were receiving electricity from their neighbors. The Deceased was not completely blind but had issues with his good eye. He could not recall which law firm Carolyn Lightbourn, his mother's sister, worked for but recalled that she dealt with her mother's estate.

18. He could not say who acted on his parents' behalf in the preparation and execution of the Conveyance for the Family Home. He had no idea why the Deceased would retain Davis & Co. if he had previously utilitzed his aunt. His mother had worked for Mr. Christie. The Second Defendant was someone the Deceased grew up with but she was not his close friend. She would visit with the Deceased from the comfort of her car and would not come into the house. The Deceased would not always want to go to her job but went to show good face.

19. He was aware that the Deceased attended the Yellow Elder Home for Senior citizens, and on a few occasions he gave the First Defendant food for the Deceased. He never visited him at the Home, only at the First Defendant's home. He and the Deceased grew up like brothers.

20. During re-examination the Second Plaintiff stated that there were people who saw him acquire information from JBR and that there was evidence of his acquiring building materials from JBR which he purchased using his building account. He added that the Deceased also had glaucoma in his eye and had blurred vision.

21. Mr. Jim Bethel, a neighbor of the Deceased and the Plaintiffs, gave evidence that he knew that prior to the construction of the Family Home, there was a wooden structure on the property. The Family Home was constructed by the Deceased and the Second Plaintiff who also took care of the Deceased and would daily change the dressing on the Deceased's leg.

22. The First Defendant would leave the Family Home, and would not be seen for years and then she would later return. At one point when she started to come around, there was a joke about her returning at the end of the month when the Deceased would receive his benefits. The First Defendant was never around to assist with the Deceased when he was sick. During his time in and out of the hospital, his health started to decline. He would describe him as "doting" as he would forget his name or call him by the wrong

name. The Deceased always showed that he loved all of his children.

23. During cross-examination Mr. Bethel stated that while it was a long time ago he might have slept at the Family Home once or twice. He had not seen the First Defendant there prior to the Deceased leaving ICU and added that he always visited the Family Home. He did not think the Deceased was able to see him as he had to tell him who he was although he did not think he could not see at all. He stated that the Plaintiffs did not have electricity in the Family Home but were receiving it from a neighbor.

**Defendants' Evidence**

24. The First Defendant stated that the Second Defendant was a close family friend whom she grew up with and whom she affectionately called 'aunt'. The Deceased and the Second Defendant grew up as family. She denied any allegations of impropriety and undue influence or that the Deceased lacked the mental capacity to make and execute his Will. The Deceased constructed the Family Home with the assistance of many people using his own personal resources. The Second Plaintiff did not assist the Deceased physically or financially but would call on her to assist him financially.

25. She moved initially from the Family Home after her mother died but returned in 2007 and left again in 2008/2009 on the encouragement of the Deceased, as the Second Plaintiff, who also lived there with his family, would initiate many arguments which would from time to time become physical. After the Deceased's health declined both she and the Second Plaintiff assisted with his care. The Deceased stayed with her for a week but requested to return to the Family Home. In 2011 after the Deceased had a severe heart attack, the Second Plaintiff had informed her that he was unable to collect the Deceased from the hospital and had no one to care for him and he came to reside with her and lived there until his demise.

26. The Deceased was free to move as he wished however, it was in his last few months that he had lost his mobility. He was free to call whomever he wished. The Plaintiffs did not assist her with caring for the Deceased nor did they visit him on a consistent basis, instead only visited once or twice a year. She sought assistance from the Department of Social Services and was able to enroll the Deceased in the Yellow Elder Senior Citizen Day Care Facility at a weekly cost of twenty five dollars.

27. The Deceased suffered a seizure and stroke in April of 2013. He was advised not to wear his glasses for prolonged periods because of his suffering from seizures and strokes but he was still able to use his good eye to see. In mid-2016 she noticed that the Deceased's memory began to decline. In October 2016 he was diagnosed with having moderate dementia.

28. There is no medical evidence which suggests that the Deceased was impaired physically or mentally when he executed his Will.

29. The Deceased always told her that he would leave the Family Home to her and would involve her in its affairs.

30. There was evidence of meter tampering at the Family Home, the electricity supply was disconnected and the Deceased's account was billed as a result.

31. The Deceased always entrusted Davis & Co. to handle his legal affairs. Davis & Co. assisted both parents in the purchase of the property on which the Family Home was built and remained in possession of its title documents. The only time the Deceased utilized separate legal counsel was in 2011 when Carolyn Lightbourn prepared a Power of Attorney for him and in 2012 Alex Morley was given instructions to prepare a new Power of Attorney.

32. On 22nd January 2013, after the Deceased informed her that he needed to see the Second Defendant, she took him to Davis & Co. and left him there. She was unaware that he intended to make the Will but informed her after he had made it. Since the Deceased's death and after she had obtained the Deed of Assent, the Plaintiffs continued to possess and have use and enjoyment of the Family Home to her exclusion. This exclusion resulted in her loss of its use and enjoyment despite efforts to have them removed from the home.

33. The Caveat filed by the First Plaintiff referred to a Will dated the 12th March 1998 allegedly executed by the Deceased. She was unaware of the existence of such Will nor has it been produced by the Plaintiffs.

34. During cross-examination, the First Defendant testified that she and the First Plaintiff did not share a close relationship and that she was frightened of the Second Plaintiff. The Second Plaintiff physically helped with the reconstruction of the Family Home by placing rocks in the foundation and she did not have any direct knowledge of whether he gave the Deceased any money towards its construction. She believed the Deceased's claim that the Second Plaintiff had not helped financially and knew that he would not have asked the First Plaintiff who rarely had any money.

35. Around once a month, she averred that the Deceased would ask her for money to assist with the construction. When her father was in ICU after suffering a stroke she was not able to see him immediately as she was named as a friend of the family and not his daughter which would have made her immediate family. She had to retrieve her birth certificate and passport to present to the nurse at the hospital in order to see the Deceased. She agreed that her Aunt Caroline was responsible for the Deceased's continued receipt of benefits from his former job at JBR Building Supplies.

36. In December 2011 she became next of kin because the Plaintiffs would not agree to the heart surgery needed for the Deceased. She did, and signed off, consenting to the surgery. Upon his release she carried him to the Family Home but because her brothers would not have been able to assist due to their work she took him to her home. In March 2012 he asked for a Power of Attorney to be prepared based on the content of the Power of Attorney which had been drafted by Carolyn Lightbourn and informed her that he preferred her to be in charge of his well-being.

37. The Deceased had been told about Alex Morley as an attorney which was why he had asked him to draft the Power of Attorney. She could not say why he would not go to Davis & Co. On the day the Deceased attended Davis & Co. to make his Will, he did not speak to her while they were on the way about what he was going to do. After she had collected him from the meeting he informed her that he had the Will prepared and she did not discuss any of it with the Second Defendant.

38. In 2016, after a hurricane had passed, and damaged her residence, she had called the

Plaintiffs seeking a place to stay for her family, her aunt and the Deceased but they told her there was no room for them. She did not inform the Plaintiffs about the Will because she was frightened of them. She agreed that it was incorrect that the Deceased had always utilized the law firm of Davis & Co.

39. During re-examination the First Defendant averred that she disliked the First Plaintiff because he was a thief who would also steal from her parents and he smoked weed. The police would kick down their door and find drugs. She was afraid of the Second Plaintiff because he had physically abused her and caused her a swollen eye and mouth. On one occasion he chased her with a cutlass and told her he was going to kill her. Thereafter, the Deceased decided that she would move out of the Family Home. The First Plaintiff's name was removed as next of kin because the Deceased had no faith in him.

40. The Second Defendant, a co-executrix of the Deceased's estate, averred that she and the Deceased grew up together as family. On 22nd January 2013 he visited Messrs, Davis & Co., where she was employed as an accountant, with the First Defendant. The First Defendant left and she and the Deceased, who was coherent, exchanged stories about their past and then he told her it was time for him to make a Will. She directed the Deceased to Merlean Poitier, a Legal Administrator and she was not present when he gave instructions for the Will nor was she present for its execution.

41. During the Deceased's latter years, the Plaintiffs did not assist with the Deceased's care. In the daytime, the Deceased would attend the Yellow Elder Senior Citizen's Centre. The Deceased would often express his love and affection for the First Defendant and informed her that upon his death, the First Defendant would receive the Family Home.

42. During cross examination the Second Defendant stated that she would consider herself friendly with the First Defendant. She could not speak to the relationship between the Plaintiffs and the First Defendant. During the Deceased's lifetime, while he was still working, he would stop by her office and visit with her from time to time. On 22nd January 2013 she was unaware that the Deceased would be coming to the firm. Prior to the First Defendant looking after the Deceased he looked after himself. When he was in the hospital she would meet all of the children at the hospital from time to time.

43. Merlean Poitier, a Legal Administrator in Davis & Co. **("Ms. Poitier")** averred that the Deceased would often visit the Second Defendant at the firm and became one of the firm's clients. She was a witness to the execution of both the conveyance and mortgage deeds for the Family Home. On 22nd January 2013 she alone took the Deceased's instructions for his Will. He was adamant that the instructions were his own and she read them over to him as customary. The Will was witnessed by herself and Debbie Michelle Gilbert. The Deceased was coherent and his usual self as he had come to know him over the years. The Will was secured in the firm's deed safe until his death in 2017. Neither of the Defendants were present when its instructions were given or when the Will was executed.

44. During cross examination, Ms. Poitier stated that she had never studied law and she was aware that the Deceased had children other than the First Defendant. She was aware that the Deceased had been in and out of the hospital a year prior to making the Will. Prior to the notarization of the Will it was looked over by an attorney. She agreed that there was no attorney's signature in the margin of the Will. They did not take an oath

on the Bible prior to executing the attestation of witnesses' pages. She agreed that she had heard of disputes between families after only one child had inherited the entirety of a deceased parent's property. She agreed that it would have been prudent for a lawyer to look over the Will. The Second Defendant did not discuss the Will with her.

45. During re-examination she stated that there was nothing in law which specified that a will had to be prepared and ratified by an attorney. The Deceased's instructions did not raise any suspicion as it was not uncommon. She had never contacted a named executor to confirm whether they consented to the appointment and she did not know of any legal requirement to do so.

46. Dr. Leander Farrington, a Family Medicine Specialist submitted a letter dated 7th November 2018 speaking to the Deceased's diagnosis and mental condition. She was familiar with the Deceased and confirmed that in April 2013 he attended her office at Agape Family Medical Center on Collins Avenue with his daughter. His was a continual visit after suffering from a seizure. She administered a mini-mental status exam to assess his cognitive function and found that he had a degree of mild cognitive impairment consistent with dementia. He was capable of making decisions and could discuss his medical illness, his daily activities or daily living and his relationship with his daughter. She saw him several times thereafter. He had scored 23 of 30 in 2013.

47. Dr. Farrington last saw the Deceased in October 2016 and detected a significant decline in his cognitive functions and scored lower on his mini-mental examination. He was able to communicate but there was a deficit in his ability to recognize time and places. There were also some behavioral issues and wandering. There was a possibility that the dementia could have been brought on by the numerous strokes the Deceased had however, there were other causes of dementia. At the time the Deceased was seen initially, it was her opinion that he had the mental capacity to make a Will. Persons with a mild form may have issues with their memory.

48. Dementia is an illness which is neurodegenerative which leads to cognitive impairment. It has a group of symptoms. Strokes can cause dementia as well as brain infection.

49. Persons with dementia do have periods of lucidity where they can make decisions and verbalize those decisions.

50. She confirmed that the Deceased was fully blind in his right eye but had some vision in his left eye.

51. During cross-examination, Dr. Farrington stated that her opinion may have differed depending on the complexity or simplicity of the Will. She confirmed that when she saw him initially, he did have the mental capacity to make the Will. The onset of dementia is gradual and cognitive deficiencies may not be detectable.

## SUBMISSIONS

### Plaintiffs' Submissions

52. The Plaintiffs allege that the Will was executed under suspicious circumstances and by undue influence exerted by the Defendants. Their challenge of the Will's validity was in

the same manner as that in **Moss v. Moss and another [2015] 1 BHS J. No. 93** where the Will in question was deemed to be prepared and executed under suspicious circumstances such that the Deceased was in such a mind that he was unable to understand the nature of the acts and it effect, nor to comprehend and appreciate matters to which he ought to give effect. Winder J then declared the Will invalid and set aside the Grant of Probate.

53. As for the allegation of undue influence, the Plaintiffs rely on **Priestman v. Thomas (1884) 9 P.D. 210** where it was held that a grant of probate or letters of administration with a will annexed, may subsequently be set aside if, e.g., the validity of the will is later contested on the grounds that it was a forgery or was obtained by undue influence or because letters of administration were granted to a person who was illegitimate when there were legitimate next-of-kin.

54. The relationship between the Defendants and the Deceased raised a presumption of undue influence. The Deceased was under the sole custody of the First Defendant to the exclusion of the Plaintiffs leading up to the making of the Will which she concealed or otherwise failed to disclose to the Plaintiffs until the Deceased's death.

55. Once the presumption of undue influence was raised, the principle to be applied was as enunciated by Cotton L.J. in **Allcaird v Skinner 36 Ch. D. 145** and approved and applied by the Privy Council in **Inche Noriah v Shaik Ali Bin Omar [1928] A.C. 127** at pg. 133

> **"The question to be decided is stated in the judgment of COTTON, LJ, in the well-known case of *Allcard v Skinner* (1) 36 Ch D at p 171, as follows:**
>
> > **.....second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused."**
>
> **.....It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing."**

56. The rules were first propounded in **Barry v Butlin (1838) 2 Moo P.C. 480** where Baron Parke stated: -

**"These rules are two: The first that the onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to produce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."**

57. Although the question speaks to a will written or prepared by a party taking a benefit under it, the principle applies equally to cases in which the will was written and prepared by a solicitor but the person principally benefitting was closely connected with and instrumental in the process of instructions being given.

58. In **Gibson v Darling [1989] BHS J. No. 31**, Georges CJ held that there was suspicious circumstances where the deceased was totally dependent on Ms. Knowles as he lived in the house surrounded by her family. The dependence eventually created the trust and confidence which were preconditions from which the presumption of undue influence arose. Georges CJ held,

**"My conscience is not satisfied that the will.....represents the free and voluntary exercise of the will of the deceased. Accordingly, I am unable to pronounce in favor of it."**

59. In the Plaintiff's closing submissions, they inter alia further submit:-
    i. The Plaintiffs lived in the said home with their minor children for the entire time their father was alive. It is and has always been the Moncur family Homestead
    ii. Neither of the Plaintiffs were aware of the Will until after the death of their father when the Defendants filed for a grant of probate.
    iii. In March 2012 a few weeks after being discharged from the hospital and moving in with the First Defendant, the First Defendant secured a power of attorney from the deceased on her own without the knowledge of Aunt Carolyn Lightbourn or the Plaintiffs.
    iv. The Power of Attorney purported not only to give the First Plaintiff (sic) power to deal with the deceased's financial affairs but also the day to day control of the Homestead where her brothers and their minor children were living. It is noteworthy that none of the deceased's trusted confidants like Caroline Lightbourn and Davis and Co., were advised of this Power.
    v. The same law firm where the co-executrix is employed, without notice obtained a grant of probate in the estate of Phillip Moncur Sr., on 14th day of September 2018, despite the fact that a Notice to the Defendant's warning to Caveat was filed and served on behalf of the Plaintiffs.
    vi. The Last Will and Testament of Phillip Alexander Moncur Sr., dated 22nd January, was not executed in compliance with Section 5 subsection 2 (b) and (c) of the Wills Act.

60. The Defendants evidence is riddled with suspicious circumstances which include the following:-

**i.** the Deceased was not given a copy of the Will.

**ii.** Both Defendants are portraying a complete hands off and no knowledge of the instruction and execution of the will which is highly suspicious and which the court cannot turn a blind eye to.

iii. The Second Defendant knew the family, she had peculiar knowledge of the volatile relationship between the Plaintiffs and their sister, she was aware of the Deceased's physical and medical challenges.

iv. The Second Defendant tries to distance herself from the First Defendant.

v. The First Defendant claimed that she did not even go inside when she returned to collect her father but stayed outside and merely rang the bell and waited for him to come out.

vi. There was no attorney involved. While there is no legal requirement for a Will to be prepared by an Attorney Mrs. Poitier knew that greater vigilance was required for this Testator.

vii. Debbie Michelle Gilbert refused to attend Court to give evidence under Oath that she witnessed the Testator sign the Will

viii. Merlene Poitier claims that the will was read to Mr. Moncur. She purported to have prepared and witnessed the will.

ix. Her evidence on the whole was arrogant and incredible. She showed an unease and a willingness to say whatever she was asked to say or felt required to say whether true or not.

x. Under cross-examination, Ms. Poitier undermined her own credibility and the Court should be vigilant in examining her evidence.

61. The Will is invalid because it was obtained by undue influence. Facts which support this submission were:-

i. The Power of Attorney was prepared by "some random attorney" with whom the deceased had no prior relationship.

ii. The testator's incapacity.

iii. Dr. Farrington does not state in her letter or in her evidence, when she would have made the assessment, such as it is, contained in her said letter. The April 2013 sessions were on 2nd April after a seizure episode and the visit on the 4th was during a seizure episode. It is questionable what Dr. Farrington's letter dated 7th November 2018 represents.

iv. Dr. Farrington was only able to speak to "...his mental capacity in general".

**Defendants Submissions**

62. The Defendants submit that the Will was executed pursuant to the criteria set out in Part II, Sections 3 to 5 of the Wills Act as it was in writing and executed by the Deceased in the presence of two witnesses. The Deceased was over the age of eighteen and of a sound mind.

63. Under the common law, specifically **Lucky v Tewari (1965) 8 W.I.R.**, there was a presumption that a will was valid where it was professionally drawn and made by a person whose capacity was not in doubt. In **Lucky**, the Privy Council ruled: -

> **"That when the will has been read over to a capable testator on the occasion of its execution that is sufficient proof that he approved of, as well as knew the contents of the will."**

64. The locus classicus, which formulated the test and remains applicable to date is, **Banks v Goodfellow (1870) L R 5 QB 549**, and which held: -

> **"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."**

65. There was no evidence of any lack of testamentary capacity despite the Deceased's history of strokes and seizures as there was no evidence that he had any disease of the mind at the time he made his Will which would prevent him from making his Will. There was no physical evidence which suggested that the Deceased was physically or visually impaired. The Plaintiffs case was summed up as one of "sour grapes and disappointment".

66. In **Re Devillebichot (deceased) Brennan v Prior and others [2013] EWHC 2867 (Ch)** the Court stated: -

> **"62. In this context Mr Harris, for the siblings, referred me to the judgment of Lord Neuberger MR (as he then was) in *Gill v Woodall* [2011] Ch 380, where having referred in paragraph 15 to the strong presumption of due execution which arises where a will has been read over to and executed by a competent testator, and then said at paragraph 16 : –**
>
> > **'There is also a policy argument, rightly mentioned by [counsel for the charity propounding the disputed will], which reinforces the position that a court should be very cautious about accepting a contention that a will executed in such circumstances is open to challenge. Wills frequently give rise to feelings of disappointment or worse on the part of relatives and other would-be beneficiaries. Human nature being what it is, such people will often be able to find evidence, or to persuade themselves that evidence exists, which shows that the will did not, could not, or was unlikely to, represent the intention of the testatrix, or that the testatrix was in some way mentally affected so as to cast doubt on the will. If judges were too ready to accept such contentions, it would risk undermining what may be regarded as a fundamental principle of English law, namely that people should in general be free to leave their property as they choose, and it would run the danger of encouraging people to contest wills, which could result in many estates**

**being diminished by substantial legal costs.'**

67. In instances where undue influence is alleged, the burden of proof is on the person making the allegation. It must be proven by the Plaintiffs that the Deceased did not exercise his free will, devoid of influence or fraud by some other person. **In Hall v. Hall (1868) LR. 480** Sir J.P. Wilde stated: -

> **"To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affection or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like- these are all legitimate and may be fairly pressed on a testator. On the other hand, pressure of whatever character whether acting on the fears or the hopes if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made.... In a word, a testator may be led but not driven and his will must be the offspring of his own volition, and not the record of someone else's."**

68. There must be strong evidence in support of a claim of undue influence and it will not be presumed merely because of a close relationship but may arise from circumstances under which the will was executed. The Plaintiffs did not provide any evidence of undue influence by the Defendants over the Deceased. Neither of the Defendants were present at the time the instructions were given or when the Will was executed.

69. As for suspicious circumstances, Duff CJ in **Riach v. Ferris [1935] 1 DLR 118** adopted the definition of **Davey LJ in Tyrrell v. Painton [1894] P. 151**: -

> **"The principle is that, wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed."**

70. This doctrine was a restatement of the question of whether a will represented the true will of the deceased. The suspicion could relate to the testamentary capacity of the deceased or whether the deceased made a will under undue influence. The onus is on the executors to prove that there were no suspicious circumstances when such an allegation has been made as stated in **Barry v. Butlin**: -

> **"If there is no evidence of incapacity, the will must be probated for every person is presumed sane; but once the will is attacked, whether it has been admitted to probate in common form or not, the burden of proof of testamentary capacity is on the executor or other persons who propound the will for probate. The burden of proof is the same whether the application to prove the will in solemn form was made before or after it was admitted to probate. The onus is on the propounder to establish, on a balance of probabilities, testamentary capacity."**

71. There was a presumption that the Will is valid. The Deceased was of sound mind and acted of his own volition when he gave instructions, read and signed the Will. The Will was drafted at the law firm Davis & Co. and kept there until the Deceased's death. In the absence of cogent evidence to rebut the presumption, the Will must stand. Prior to 2017, the Plaintiffs resided at the Family Home with the Deceased's permission. Since his demise, they lived rent free with no right to continued occupation and cannot be said to

hold any equitable interest in the Family Home.

72. In the Defendants closing submissions they inter alia submit that:-

i. The Second Plaintiff failed to produce any documentary evidence to show his contribution to building the home.

ii. The Second Plaintiff contradicted his own evidence as to why the electrical power was disconnected on the home and admitted that they had tampered with the power.

iii. He admitted that neither the Deceased nor the First Defendant lived in the home in 2016.

iv. The First Defendant was unable to give any salient details of the Deceased's medical history or any evidence of his pension or NIB benefits. This accordingly calls into question how involved he was in the life of the Deceased.

v. The First Plaintiff contradicted his own witness statement by admitting inter alia under cross-examination that the First Defendant was around and would take the Deceased for wound care services.

vi. There was no evidence that the Deceased was not cogent while in ICU in 2010. The First Defendant admitted that the Deceased was not completely blind.

vii. He did not know where Carolyn Lightbourn worked despite claiming that he was so involved in their family life.

viii. The Second Defendant admitted to knowing that the Deceased attended Yellow Elder Old Folks Home for seven years prior to his death where he was free to visit with his father. He also admitted that he visited the Deceased at the Defendants home thus revealing that he had unfettered access to the Deceased.

ix. The first Defendant was unable to recall specific dates, times or important incidents relating to the Deceased. E.g. time of retirement, amputation.

x. The First Plaintiff admitted that he would visit the Deceased at the Yellow Elder Home and did not need permission from the First Defendant.

xi. Mr. Jim Bethel's evidence could not definitively state when he last saw or interacted with the Deceased. His statement contradicted the statement of the other Plaintiff witnesses.

xii. Dr. Farrington opined that the Deceased was "borderline" and with a greater probability he was able to give instructions or consent or contract to a will.

xiii. Lucid moments are more common in persons with moderate to severe dementia.

xiv. The Deceased was fully visually impaired in his right eye but his left eye had some vision.

xv. The First Defendant denied giving instructions to having the Power of Attorney prepared by attorney Alex Morley.

xvi. The First Defendant maintained that she was not aware of the contents of the will until after it was made and that the Deceased had never discussed it with the Second Defendant.

xvii. Ms. Poitier confirmed that there was no requirement under the Wills Act that a will must be prepared and ratified by an attorney.

**DECISION**

73. Both parties only submitted their closing submissions last week and well past the deadline fixed by the court. Nevertheless the court has reviewed these submissions.

74. The Defendants carry the burden of satisfying the court that the Will of the Deceased complied with the law governing the execution of wills.

75. Having reviewed the evidence and submissions, I am satisfied that the will was executed in accordance with the requirements of Section 5 of the Wills Act. There is no requirement that the attestation must be on oath. Section 5(1) states:-

> **(1) Subject to section 6, no will is valid unless it is in writing and signed at the foot or end thereof by the testator or by some other person in his presence and by his direction in accordance with subsection (2).**

Section 5(2) states:-

**(2) The signature of the testator or other person mentioned in subsection (1) is effective if —**

> **(a) so far as its position is concerned it satisfies subsection (3);**
> **(b) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and**
> **(c) each witness either —**
>
> > **(i) attests and signs the will; or**
> > **(ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness),**

**BUT NO FORM OF ATTESTATION IS NECESSARY NOR IS PUBLICATION OF THE WILL NECESSARY. (my emphasis)**

76. In **Re Jean Mary Clitheroe (deceased) Clitheroe v Bond [2020] EWHC 1185 (Ch)** it was stated:-

> **"A will rational on its face, executed and attested in the manner required by law is presumed in the absence of evidence to the contrary to have been made by a person of competent understanding"**

The will of the Deceased was in writing, signed at the end by the testator in the presence of two witnesses who attested on that document to his execution.

77. Once the will complies with the requirements of the Wills Act, the burden then shifts to the Plaintiffs to prove undue influence and suspicious circumstances as they claim.

78. The Deceased executed his Will on the 22nd January 2013 and died on the 11th April 2017. He was diagnosed with mild cognitive impairment in April 2013 after scoring 23 out of 30 on a mini-mental assessment.

79. The only medical opinion produced in evidence confirmed that at the time he was tested and examined he had the competency to make and execute a will.

80. The Deceased is the father of both Plaintiffs and the First Defendant and a friend of the Second Defendant. He was living with the First Defendant when he executed his Will. It

is undisputed that he visited the Second Defendant. It is disputed by the Defendants that the Plaintiffs were alienated from their father. The fact is that during the time that the Deceased resided with the First Defendant, the Plaintiffs did not see their father regularly, which they maintain was as a result of the actions of the First Defendant. The First Defendant denies this and avers that they simply did not come to check on him or assist with his care. The First Plaintiff in his evidence confirmed that he visited his father at the Yellow Elder Day Care Center.

81. The Court, after a review of all the evidence and submissions, must determine whether the Will was executed under undue influence by the Defendants or under suspicious circumstances as alleged by the Plaintiffs, including whether the Defendants possessed a relationship of confidentiality which would invoke a presumption of undue influence and which suspicion has not been removed by any evidence.

**Undue Influence**

82. The test for undue influence was ventilated in **In Re Estate of Abdelnoor; Abdelnoor and another (as executors of the estate of Pamela Mavis Anne Abdelnoor, deceased) v Barker and others [2022] EWHC 1468 (Ch)** by Master Pester: -

> **"(2) Undue influence**
> **47. As to undue influence, there are no presumptions of undue influence in a probate context. On the facts of this case, Elten bears the burden of proving that Pamela was coerced into making the 2018 Will against her own volition.**
> **48. The relevant principles are concisely summarised in the decision of Lewison J (as he then was) in Edwards v Edwards [2007] EWHC 1119 (Ch) at [47]:**
>
> > **"i) In a case of a testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence;**
> > **ii) Whether undue influence has procured the execution of a will is therefore a question of fact;**
> > **iii) The burden of proving it lies on the person who asserts it. It is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis. In the modern law this is, perhaps no more than a reminder of the high burden, even on the civil standard, that a claimant bears in proving undue influence as vitiating a testamentary disposition;**
> > **iv) In this context undue influence means influence exercised either by coercion, in the sense that the testator's will must be overborne, or by fraud;**
> > **v) Coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, or 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;**

**... ...**

**ix) The question is not whether the court considers that the testator's testamentary disposition is fair because, subject to statutory powers of intervention, a testator may dispose of his estate as he wishes. The question, in the end, is whether in making his dispositions, the testator has acted as a free agent."**

**49. Whilst Lewison J stated that what must be shown is that the facts are "inconsistent with any other hypothesis" other than undue influence, this is to overstate the position. The standard of proof is the normal civil one of the balance of probabilities. As counsel for the Claimants pointed out, an allegation of undue influence is a most serious one to make: see Re Good (deceased) Carapeto v Good [2002] EWHC 640 (Ch). It is a species of fraud, which requires strong and cogent evidence to prove, citing Re H (Minors) [1996] AC 563, in the well-known speech of Lord Nicholls, at p. 586:**

**"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence... Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.**

**Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred."**

83. In **Vadakathu v George [2009] SGHC 79, 1212 ITELR 101,** Chan Sek Keong CJ of the Singapore High Court on an appeal of a decision of the lower court which had held that the propounder of the will had not discharged the burden of proving the testator had had testamentary capacity. In that case the testator had suffered from schizophrenia. The Chief Justice held:-

**"A presumption of continuance of testamentary incapacity did not arise merely because the testator had a serious mental illness; it had to be shown that the illness was sufficient to have caused lack of testamentary capacity on the earlier date. Faced with an allegation of serious mental illness, the propounder of the will had either to show that the illness was**

**not such as to have caused lack of testamentary capacity or that the testator had executed the will during a lucid period. There was no evidence as to when the testator might have ceased to have testamentary capacity and evidence that he had been lucid at the time of execution of the will."**

84. It follows therefore that the burden of proving that the Will was executed by the Deceased under the undue influence of the Defendants falls on the Plaintiffs. The standard of proof required is on a balance of probabilities. One factor which should be taken into consideration in making this determination is the health, both mental and physical, of a testator however, this is not to be treated as the determinative factor.

85. The Plaintiffs must also be able to show that the Defendants, as a result of the Deceased's ailing health, were able to convince him to execute the Will as it is drawn to their exclusion. There is considerable evidence before the Court which confirms that the Deceased was in poor health physically. However, based on the evidence of Dr. Leander Farrington, the only medical evidence produced which opined that the Deceased had the mental capacity to draft and execute the Will in its current format. Dr. Farrington in her testimony averred that she saw him three months after he had executed his will. At that time she was of the opinion that his cognitive impairment was mild. She did concede that if the will was complex she may have questioned his ability to make a complex document. This will was not complex. The Plaintiffs did not adduce any evidence to counter this and accordingly, I find that at the time of the execution of the will, the Deceased possessed the capacity to instruct and execute his will.

86. The Plaintiffs claim that the First Defendant intentionally kept the Deceased away from them which ultimately led to the allegation that she and the Second Defendant influenced the Deceased to make them co-executors of his estate and to leave the Family Home to her alone. They also claim that their father had said that he loved all of his children and would have wished for them to all benefit from his estate. This evidence is refuted by the First Defendant who sets out in her evidence how the Deceased came to live with her. The Plaintiffs knew that the Deceased attended the Yellow Elder home for a few years prior to his death, and in fact the First Plaintiff admitted to visiting him there. This admission supports the First Defendant's evidence that she did not prevent the Plaintiffs from visiting their father.

87. The First Defendant however, claims that the Deceased wished for her to have the Family Home as he allegedly stated that the Plaintiffs, as men, should have provided for themselves. The evidence with respect to the reconstruction and residence of the Family Home is disputed. Despite averments of contributing to the construction of the home by the Second Plaintiff, no evidence of payment by him for the building supplies were produced. The account history from JBR is in the name of the Deceased and does not show or provide any indication of any payments by the Second Plaintiff.

88. The Plaintiffs did not provide any evidence of undue influence by the Defendants over the Deceased other than the fact that the Deceased lived with the First Defendant and was friends with the Second Defendant. I am satisfied that they were able to visit with their father if they wished even if not at the First Defendants home. The Deceased would have spent the majority of his day at the Yellow Elder Home which was open to the public and family members. Neither of the Defendants were present at the time the instructions were given or when the Will was executed. This fact was corroborated by Ms. Poitier who was the person who took the instructions and oversaw the execution of

the Will. Ms. Poitier also confirmed that she did not discuss the instructions with either of the Defendants.

89. I have reviewed the evidence of the witnesses and observed their demeanor and I prefer the evidence of the Defendants over that of the Plaintiffs. I do not find that there was any evidence of coercion of the Deceased by either of the Defendants. The Second Defendant did not live with the Deceased only visited periodically. There is no evidence of collusion between the First and Second Defendants to coerce the Deceased. In fact, by the evidence of Ms. Poitier, neither Defendant was present when the instructions were given. There is no evidence of any influence by any of the Defendants over Ms. Poitier. Ms. Poitier's evidence is accepted as objective and persuasive.

90. The Deceased did live with the First Defendant, and as such there did exist a relationship of confidentiality between them. Without more, this fact is however insufficient to prove undue influence. Having observed her demeanor, listened to her and reviewed all of the evidence, I am satisfied that there was no evidence led by the Plaintiffs or by the Defendants which would prove that she exerted undue influence over the Deceased. As stated above there is no evidence of any collusion between herself and the Second Defendant. She was not present when the instructions were given. The Deceased may have been of frail physical health but his mental capacity was adequate to give instructions and to execute his will. There was no Defendant present when he gave his instructions who would have influenced his instructions. The medical evidence which I accept support the fact that the Deceased was able to give instructions of his own free will.

91. There is also no evidence that either Defendant wrote or prepared the Will.

**Suspicious Circumstances**

92. The test of suspicious circumstances was considered by Charles J in **Lyle Ethrin Adderley and Lyric Ethan Adderley and another v Michael Duran Adderley and another [2020] 1 BHS J. No. 8** where she stated:-

> **15 It is well-established that the onus probandi lies with the party seeking to propound the will. Lindley LJ in Tyrrell v. Painton and another [1894] P. 151 at page 156 stated:**
>
> > **"In Barry v. Butlin 2 Moo. P.C. 480, Parke, B. delivering the opinion of the Judicial Committee, said: "The rules of law according to which cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two: The first, that the onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded in the last will of a free and a capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in**

**examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."**

**16 Lindley LJ at page 157 continued:**

**"The rule in Barry v. Butlin (3), Fulton v. Andrew (1), and Brown v. Fisher (2) is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which incite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to approve affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will."**

93. Once there is evidence that the testator gave instructions and approved the contents of his Will, the onus then falls on the Plaintiffs to prove that the Will was executed under suspicious circumstances and to refute the evidence that the Will was validly executed by a testator with the mental capacity to do so. I have found that the Will was not executed under undue influence and that the Deceased had the mental capacity to instruct and execute the Will. The Will was drafted in accordance with the provisions of the Wills Act in a law firm. In the absence of any evidence by the Plaintiffs or the Defendants that the Deceased lacked the necessary testamentary capacity, I also find that the Will was not executed under suspicious circumstances. The fact that the Deceased had mild dementia does not deprive him of the capacity to execute a Will at the time he made it. The medical evidence clearly confirms that he could make his Will and I accept this. The Plaintiffs did not lead any medical evidence which would refute this. There is no requirement that a testator must include all of his children in his will. His assets are his to distribute as he sees fit. The court will only intervene where there is clear evidence of undue influence or suspicious circumstances, which I do not find here.

94. The evidence of Ms. Poitier is accepted as to the sequence of events which transpired at the time the instructions were given and the Will executed. There was no Defendant present, the Will was read over to the Deceased by Ms. Poitier. Ms. Poitier knew the Deceased having provided services to him previously. In her opinion, he was coherent. One does not have to be an expert to ascertain if a person is coherent in thought and speech. She stated that the Deceased was adamant that they were his own instructions and last wishes. This evidence was not refuted. He confirmed the contents of the draft Will and the Will was executed in her presence along with Ms. Gilbert as witnesses. There is nothing before me which would refute these facts, and which would satisfy the Court on a balance of probabilities that there were suspicious circumstances surrounding the execution of the Will. There was no requirement that the Second witness attend to confirm

that she was one of the witnesses. Her signature appears on the will attesting to the execution by the Deceased. In the absence of any evidence to refute this, I accept that she was a witness to the Will.

95. I accept that the First Defendant nor the Second Defendant knew why the Deceased was going to Davis & Co., and neither did they participate in the drafting of the Will. The Second Defendant only discovered the reason on his arrival and turned him over to Ms. Poitier. Neither Ms. Poitier nor the Second Defendant benefitted from the Will. The First Defendant only discovered the reason for the visit after the Will was executed.

96. I have found the dicta of Chief Justice Keong in **Vadakathu V George** helpful in determining the issues to be decided here, and set it out herein:-

**"....it is pertinent to recall Cockburn CJ's statement in Banks v Goodfellow (at 570) that:**

**It seems unreasonable to deny testamentary capacity on the speculative possibility of unsoundness which has failed to display itself, and which, if existing in a latent and undiscovered form, would be little likely to have any influence on the disposition of the will....."**

**Further at Para 64:**

**"64 In a case of this nature, the function of the court is to decide whether the testator has testamentary capacity at the relevant time. This involves making a finding of fact by applying the law to the evidence. In matters involving specialised knowledge, such as schizophrenia, the court has to rely on the opinion of medical experts, but it does not have to accept any medical opinion if it is not supported by the objective evidence. An expert opinion should have at the least a substratum of facts."**

**The medical opinion of Dr. Farrington was supported by the test results, and by the evidence of the sequence of events as stated by Ms. Poitier. The Deceased knew what he was doing.**

97. Further CJ Keong also stated:-

**"67 Besides being simple, the Will was also entirely rational. Neither Dr Ngui nor Dr N was questioned on the rationality of the Will in relation to GG's testamentary capacity. The DJ did not raise it either. In my view, the rationality of a will has a significant bearing on the testator's rationality, and is a sound indication of testamentary capacity. In *Banks* ([29] *supra*) and *Estate of Eusoff* ([33] *supra*), the courts took into account the "inofficiousness" of the will as indicating a lack of testamentary capacity. In my view, just as an inofficious will is some evidence of an irrational testator, a rational will is some evidence of a rational testator. In the present case, not**

**only was the Will not inofficious, it was completely rational and something that was naturally expected.**

**68 In *Cartwright v Cartwright* (1793) 1 Phill Ecc 90; 161 ER 923 (referred to in *Banks*), Sir William Wynne was of the opinion that the rationality of the act done afforded an effectual test of the mental capacity of the party doing it, even in the case of a will executed in a lunatic asylum. He said:**

**... I think the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself; that I look upon as the thing to be first examined, and if it can be proved and established that it is a rational act rationally done the whole case is proved. What can you do more to establish the act? because, suppose you are able to shew the party did that which appears to be a rational act, and it is his own act entirely, nothing is left to presumption in order to prove a lucid interval."**

The Deceased confirmed his instructions to Ms. Poitier. Neither Defendant was present. They did not know his reason for attending the chambers of Davis & Co. He signed his Will and told the First Defendant after the fact. I am satisfied in all the circumstances of his testamentary capacity at the time he made the Will. The Wil was a simple Will and despite his mild cognitive impairment, he was lucid enough to give instructions and to execute his will.

98. The Plaintiffs in their closing submissions submit that the will did not meet the requirements of Section 5(2) of the Wills Act. This claim was not pleaded by the Plaintiffs and. Nevertheless I am satisfied that the will was executed in the presence of two witnesses and that each witness attested and signed the will.

**COUNTERCLAIM**

99. I am satisfied also that the Plaintiffs have been living in the Family Home which has been validly devised to the First Defendant, without her consent and without compensation to her.

100. I hereby order that the Plaintiffs and their families do vacate the said premises on or before 31st March 2023 and that damages for the First Defendant's loss of use and enjoyment be assessed by the Registrar.

**CONCLUSION**

101. The will was executed in compliance with the requirements of the Wills Act.

102. The Will was not executed under undue influence.

103. The Will was not executed under suspicious circumstances.

104. The Plaintiff's Writ of Summons filed 22nd January 2019 is hereby dismissed and the Will of the Deceased is hereby declared valid. The Grant of Probate issued on the 14th September 2018 proving the said will is hereby declared valid.

105. The Plaintiffs and their families shall vacate the Family Home on or before 31st March, 2023.

106. The Plaintiffs shall deliver the all title deeds for the Family Home forthwith to the First Defendant.

107. The Plaintiffs shall pay to the Defendants the costs of this action to be taxed if not agreed.

**Dated this 20th day of January 2023**

**Hon. Madam Justice G. Diane Stewart**