IN THE GRAND COURT OF THE CAYMAN ISLANDS

GEORGE TOWN, GRAND CAYMAN

PROBATE AND ADMINISTRATION CAUSE NO. P.0089 OF 2014

IN THE ESTATE OF ELENA GOMEZ DEL CAMPO BARCARDI DE LINDZON, DECEASED ("Mrs. Lindzon")

MATTER DEALT WITH ADMINISTRATIVELY
THE 19TH DAY OF FEBRUARY 2015
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

REASONS FOR (NON-CONTENTIOUS) GRANT OF PROBATE

1. This matter concerns the estate of Mrs. Lindzon who died in the Principality of Monaco, on the 20th February 2014. A will which purports to have been executed by Mrs. Lindzon on 31 October 2005 ("the 2005 Will"), has been propounded for probate in common form by her widower (and the named executor) Mr. Jerry Lindzon. The application has been and remains non-contentious although Mrs. Lindzon's adult daughters, who would be entitled to contend against the grant in their own rights as potential beneficiaries, are on notice of the application.

2. Indeed, far from opposing, a letter sent on their behalf by local attorney Mr. Colin Shaw, confirms that they do not contest the 2005 Will, even while acknowledging that a will executed in 2001 by Mrs. Lindzon which would carry the same dispositive effects, would be available for probate in the event this application fails.

3. Concerns attending the grant of probate to the 2005 Will have however arisen, as they relate to the state of Mrs. Lindzon's capacity at the time of execution on 31 October 2005. The concerns have arisen although it is established that she was on that date attended upon by her legal advisers at her home in Lyford Cay, The Bahamas, and did in the presence of some of them, sign the 2005 Will.

4. Mrs. Lindzon suffered from Parkinson's disease and a condition described as "dementia with Lewy body type"; illnesses which the medical evidence informs me were capable of being controlled by medication, as they were in Mrs. Lindzon's case. Expert medical evidence provided at my request includes an opinion from an independent doctor who had no prior relationship with Mrs. Lindzon. The evidence is that her illnesses would not have incapacitated her mentally, but depending on her condition from day to day, they could have been debilitating enough to have diminished her capacity to grasp and fully understand the complexities of a document like the 2005 Will.

5. Her resident physician at Lyford Cay who usually attended on her, Dr. Angela Kunz, was not present on the 31 October 2005, but had last seen her on the 28th October, 2005. In respect of that attendance Dr. Kunz reported that Mrs. Lindzon was lucid at that time.

6. The question whether Mrs. Lindzon had capacity to execute the 2005 Will on the 31st October 2005, arose out of concerns of her legal advisers about her obviously frail physical and emotional state at the time and the further circumstances to be discussed below.

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7. I have now seen the very helpful affidavit of attorney Ziva Robertson[1], one of the legal advisers who attended upon Mrs. Lindzon on the 31st October 2005. Ms. Robertson was also one of the two witnesses to the execution of the 2005 Will, the other being Mr. Joseph Field, Mrs. Lindzon's long-standing and trusted American lawyer.

8. While Ms. Robertson explains in her affidavit, her very plausible reasons for having witnessed the execution of the 2005 Will, she nonetheless, in what I accept is a frank and thorough account, explains why neither herself nor Mr. Field felt able to attest to an affidavit of due execution, when asked to do so a few months later in March 2006.

9. In essence, Ms Robertson's explanation is that the 2005 Will not having been read over to Mrs. Lindzon in their presence at the time of execution, and given Mrs. Lindzon's obviously very frail physical and emotional state, neither herself nor Mr. Field was prepared to attest to a belief that she truly understood and appreciated the nature and contents of the document when she signed it.

10. In this regard, Ms. Robertson exhibits to her affidavit a letter dated 20 March 2006 which she wrote to Mr. Philip Dunkley, Mrs. Lindzon's Bahamian lawyer, setting out her concerns. In that letter she stated:

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> *"In the circumstances I do not feel able to take any further step [(by way of an affidavit as requested, attesting to due execution)] to affirm the validity of the Will of 31 October. As noted above, I have*

[1] Provided at my direction pursuant to Probate and Administration Rules (2008 Revision) rules 16 and 24 which read:

> *"16. A Judge shall not issue any grant until all inquiries which he sees fit to make have been answered to his satisfaction, and a Judge may require proof of the identity of the deceased or of the applicant beyond that contained in the oath."*
>
> *24.* "Where it appears to a Judge that there is some doubt as to the due execution of a will ... the Judge may require an affidavit of execution from one or more of the attesting witnesses...."

discussed this with (Joe [Joseph Field] and Jay [McDowell][2]) who share my concerns, and have shown them a draft of this letter. I do not think it is for us to decide whether this will is valid or not; I understand that it is in fact very similar to Mrs. Lindzon's previous will and the question may be largely academic. However, to the extent that it arises, the answer lies in the application of the law of the Bahamas to the facts rather than in the views of the witnesses."

11. Despite those misgivings, both Ms. Robertson and Mr. Field had, in fact, as already noted, attested to the execution of the 2005 Will as witnesses.

12. For her part, Ms. Robertson expands upon her reasoning as follows (at paragraphs 36-37 of her affidavit):

> *"36. My role as a witness was to attest to the signature of the will by the testatrix, and Mrs. Lindzon certainly signed it in my presence. The question of capacity had been addressed by Dr. Kunz's medical report which I did not then (and do not now) feel qualified to second-guess, though I was subsequently concerned that the report dated 31 October 2005 could not be read as certifying her capacity on that day since Dr. Kunz had not seen her since the previous Friday [(the 28th)].*
>
> *37. Since I was not involved in taking Mrs. Lindzon's instructions for the preparation of the 2005 will, I was not in a position to say whether it reflected her wishes, but as a witness I did not*

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[2] Mr. McDowell, a colleague of Mr. Field's from the same firm, was also present throughout but no affidavit has been sought from or provided by him.

consider it right to frustrate her testamentary intentions by refusing to sign. As a lawyer, I was aware that as a matter for English Law, the test of capacity, knowledge and approval had to be satisfied at the time when the instructions were given, and a will would be valid even if the testatrix had lost capacity in the intervening period between giving instructions and executing the will. I did not know whether that was the case in Bahamian law as well, but I considered that if these requirements were satisfied when Mrs. Lindzon gave instructions, my refusal to witness the will would frustrate her final wishes, possibly irretrievably so (as she seemed weak and frail). By contrast, I knew that if I did witness the 2005 Will but it was later found to be invalid, my signature would not validate it.

Therefore, in these difficult circumstances, I considered it safer to sign as a witness and I proceeded to do so in the presence of Mrs. Lindzon. Mr. Field signed after me."

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13. There were still further circumstances of note.

14. Ms. Robertson further explains in her affidavit, that the primary reason for her attendance upon Mrs. Lindzon at her home on 31 October 2005 was not to witness the execution of the 2005 Will but to present to her and explain to her for her execution, certain draft deeds for the establishment of further Cayman Islands trusts. These were at the time deemed advisable for the purpose of the restructuring of Mrs. Lindzon's affairs in ways that would be most beneficial to her daughters. Clause 2 of the 2005

Will contained dispositive provisions which were necessary for those purposes and so Ms. Robertson (and her colleague at Maples and Calder at the time, Mr. Justin Appleyard) had reviewed Clause 2 in order to be able to explain the entire suite of documents to Mrs. Lindzon.

15. The trust deeds having been explained to her on 31 October 2005, just before the 2005 Will was presented to her for her signature, Mrs. Lindzon signed the deeds. This all happened however, only after an episode of upset and anguish believed by those in attendance to have been brought on by Mrs. Lindzon's realization that she was engaged upon preparing for her own passing. So much so, that before the documents could finally have been presented to her, she had to be encouraged and comforted by her husband Mr. Lindzon and by her companion and friend Ms. Sonia Golt; and calmed by her prescribed medication.

16. This is how Ms. Robertson describes the eventual execution of the trust deeds following on from that episode during which Mrs. Lindzon had withdrawn to another room (at para. 32 – 33):

> *"32. Mrs. Lindzon returned with Ms. Golt to the room where Mr. Field, Mr. McDowell, Mr. Lindzon and I were sitting (our flight out of Nassau was not due until later that evening). Mrs. Lindzon whispered in a weak voice to Ms. Golt who told us that Mrs. Lindzon wished to sign the documents that would give her daughters peace.[(There was a history of hostile litigation involving her daughters as the beneficiaries of her trusts and estate)]. Ms. Golt told us that Mrs. Lindzon had taken*

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medication half an hour earlier, which she said generally improved her strength and co-ordination.

33. *Mr. Field and I then explained that the new trusts contained "disputant clauses", which would benefit legal advisers if members of the family brought an attack in connection with the family trusts at a later date.*

We explained that because these provisions might benefit us, we could not give her independent legal advice and she had to decide for herself whether these were satisfactory. Sonia (Golt) repeated the explanation in Spanish and Mrs. Lindzon nodded and whispered what sounded like "Si.". She then signed the certificate confirming this, and the three trust deeds."

17. Ms. Robertson further explains in her affidavit that before Mr. Dunkley's arrival with the engrossed original of the 2005 Will a draft, bearing manuscript annotations, had been available and was shown to Mrs. Lindzon. Although she did not attempt to read the draft, she was prepared to sign it and was in the process of doing so when Mr. Dunkley arrived with the engrossed original of the 2005 Will.

18. Ms. Robertson explains that although by then Mrs. Lindzon's physical strength was plainly ebbing (as can be discerned from the apparent deterioration of her signature on the 2005 Will); she signed it, in the presence of herself, Mr. Field, Mr. Dunkley, Mr. McDowell, Mr. Lindzon and Ms. Golt.

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Analysis and conclusion

19. Ms. Robertson's concerns about the due execution of the 2005 Will were brought to my attention by Mr. Lindzon's attorneys upon the filing of his application for probate. In my memorandum of 6 January 2015 to the Clerk of Court and to Maxine Bodden of Maples and Calder in this matter, I expressed my willingness to grant probate of the 2005 Will, subject to being provided with an affidavit from Ms. Robertson addressing the issues which she has now addressed in her affidavit. I set out following in brief, my reasons for confirming the grant of probate of the 2005 Will.

20. In particular, I am now satisfied that there is insufficient reason for doubting Mrs. Lindzon's testamentary intention at the time of its execution. In light of her demonstrated ability to converse and consult with her advisers (her apparent state of upset and anguish over the contemplation of her own passing being in itself a sad but nonetheless telling indication of her appreciation of the nature of the proceedings); I do not harbour the kind of "serious" or "grave doubt" as to her competence that would be needed to set aside the presumption of due execution: Williams, Mortimer and Sunnucks on Executors, Administrators and Probate, (being the 16th edition of Williams on Executors and the 4th edition of Mortimer on Probate) (para. 13.21). The understandable misgivings of her advisers about her lack of capacity do not persuade me that I should deny the presumption of due execution that would otherwise apply. Clear evidence is needed to lead to such an outcome; and the presumption of due execution will still be applied where the evidence shows that a will might not have been duly executed but does not positively demonstrate that it

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was not: *Halsbury's Laws,* 5th Edition, Volume 102, para. 77; citing inter alia: *Weatherhill v Pearce* [1995] 2 All E.R. 492; *National Trust for Places of Historic Interest and Natural Beauty v Royal National Institute for the Board* [1999] All E.R. (D) 81; *Sherrington v Sherrington* [2005] EWCA Civ. 326.

21. Here, notwithstanding her misgivings, Ms. Robertson has not affirmed to a belief that Mrs. Lindzon was incapacitated to the point of not being capable of a testamentary intention. As I understand her position, Ms. Robertson's misgivings which informed her refusal to attest affirmatively to due execution, derived from her not having witnessed Mrs. Lindzon read over or have the document read over to her and from not herself having been privy to Mrs. Lindzon's instructions for the drafting of the document; all combined with the manifest state of frailty and emotional upset of Mrs. Lindzon at the time of execution.

22. The fact of the matter is that Mrs. Lindzon did sign the 2005 Will, the circumstance that it was presented to her as her last will and testament having been explained to her. Frail though she was, and frail though her signature appears to be; even "*an incomplete signature is sufficient where there is evidence that (atestatrix) intended it to be the best (she) could do by writing (her) name":Halsbury's Law 5th Edition, Volume 102, para. 63, citing Re Chalcraft, Chalcraft v Giles* [1948] 1 All E.R. 700.

23. I also note that Mr. Joseph Field, in his affidavit of 11 December 2014, swore as follows:

> *"7. Immediately before she signed the will, I explained to Mrs. Lindzon what the 2005 Will did in general terms, and that it was not intended greatly to differ in effect from the 2001 Will and Codicils in relation to the disposition of her personal*

estate. Ms. Golt confirmed to us that Mrs. Lindzon understood my explanation."

24. Given the circumstances as described and the litigious history of this matter – with which I am familiar as the judge who dealt with the extensive family trust disputes in this jurisdiction – there is a compelling ring to Ms. Robertson's report of Mrs. Lindzon's response during the course of events on 31 October 2005, confirming that she wished to "*bring peace to (my) daughters*".

25. There is nothing in the attendant circumstances to cause me to doubt that by putting her signature to the 2005 Will, Mrs. Lindzon had failed to appreciate that she was performing a testamentary act towards that end.

26. It is trite law that the validity of a will as regards movables depends on the law of the testator's domicile, and as regards immovables on the *lex situs:* see *Halbury's Laws* op. cit at para 5 F.N. 1.

27. In this regard, I note that I have seen the affidavit of Foreign Law of Mr. Daniel E. Gonzalez, of the Florida bar, based in Miami. In it he opines that Mrs. Lindzon was domiciled in Florida based upon his understanding not only of Florida law but also of English law, as it is applied in the Cayman Islands and in the Bahamas. He opines that Mrs. Lindzon's domicil derives from that of her husband Mr. Lindzon, whose domicil of choice is and was at the time of her death, Florida. Mr. Gonzales also opines that a Florida Court would conclude that the 2005 Will was validly executed in conformity with the laws of the Bahamas.

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28. I recognise that the 2005 Will is propounded for probate by this Court because there are movable assets in this jurisdiction which come within the estate. It is on this jurisdictional basis that I make the grant of probate. And further, in keeping with

Probate and Administration Rules (2008 Revision) rule 37(1), I order that the grant be made to Mr. Jerry Lindzon, as the person named as executor and who would be entrusted with the administration of the estate by the Court having jurisdiction at the place where Mrs. Lindzon was domiciled at the time of her death[3].

29. I confirm that the grant of probate of the 2005 Will should issue accordingly.

Hon. Anthony Smellie
Chief Justice

February 24, 2015
Re-issued on August 10, 2015

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[3] I note that in 2006 after Mrs. Lindzon became incapacitated, an enduring power of attorney ("EPA") was propounded with this Court, seeking its recognition of the attorneys appointed by the EPA. This was on the basis, inter alia, that Mrs. Lindzon was domiciled in the Bahamas as the place where it was validly executed by her. One of the reasons for not granting direct recognition and enforcement to the EPA, was that there had not been a declaration by the Bahamian Court as to its validity. Instead, the attorneys named in the EPA were appointed by this Court as her guardians and receivers of her Cayman assets in exercise of the Court's original jurisdiction. See 2006 CILR Note 3. Given those circumstances, the representation then made on her behalf that Mrs. Lindzon was not only resident but also domiciled in the Bahamas, may not now for present purposes be regarded as conclusive of that fact .