

**EASTERN CARIBBEAN SUPREME COURT
ANGUILLA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. AXAHCV 2021/0048

BETWEEN:

- [1] FELICITY HORSFORD LEADER**
- [2] JOYCELYN HORSFORD FIREBRACE**
- [3] HELEN COURY**
- [4] GELMAN HORSFORD**
- [5] JULLION HORSFORD MUNROE**
- [6] GRACE HORSFORD HAMLER**
- [7] BLANCHE OWENS**

Claimants

-AND-

- [1] SELWYN HORSFORD (as the sole
executor of Randolph McArthur Babrow,
deceased)**
- [2] ELVESA LIBURD**

Defendants

Before: His Lordship The Honourable Justice Ermin Moise

Appearances:

Ms. Jean M. Dyer of counsel for the Claimants
Mr. D. Michael Bourne of counsel for the Defendants

2023: April 25-27;
May 4;
November 24.

JUDGMENT

- [1] **Moise, J.:** Mr. Randolph McArthur Babrow died on 5th January, 2021. On 19th May, 2017, he executed his Last Will and Testament. In clause 3(a) of that Will, Mr. Babrow bequeathed certain benefits upon the claimants. However, on 23rd November, 2020, Mr. Babrow executed a codicil. The effect of this codicil was to revoke clause 3(a) of his Last Will and Testament. This codicil also made various dispositions of property to the 2nd defendant. The claimants, who are nieces and one nephew of Mr. Babrow, bring this action for an order revoking the codicil, primarily on the ground that Mr. Babrow was not of sound mind when this codicil was executed and that he was unduly influenced by the 2nd defendant. Having assessed the pleadings and the evidence in this case and also giving due regard to the submissions of counsel, I have decided that the case should be dismissed with costs to the defendants. The reasons for my decision are contained in the remainder of this judgment.

The Facts

- [2] Mr. Randolph McArthur Babrow (Mr. Babrow) was born on 13th February, 1926. At the time of his death he was 94 years old. On 19th May, 2017, at the age of 91, he executed his Last Will and Testament. In clause 3(a) of that Last Will and Testament, Mr. Babrow made certain dispositions as follows:

“My real property situated in The Quarter on which is situate my residence, to be placed in a trust to be created for the benefit of my children Hugh Mc. Arthur Babrow and Donna Labega and the children of my deceased sisters Celestine Horsford and Una Khory.”

- [3] The claimants are all children of Mr. Babrow's two sisters who were referred to in this clause of the will. I understand that most, if not all of them, live overseas. They assert that they nonetheless had a close relationship with Mr. Babrow. It is also important to note that in clause 3(b) and (d) of that will, Mr. Babrow devised certain properties and money to Ms. Elvesa Liburd (Ms. Liburd), who is the 2nd defendant

in the matter. It is apparent from the evidence that Ms. Liburd had a long standing friendship with Mr. Babrow. She managed a store located on one of Mr. Babrow's properties and was also described as a caretaker for him as he grew older. There is a dispute as to whether Ms. Liburd was employed as a caretaker for which she was paid. She denied this in her defence and therein asserted that she provided assistance to Mr. Babrow due to the closeness of the relationship they shared at the time. By the time of his death, the evidence suggests that Ms. Liburd lived with or spent a significant amount of time with Mr. Babrow and provided care for him. The Last Will and Testament also made provision for two of Mr. Babrow's children, who were also named as his residual legatees in the will. However, there was some intimation during the course of the evidence, that Mr. Babrow may have had other children. That is a fact which remains unclear to the court.

- [4] On 23rd November, 2020, Mr. Babrow executed a codicil in which he amended clause 3(a) of his Last Will and Testament to state that *"I hereby give, devise and bequeath absolutely my residential home situate in The Quarter, Anguilla and registered as South East Registration Section 78914B Parcel 116 to Elvesa Liburd as her own absolutely."* The Codicil also went on to specify that section 3(a) of the Last Will and Testament executed on 19th May, 2017 was no longer of any legal effect.
- [5] The claimants all question the validity of this codicil and raise concerns regarding Mr. Babrow's mental capacity at the time of its execution. Mrs. Felicity Horsford Leader (Mrs. Leader) gave evidence before the court. She states that she is the daughter of Celestine and John Horsford. Celestine Horsford was Mr. Babrow's older sister. At some point in her life, Celestine moved to Saint Kitts and resided there. She was married to John Horsford. Mrs. Leader states that sometime during his youth, Mr. Babrow lived with her mother in Saint Kitts. He moved there in order to attend school. He had a close relationship with his sister. Mrs. Leader suggests that her own mother was more like a mother figure to Mr. Babrow given the disparity in age between them. Though she was born sometime later, Mrs. Leader

states that she remembers Mr. Babrow living with her parents. She too had a close relationship with him.

- [6] Some years later, after he was done with his schooling, Mr. Babrow moved back to Anguilla. For a time he resided on the family property. This property is registered in the Land Registry of Anguilla as Registration Section North Central Block No. 48814B Parcel 41. Mr. Babrow constructed various buildings on the land and eventually built his own home on other property he purchased in The Quarter referred to as *Section 78914B Parcel 116*. The evidence suggests that Mr. Babrow had become a successful businessman.
- [7] Mrs. Leader goes on to state in her evidence that she had a very close relationship with her uncle. Before the Covid-19 pandemic, she visited him in Anguilla almost every year with her husband and/or one or more of her siblings. During those visits they always stayed with Mr. Babrow at the family home in The Valley. After he constructed his house in The Quarter, they also stayed there during visits to the island. She stated that she spoke with Mr. Babrow at least once a month. However, those communications began to decline as Mr. Babrow became difficult to reach.
- [8] Mrs. Leader states that at some point she was introduced to Ms. Liburd. She doesn't state in her evidence exactly when that was. However, she states that Mr. Babrow introduced Ms. Liburd to her as his housekeeper. She understood that to mean that she was employed as such. She didn't see any reason to doubt this as whenever she visited the island Ms. Liburd performed tasks for Mr. Babrow which are normally associated with that of housekeeping. Ms. Liburd even picked Mrs. Leader and other family members up from Blowing Point or the airport whenever they visited Anguilla.
- [9] Mrs. Leader stated in her evidence that during one of her visits to Anguilla prior to 2017, Mr. Babrow had showed her a will. She could not recall the exact date. However, she states that in that will Mr. Babrow had named his sisters' children as

the beneficiaries of the family home; that is Parcel 41. She states that she was not surprised at this because Mr. Babrow was a family man and the land in question was family land which had been owned by his parents. It is stated that Mr. Babrow's parents had operated a small shop on that land. Mrs. Leader states that the shop was operated by Mr. Babrow's mother after her husband died. They also rented out a place towards the back of Parcel 41 where the old court house used to be back in the day. Upon his return to Anguilla, Mr. Babrow started a little store on Parcel 41. Over the years he renovated the place and expanded.

[10] Mrs. Leader went on in her evidence to state that over the years, Mr. Babrow always spoke about leaving Parcel 41 to his family. She states that prior to this she herself was looking for property to purchase in Anguilla. However, when she identified a property for purchase, Mr. Babrow discouraged her and informed her that she would be getting land when he died. Mrs. Leader indicates that she was promised that she as well as her cousins would inherit the land. Mr. Babrow however had her promise that if they were to inherit the land Ms. Liburd would be allowed to remain in occupation of the shop.

[11] Mrs. Leader insisted in her evidence that Mr. Babrow's health had faded over the years. She states that he complained about pain in his legs which was being caused by his veins. He was on a lot of medication. He went to different doctors about it. She claims to have been aware that he had a surgery at Hughes Medical Centre in or about 2015 to 2017. Her evidence does not indicate what precise illness warranted this surgery.

[12] Mrs. Leader went on to state that she visited Anguilla in January 2017. She observed that Mr. Babrow didn't seem as sharp. He seemed, according to her, to be getting down in age. She states that she became aware from Ms. Liburd that Mr. Babrow had driven into a ditch and as such he no longer drove his car. Mrs. Leader was unable to say if Mr. Babrow had surrendered his driver's licence or if the police stopped him from driving. She spoke with Ms. Liburd concerning Mr. Babrow's health. It was her evidence that Ms. Liburd complained that he was out

of his mind and hallucinating and that he should not be driving. She also complained that he was being very disgusting.

[13] Mrs. Leader's last trip to Anguilla, prior to Mr. Babrow's death, was January 2019. She states that during this trip, she entered Mr. Babrow's bedroom upon his invitation. He was in bed at the time. When he got out of the bed, she noticed that there was a lot of money on his bed. Mrs. Leader indicates that she was concerned because she found that behavior to be erratic. She states that, Ms. Liburd, who was present, remarked that he was always doing this craziness. Mr. Babrow had also allegedly left his house on at least one occasion and was roaming the streets in only his pajamas and his indoor bed slippers. Mrs. Leader also recalled an argument between Mr. Babrow, Ms. Liburd and someone else by the name of Angela, who cooked food for Mr. Babrow. She claims that Mr. Babrow was shaken up by the argument and was later that afternoon taken to the hospital. He required no medication. However, Mrs. Leader states that she was shocked by how these two women, who were supposed to be looking out for him, actually treated him. She also claimed that on one occasion when her family took Mr. Babrow to lunch he appeared spaced out and not his usual self.

[14] Mrs. Leader states in her evidence that on 21st December, 2020 she contacted Ms. Liburd as she was informed that Mr. Babrow had died. That turned out to be untrue. Ms. Liburd informed Mrs. Leader that Mr. Babrow had been taken to the hospital but was back at home and was doing ok. Mrs. Leader was unable to speak with Mr. Babrow because he was asleep. According to her evidence, she was informed by Ms. Liburd that she had moved into the house with Mr. Babrow so she could look after him. On a video call with Mr. Babrow the following day, Mrs. Leader states that it was difficult to speak with him as he didn't recognize her and that his speech was slurred. She couldn't quite understand what he was saying.

[15] Mrs. Leader then went on to state that it was only after Mr. Babrow's death did she become aware that he had made a will in 2017 which he amended by a codicil

dated 23rd November, 2020 . Given that Mr. Babrow was 94 years old at the time and in declining health with a defective and untrustworthy memory, she did not think that he would have been alert and clear to know or understand what he was doing when he drafted this codicil. All of Mrs. Leader's siblings were of the same view and therefore engaged the services of an attorney to write to the first defendant, who is the executor named in the will, and requested amongst other things that he provide them with (i) the contemporaneous attendance note prepared by the attorney who drafted the codicil; and (ii) the contemporaneous medical evidence which shows that Mr. Babrow was possessed of sound and disposing mind and memory. This letter was written on 11th August, 2021 and requested of the first defendant that should he not comply with the demand, legal action would be instituted against Mr. Babrow's estate. Mrs. Leader and her siblings were not satisfied with the information provided by the first defendant.

[16] Mrs. Leader indicated that she and her cousins had a very good relationship with Mr. Babrow and insisted that he would not have disinherited them if he had his full faculties. It is her view that Ms. Liburd used her position as Mr. Babrow's caretaker and the opportunity after the onset of the Covid-19 pandemic which prevented them from visiting Anguilla, to influence him to disinherit his nieces and nephew knowing that he was in a weakened physical state and according to her "he was out of his mind and hallucinating...". It was Mrs. Leader's evidence that Mr. Babrow was by then under Ms. Liburd's complete domination. She encouraged him to believe that he had been abandoned by his family when she knew that they were unable to visit him due to the pandemic.

[17] The court also heard evidence from Mrs. Joycelyn Horsford Firebrace (Mrs. Firebrace) who is also one of Mr. Babrow's nieces. She is sister to Mrs. Leader. Mrs. Firebrace's evidence is largely consistent with that of her sister. However, she recounts two visits to Anguilla during which she interacted with Mr. Babrow. The first was a visit in January 2015. Mrs. Firebrace stated that during that visit, Mr. Babrow informed her that he had named all of her siblings in his will. He allegedly told her that he had inadvertently named her deceased sister,

Rosalind Sue, instead of herself, but he stated that it should still be “okay”. Mrs. Firebrace was of the view that her uncle was an astute businessman and that it was therefore unusual for a right-thinking person like him to assume that an incorrect name on a legal document, the Will, would be acceptable.

[18] During her second visit in January 2018 Mrs. Firebrace thought it strange that neither Mr. Babrow nor Ms. Liburd was on hand to meet her at the port. She took a taxi to the house and was only let in after she was able to identify herself to Mr. Babrow. She thought this strange, given the fact that she had made him aware of her intention to visit. It was her evidence that there was not a lot of interaction with Mr. Babrow during that visit. She formed the opinion that he wasn’t doing very well. She observed that Mr. Babrow was in pajamas all day and was in bed a lot. He was only out of his room for short periods on that visit. She described Mr. Babrow as “tottering a bit; his walk was unsteady.” He complained about a burning sensation in his feet. Mrs. Firebrace recalled that Mr. Babrow passed gas one day and he asked if she heard that. This was unlike Mr. Babrow. She stated that during that trip, Mr. Babrow called her into his bedroom one day and told her he felt so bad because he had no money, which was embarrassing for him. However, it was her recollection that Mr. Babrow was a man of means. Mrs. Firebrace returned to Canada after this visit.

[19] Mrs. Firebrace alleges that she became aware that Mr. Babrow suffered a stroke in late 2020. She does not give a precise date or month in which this stroke occurred. There is also no medical evidence to substantiate the notion that Mr. Babrow had in fact suffered a stroke. She states that she tried contacting Mr. Babrow but was unable to do so. She alleges that one of her sisters eventually spoke with Mr. Babrow and advised her that he was not sounding well. She therefore contacted him on Christmas Day but his words did not appear to be coherent. Given that she could not understand what Mr. Babrow was “mumbling”, Mrs. Firebrace kept asking Ms. Liburd to ‘translate’. During the conversation, Ms. Liburd complained that she had to spend Christmas Day with Mr. Babrow and that he kept falling out of his bed on purpose. She had to get help to put him back in bed.

That was the last conversation Mrs. Firebrace had with Mr. Babrow. After his passing, she too found out about the will and codicil; and expressed the view that due to the relationship she and her siblings shared with Mr. Babrow, he would not have disinherited them if he was of sound mind.

[20] The claimants also led evidence from Ms. Maylene Holder (Ms. Holder) and Mrs. Meredith Lloyd-Richardson (Mrs. Richardson). The evidence does not suggest that they are related to Mr. Babrow. Both of these witnesses reside in Toronto, Canada but claim to have had a close relationship with Mr. Babrow over the years. Both claimed to have visited Anguilla in 2017 and made observations of what they perceived to be Mr. Babrow's decline. Ms. Holder described Mr. Babrow as looking disheveled and unkempt. He was not clean shaven as he used to be and didn't have proper shoes on. She visited again in 2019 and 2020 and claimed that Mr. Babrow was by then fully declined. He didn't recognize her, despite the fact that her appearance hadn't changed. He was withdrawn, lethargic and not his usual self. Although her conversations with him were limited, he complained about his finances and not having anything to eat. She states that Mr. Babrow was a family man and it was surprising to her that he had cut his niece Felicity out of his will.

[21] Mrs. Richardson described her 2017 visit to Mr. Babrow in much the same way. She states that she spent time with him and observed that he had mobility issues and didn't walk very far. He had no access to a car or anyone to drive him around. She states that his social life was declining. He was having issues with his leg and spending a lot of time in bed. Mrs. Richardson alleges that Mr. Babrow had little in his fridge to eat or water to drink. He is alleged to have been having financial difficulties.

[22] During her 2019 visit to Anguilla, Mrs. Richardson also claims to have interacted with Mr. Babrow. She observed that he was in further decline. He didn't recognize her and his appearance was not what it used to be. Mrs. Richardson states that she was concerned about Mr. Babrow's health and enquired of this. He didn't

speaking much during that visit but allegedly said to her that he was having memory issues. He couldn't go out because whenever he did he would have an accident. Mr. Babrow was listening to the radio and the television at the same time and Mrs. Richardson found this to be strange.

[23] Mrs. Richardson also states that over the years she had conversations with Mr. Babrow about his will. She states that she offered advice to him so that there would not be any confusion. At one point he handed her an envelope with his will in it for her to read. She stated that she did not oblige as she was not comfortable. She however indicated that Mr. Babrow had always said to her that he would will his family property to another generation of his family. She also states that he had informed her that he would wish for his own home in The Quarter to remain as a family home for whenever members of his family visited Anguilla. Mrs. Richardson stated that she was so close to Mr. Babrow that he would have consulted her on anything he did. As it relates to his will and codicil she states that Mr. Babrow would not have done what was contained therein.

[24] In defence of this case, evidence was led from Mr. Keithley Lake, who is a retired attorney-at-law. Mr. Lake stated that he knew Mr. Babrow. They were friends for several decades but were also cousins. He states that although he was not formally retained as Mr. Babrow's attorney, he considered him to be a valued client. Sometime in February 2020, Mr. Babrow called Mr. Lake's office and requested to speak with him. Mr. Lake had spent the better part of 2020 overseas for personal reasons and did not meet with Mr. Babrow until November 2020. In fact, Mr. Lake states that he was informed by his staff that Mr. Babrow had called the office on a number of occasions between February and November 2020. At one point Mr. Babrow threatened that if Mr. Lake didn't assist in what he wanted done, he would turn to someone else to assist.

[25] Mr. Lake visited Mr. Babrow at his residence on 18th November, 2020 together with his assistant and employee, Ms. Atrene Pemberton. Mr. Lake describes Mr.

Babrow as being in good spirits as they engaged in a lively conversation. The meeting took place in Mr. Babrow's bedroom. At that meeting Mr. Babrow gave instructions regarding changes he wished to make to his last will and testament. He informed Mr. Lake that Ms. Liburd had been very good to him over the years and that he had felt that he had not done enough for her. Mr. Babrow expressed the view that given the behaviour of his relatives near his property in The Valley over the years, he suspected that Ms. Liburd would have issues with them and would have to give up the property. He therefore wanted to change his will to give her his house as he wanted to make sure that she had her own place. Based on those instructions and what he sensed was some urgency in Mr. Babrow, Mr. Lake prepared a codicil as the instructions only required a change to one clause in the will; that was clause 3(a).

[26] Mr. Lake goes on to state that he later informed Mr. Babrow that he had carried out his instructions and prepared the codicil. Although Mr. Lake had formed the view that Mr. Babrow was capable of giving instructions and had the capacity to do so, he nonetheless advised him that he needed to see a doctor in order to certify his mental capacity before executing the will. Mr. Lake states that he spoke with Ms. Liburd the following day and she informed him that she had taken Mr. Babrow to the doctor and that a medical report was issued to him certifying that he was in good physical and mental condition. Mr. Lake then instructed Ms. Pemberton to take one other staff member with her to Mr. Babrow's residence to execute the codicil. Mr. Lake then ensured that the codicil was sealed and placed in the safe in his office along with the last will and testament which Mr. Babrow had executed in 2017.

[27] In cross-examination Mr. Lake reiterated that he had no specific reason to doubt Mr. Babrow's mental competence to give instructions. He stated that he only advised Mr. Babrow to see a doctor because of his age. Mr. Lake had no discussions with Dr. Adams, who was Mr. Babrow's personal physician and examined him for the purpose of determining his mental capacity. He also stated that he knew Ms. Liburd for many years. He knew her as Mr. Babrow's caretaker

and that she was close to Mr. Lake's father during his lifetime. Mr. Lake was aware that Ms. Liburd already owned a house of her own. He did not agree that she was being given the lion's share of Mr. Babrow's estate. However, Mr. Lake indicated that, based on the instructions he received, Mr. Babrow had noted the frequent turmoil that went on between his nephews and Ms. Liburd. He knew that she would have to sooner or later abandon those properties in The Valley. It was his feeling that she would have to abandon the stores that he was giving her. That was apparently his motive for making the changes to his will.

[28] Ms. Pemberton also gave evidence which corroborated much of what Mr. Lake had to say. She stated that she had known Mr. Babrow for quite some time and was familiar with his professional association with Mr. Lake. She stated that commencing February 2020, Mr. Babrow was persistent in contacting Mr. Lake. He was steadfast in his desire to speak with Mr. Lake to the extent that he did not wish to speak with anyone else who could assist him. Eventually, Mr. Lake returned to the island and visited Mr. Babrow. Ms. Pemberton was present during the visit. She states that on 18th November, 2020 she and Mr. Lake visited the house and spoke with Mr. Babrow. No one else was present during the conversation. Ms. Pemberton corroborates what Mr. Lake had to say about the instructions he received from Mr. Babrow. She states further that while leaving the residence, Mr. Babrow called out to her and asked her to ensure that Mr. Lake carried out his instructions because he did not want something to happen to him before this was done.

[29] Ms. Pemberton and a member of staff, Mrs. Shadira Hunt-Wathey, visited Mr. Babrow's residence on 23rd November, 2020. Ms. Pemberton states that she was aware that Mr. Babrow had visited the doctor earlier that day. When they were alone with Mr. Babrow, she attempted to read the codicil to him. However, he told her that he wanted to read it himself. He took the document and read it himself out loud. During that time, Ms. Liburd came to the house and Mr. Babrow put away the codicil and told her that he had visitors. Ms. Pemberton described Mr. Babrow as making jokes and teasing. Ms. Liburd then went back to the shop and the codicil

was executed in the presence of those two witnesses. Mr. Babrow also spoke about his childhood and his life during that visit. In Ms. Pemberton's view, Mr. Babrow knew where he was, who he was with and what day it was. He knew fully what he wanted done and what he was doing.

[30] The court also heard evidence from Dr. Patvin Adams, who was the medical doctor Mr. Babrow visited. Dr. Adams indicated that Mr. Babrow visited his office on 23rd November, 2020. Prior to that date Mr. Babrow was a patient of Dr. Adams. In his witness statement, Dr. Adams indicates that Mr. Babrow indicated to him that he wished to be examined and that the examination was to include the verification of his mental status. He indicated that he had a document he needed to sign and wanted to ensure that he had the mental capacity to do so. Dr. Adams assessed Mr. Babrow and concluded that he was in good physical and mental health and had the capacity to make decisions on his own.

[31] In oral testimony Dr. Adams further explained his assessment of Mr. Babrow. He reiterated the fact that Mr. Babrow had been his patient for a few years prior to 23rd November, 2020. He stated that he conducted a general examination for Mr. Babrow. He examined his chest and abdomen, as well as some psychiatric components to determine if he was fit to opine on changing his documents for his will, which he indicated he intended to do. Dr. Adams questioned Mr. Babrow concerning his orientation in time, place and person. He was oriented. He made enquiry into his short and long term memory; which was good. Dr. Adams also made inquiry into whether he was having hallucinations or delusions and he did not. Enquiries were made into Mr. Babrow's judgment and insight and Dr. Adams concluded that this was adequate.

[32] Dr. Adams stated that he observed Mr. Babrow entering his office in which he was unassisted and age appropriate. He sat himself down in the chair. He greeted Dr. Adams in his usual mannerisms. He told Dr. Adams that he wanted to be examined basically for the purposes of changing his will. Dr. Adams distinctly remembered Mr. Babrow telling him that he wanted that because Ms. Liburd had

been good to him and he wanted her to benefit from his will. In cross-examination Dr. Adams acknowledged that he had misplaced his notes from his examination of Mr. Babrow. His witness statement was therefore recorded from memory. However, he maintained his testimony regarding his interactions with Mr. Babrow on that day.

[33] Dr. Adams maintained in cross-examination that he thought Mr. Babrow's mental and physical health were age appropriately good. He wasn't moving for example as a young man would move. He was slower. His speech in general was slower as some aged persons have; but coherent. While for example, he didn't need to be assisted, he could arise from his chair age appropriately. Mr. Babrow was diagnosed with hypertension sometime before this examination. He was prescribed medication but Dr. Adams could not remember from the top of his head how long he was taking certain medication.

[34] Dr. Adams was cross-examined on Mr. Babrow's use of the drug Lorazepam. This he noted is used to treat anxiety disorders, trouble sleeping and severe agitation. It is acknowledged that confusion and memory loss are side effects of the medication in some persons. He was not aware that these persons are especially elderly people. Beyond the side effects Dr. Adams didn't recall that the drug predisposes mental decline.

[35] Dr. Adams was also cross-examined on the test he used to assess Mr. Babrow. He acknowledged that the test is short of a full minimum mental examination. That was nonetheless the standard test that he normally used. Dr. Adams did not agree that the test was inadequate. He stated that he would administer the mental capacity test at a level of his training as a family physician to detect if there are any appropriate concerns with mental function. The test is almost like a screen. In his opinion it did not have to be comprehensive as he only had to choose a relevant test for what Mr. Babrow said the visit concerned. So for example, he did not ask him if he had suicidal or homicidal ideation, which is appropriate for a family

physician to ask in certain circumstances but this did not apply to Mr. Babrow in that context.

- [36] Dr. Adams affirmed that his assessment was that Mr. Babrow could make that determination of what he wanted in his will. Dr. Adams did think that Mr. Babrow's physical appearance was well for his age. His assessment was also based on the mental criteria that he enquired of; which was adequate. He stated that if his impressions were not adequate he would have likely concluded that he was not able to proceed on his will or would have referred him for higher psychiatric specialist assessment.
- [37] In re-examination Dr. Adams stated that as far as he could recall most side effects of Lorazepam were short term. It is a medication prescribed for Mr. Babrow as needed and not on a daily basis.

The Law

- [38] It must be noted from the inception, that an individual is free to dispose of his property in any manner which he thinks fit. When he considers the making of a last will and testament, there is no law which generally fetters his own discretion as to the appropriate manner in which his assets ought to be disposed of after he has died. In the case of ***London Borough of Tower Hamlets v. PB (by his litigation friend, the Official Solicitor)***¹ Hayden J highlighted what he considered to have been the common law position even prior to legislative intervention in the UK. He noted that ***"[t]he philosophy informing the legal framework illuminates the point that this case highlights, namely 'a person is not to be treated as unable to make a decision merely because he makes an unwise decision'. This statutory imperative reflected extensive common law jurisprudence, prior to the Mental Capacity Act, recognising that the law does not insist that a person behaves 'in such a manner as to deserve approbation from the prudent, the wise or the good'."***

¹ [2020] 4 WLR 94

[39] Hayden J went on to refer to the case of **PC v City of York**², where McFarlane LJ made the following observation:

“there is a space between an unwise decision and one which an individual does not have the mental capacity to take and ... it is important to respect that space, and to ensure that it is preserved, for it is within that space that an individual’s autonomy operates”.

[40] In my view, where the court is called upon to consider the validity of a last will and testament, or even parts of it, the court must give due consideration to the desires of the testator. Ultimately, a testamentary document of this nature is designed to give effect to the testator’s wishes and no one else’s. His individual autonomy must be respected regardless of what others think about what he has done. He has no general duty under the law to inherit or disinherit anyone.

[41] However, it is equally important to appreciate that when one is executing a document of this nature, he must have the mental capacity to do so. Counsel for both parties have referred the court to the case of **Banks v. Goodfellow**³ where it was determined that a testator must understand the nature of the act he is undertaking and its effects. He must also understand the extent of the property of which he is disposing and he must be able to comprehend and appreciate claims to which he ought to give effect. In particular, a testator must not be suffering from any mental disorder which may ***“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.”***

[42] The court does not, as a matter of course, assume that someone who executes a last will and testament lacked the mental capacity to do so, unless there is some

² [2013] EWCA Civ 478 at [54]

³ (1869-70) LR 5 QB 549

reason to suspect that this is indeed the case. However, there may be circumstances which can raise a suspicion or concern enough to place the burden on those who wish to argue for the validation of a last will and testament to prove that the testator did in fact have the mental capacity to give instructions for its execution. In light of this, counsel for the claimants refer the court to the case of **Kenward v. Adams**⁴ where the following was noted:

“... in the case of an aged testator or a testator who has suffered a serious illness, there is one golden rule which should always be observed, however straightforward matters may appear, and however difficult or tactless it may be to suggest that precautions be taken: The making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfied himself of the capacity and understanding of the testator; and records and preserves his examination and findings ... If the testator has made an earlier will this should be considered by the legal and medical advisers of the testator and, if appropriate, discussed with the testator. The instructions of the testator should be given in the absence of anyone who may stand to benefit, or who may have influence over the testator. These are not counsels of perfection. If proper precautions are not taken injustice may well result or be imagined, and great expense and misery may be unnecessarily caused.”

- [43] This passage is often referred to as the Golden Rule of testamentary capacity. Our own courts have embraced those principles. In the case of **Anne Marie MacLeish et al v Avison Marryshow**⁵ Edwards JA noted that ***“in the case of a testator who is elderly and/or seriously ill and/or at the point of death, the making of a will by such a testator ought to be witnessed and approved by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and makes a record of his examination and findings.”*** It was also

⁴ (1975) The Times, November 29

⁵ GDAHCVAP2010/012

noted that “[t]he Law imposes a heavy burden on a solicitor confronted with circumstances where an aged or seriously ill testatrix, or a testatrix with failing memory is giving him instructions, to prepare a will, or change the previous disposition in an existing will, or to make sweeping change from an earlier will.” Although Edwards JA was not in the majority in terms of the outcome of that case, her contribution to the exposition of the law on that topic has often been cited with approval.

- [44] It must be noted however, that the Golden Rule is not so strict so as to fetter the powers of the court in determining the validity of a will or codicil. The rule is one which seeks to guide attorneys and perhaps even medical doctors on the best practices to observe when dealing with clients who may be elderly or mentally or physically ill in some way. Ultimately, though the court ought to give due weight to such issues, the court must also consider the evidence in its totality and must be guided by the general principle that for a will to be valid it must reflect the mind of the testator. In the case of *In re Key, decd; Key and another v. Key and others*⁶ the court there noted that “[c]ompliance with the golden rule does not, of course, operate as a touchstone of the validity of a will, nor does non-compliance demonstrate its invalidity. Its purpose, as has repeatedly been emphasised, is to assist in the avoidance of disputes, or at least in the minimisation of their scope.” The court has recently underscored this principle in the case of *Lauren Cundari et al v. Dwyer Astaphan*⁷ where it was noted that the failure to observe the golden rule is not necessarily fatal to the pronouncement of the validity of a will. The court must be guided by the general principles of testamentary capacity and assess the evidence in its totality in order to make an informed decision.

- [45] As it relates to the doctrine of undue influence, the principles to be considered are now well settled. The court was referred to the case of *Edwards v. Edwards*⁸

⁶ [2010] 1 WLR 2020

⁷ SKBHCV2011/0369

⁸ [2007] EWHC 1119 (Ch)

where it was noted that in a case of a testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence. Whether undue influence did occur is a matter of fact to be proven by those who assert that it did. What the case suggests is that ***“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 essence therefore ***“undue influence means influence exercised either by coercion, in the sense that the testator’s will must be overborne, or by fraud.”***

- [46] Counsel for the claimants has referred to the case of ***Schrader v Schrader***⁹ in support of her submissions on what she has referred to as “probate undue influence.” In that case, the court stated that ***“[i]t will be a common feature of a large number of undue influence cases that there is no direct evidence of the application of influence. It is of the nature of undue influence that it goes on when no-one is looking. That does not stop its being proved. The proof has to come, if at all, from more circumstantial evidence.”*** Counsel then went on to refer to the case of ***Scott v Cousins***¹⁰ in support of the argument that the court can draw an inference from evidence which *creates a general miasma of suspicion that something unsavoury may have occurred.*

Analysis

- [47] The first issue for the court to consider is whether Mr. Babrow had the mental capacity to instruct and execute the codicil dated 23rd November, 2020. I am satisfied that the burden is on the defendants to prove that he had such capacity, given his age and other factors, including the proximity between the date of execution and his death. However, it is nonetheless important to assess the evidence in its totality before coming to a conclusion as I also do not accept the evidence of the claimants in its totality. There is also an allegation that Ms. Liburd

⁹ [2013] EWHC 466 (Ch)

¹⁰ (2001) 37 ETR (2d) 113

had unduly influenced Mr. Babrow in the execution of this codicil.

[48] I note here that although issues were raised regarding Mr. Babrow's alleged decline from as early as 2015, there is no desire to invalidate the last will and testament which was executed on 19th May, 2017. The claimants have stated that there was a previous will in which they inherited substantially. This will has not been disclosed and I have doubts about its prior existence. In addition to that, I also make the observation that reference was made in the evidence to the family home. That home was initially built by Mr. Babrow's parents on what is now referred to as Parcel 41. I observe that in the last will and testament of May 2017 Mr. Babrow established a trust for the benefit of his deceased brother's children who currently occupy a portion of that property. The remaining portion which houses certain businesses, including one owned and run by Ms. Liburd, was willed to Ms. Liburd directly. There is no pleading which seeks to impunge this aspect of Mr. Babrow's will and it remains in effect. I make the observation here that it does appear that the family home was not bequeathed to Ms. Liburd. This appears to have left for members of Mr. Babrow's family.

[49] Counsel for the claimants submits that there are sufficient reasons here to raise the suspicion against Mr. Babrow's testamentary capacity so as to shift the burden to the 1st defendant who seeks to propound the will. Counsel raised a number of issues to support this proposition. They can be summarized as follows:

- (a) Mr. Babrow was 94 years old at the time he executed the alleged codicil and allegedly suffering a decline in his physical and mental capacity. This included what is alleged to be episodes of forgetfulness and possible delusions. He was hypertensive and this, coupled with cardiopulmonary arrest, killed him some six (6) weeks after he had signed the alleged Codicil;
- (b) Mr. Babrow was isolated, vulnerable and susceptible to Ms. Liburd's influence. It is noted also that the change to the 2017 will was in favour of Ms. Liburd,

who had responsibility for Mr. Babrow's daily care and finances. Ms. Liburd, as a primary beneficiary, was in a position to influence Mr. Babrow by virtue of her personality and/or position of trust as his caretaker;

- (c) Mr. Babrow did not read out the codicil in the presence of an attorney, nor Mr. Lake as an experienced will-maker. The terms of the alleged codicil were not explained by Mr. Lake to Mr. Babrow;
- (d) Mr. Babrow omitted significant beneficiaries to whom he had made promises before in circumstances where he had no reason to disinherit them, given the close relationship they had over the years and leading up to his death;
- (e) Mr. Babrow's signature varied significantly and radically from other signatures previously made by him; and
- (f) Ms. Liburd as the primary beneficiary accompanied Mr. Babrow to the appointment for his medical assessment and was present at Mr. Babrow's residence when the alleged Codicil was being executed.

[50] Insofar as the submissions are concerned, I state here that I have my own doubts regarding the veracity of the evidence presented on behalf of the claimants. In addition to that, I do have some concern here regarding the fact that the allegations in relation to Mr. Babrow's mental and physical decline, pre-date the execution of his last will and testament in May 2017. By that date Mr. Babrow was already 91 years old and, by the accounts given by some of the witnesses for the claimants, was allegedly already in decline. The majority of what is relied on to raise the suspicion of a lack of testamentary capacity can equally apply to the circumstances of the execution of the last will and testament itself; yet a request is being made of the court to endorse and declare this to be Mr. Babrow's true last will and testament, while invalidating the codicil. It would seem that the only discernable reason for doing so is that the claimants, who are not part of Mr. Babrow's natural line of succession, were named as beneficiaries in that will. If the

will and codicil were to be set aside then they would not stand to inherit at all as his estate will fall into intestacy.

[51] I note that there are a total of seven (7) claimants in the matter. Only two (2) of those claimants gave any evidence of the nature of the relationship held with Mr. Babrow. Having examined their evidence carefully, I have doubts as to the accuracy of their testimony.

[52] I state firstly, that a picture is being painted here of a man who over the years had been circumspect and astute enough to have become a successful businessman. He apparently inherited family property and developed it further. He built his own home and had his own business, all the while maintaining a close relationship with the children of his siblings, in circumstances where he is financially successful. Yet the picture being painted goes on to show a man in serious decline in his old age to the point where he is roaming the streets in his pajamas. His physical and mental health is declining to the point where he mumbles in his speech. He is visited at home and complains that he has no food. It is alleged on the one hand that he complains of being financially destitute and on the other he keeps an unusual amount of liquid cash on his bed and is abused and taken advantage of by a trusted housekeeper. This housekeeper allegedly had Mr. Babrow under her total domination to the point where he signed off on withdrawal slips for his bank account and handed it to her. She had free reign and took advantage of him to the point that he could not make decisions of his own and was unable to use his own car; notwithstanding the fact that he may have actually been too old to drive at that point.

[53] Despite all of this, family members who claim to be particularly close to Mr. Babrow, have allegedly witnessed all of this and took no steps to assist him in his old age. The only evidence presented in this case comes from witnesses who did not reside in Anguilla and who, by all accounts did not spend a significant amount of time with Mr. Babrow. In addition to those witnesses, the 2017 will left property for nephews who appear to actually reside in Anguilla and on some of the

premises which were contained in the will. He left property for two (2) of his own children. Yet, somehow this family was prepared to lay back and allow Ms. Liburd to totally dominate and take control of Mr. Babrow while his physical and mental health continuously declined from as early as 2015, by some accounts. There is no evidence that Mr. Babrow was ever examined by a medical practitioner to substantiate the allegations of his mental decline.

[54] If one were to examine certain aspects of Mrs. Leader's evidence for example, it raises serious doubts regarding the inferences which the claimants would wish for the court to draw here. Firstly, Mrs. Leader speaks of a visit to Anguilla in January 2017. That was (4) four months prior to Mr. Babrow's execution of the 2017 will. But yet Mrs. Leader seeks to raise significant questions about Mr. Babrow's mental health from January of that year. She states that she was so concerned with his decline that she enquired of Ms. Liburd as to his wellbeing. Ms. Liburd allegedly informed her that Mr. Babrow was in fact out of his mind and hallucinating and therefore should not be driving. According to her, Ms. Liburd described Mr. Babrow as being disgusting towards her and gave examples of his own abusive behaviour towards her. Yet, despite all of this, the family appeared to be quite content to allow Ms. Liburd to continue caring for Mr. Babrow with no intervention from the members of his family at all. I find this evidence to be somewhat unbelievable.

[55] Mrs. Leader goes on to refer to her visit in 2019. She described Mr. Babrow's behaviour as being erratic and unusual for someone in their right mind. She states that Ms. Liburd was present and stated that she referred to Mr. Babrow as doing "craziness". He left the house and roamed the street in his pajamas. Yet, despite all of this, no attempt was made by the family to assist in addressing any of those issues by even so much as a visit to the doctor. During that very visit, Mrs. Leader stated that she witnessed Ms. Liburd and one Angela in a verbal altercation with Mr. Babrow. She stated in her witness statement that *"we were all shocked by how these two women, who were supposed to be looking out for him, actually treated him."* Despite this, Mrs. Leader's evidence was that Mr. Babrow requested to be taken to the hospital as a result of how shaken up he was after the altercation.

Mrs. Leader's response was that he should rest and she would take him to the hospital after she returned from church if he was still feeling unwell.

[56] This doesn't seem to me to be the kind of response one would expect from a close family member who was shocked and concerned about how Mr. Babrow was being treated; especially at that age. Mr. Babrow's visit to the hospital later that day appeared to have raised no red flags as he was simply advised to return home with no further medical intervention necessary. There is no evidence that any of this alleged erratic behaviour and the alleged verbal abuse of Mr. Babrow was brought to the attention of the medical personnel who attended to him. Given the closeness Mr. Babrow is alleged to have had with his nieces and nephews, one would have thought that Mrs. Leader would seek some intervention for Mr. Babrow having witnessed such a decline and potential abuse. However, Mrs. Leader left the jurisdiction and Mr. Babrow remained in Ms. Liburd's care.

[57] Mrs. Firebrace's evidence is similar. She speaks of her view of Mr. Babrow in 2015 in that his behaviour was unusual and contrary to that of any right thinking person. She visited again in 2018 and asserts that Mr. Babrow was tottering and unsteady. He claimed to have been embarrassed by a lack of finances. But yet, just like Mrs. Leader, who also happened to have been in touch with Mr. Babrow's own daughter, Mrs. Firebrace returned to Canada with no action taken in relation to what is now asserted to be a deep concern about Mr. Babrow's condition. Everyone seemed quite content to leave him in the care of Ms. Liburd with no further evaluation or assessment of his health or mental health needs and no attempt to move the family to do something about his condition. Mrs. Firebrace also learned in late 2020 that Mr. Babrow suffered from a stroke. She learnt this from a third party and accused Mrs. Liburd of not informing the family. Yet there is no medical evidence that Mr. Babrow ever suffered a stroke. He died in January, 2021 and his death certificate does not substantiate this. On balance I do not find that Mr. Babrow had suffered a stroke at the time of the execution of the codicil.

[58] The evidence of Ms. Holder and Mrs. Richardson is viewed in a similar vein. In particular, Mrs. Richardson lives outside of Anguilla and claims to be so close to Mr. Babrow that he would discuss issues relating to his last will and testament with her. Yet, she is completely unaware that Mr. Babrow had executed a will in 2017. This is the very will which the claimants would wish for the court to declare his true last will and testament. Despite saying that Mr. Babrow would take no decision without consulting her, Mrs. Richardson gives very little evidence about any other aspect of Mr. Babrow's life and his business dealings to satisfy the court of the nature of the relationship which she claims to have had with him. Mr. Babrow was a man who had a good measure of success in his business dealings. Mrs. Richardson does not go into any significant detail regarding the decisions which Mr. Babrow had made in consultation with her. The evidence was rather scarce in detail. She also does not know all of Mr. Babrow's children. He is alleged to have suffered significant health issues over the years. Yet this witness gave no details of anything of that nature sufficient to satisfy the court of the level of closeness and the confidential nature of the relationship she claims to have had with Mr. Babrow. I do not accept hers as evidence upon which the court can be moved to invalidate Mr. Babrow's will, even to the level of raising any significant suspicion regarding the execution of the codicil. The court expresses a similar view to the evidence of Ms. Holder. I simply state that having observed those witnesses and examining the evidence myself, I do not believe much of what they had to say to be true.

[59] In addition to this, all of the persons who gave evidence regarding Mr. Babrow's condition are persons who visited Anguilla rarely. Mrs. Leader and Mrs. Firebrace were born in Saint Kitts and later moved to Canada. Despite the claim of being close to their uncle, they never quite grew up with him. They visited Anguilla perhaps annually, but I express my doubts as to whether theirs is evidence sufficient to get a clear picture of Mr. Babrow's own disposition on a number of issues. Even Mrs. Richardson's evidence should be assessed with some measure of caution. She and her daughter visited Anguilla and went to Mr. Babrow's residence on an afternoon. Yet they make serious allegations of Mr. Babrow's

eating habits, his deportment and similar issues. When balanced against the evidence presented for the defendants in the matter, I do not accept these allegations of serious levels of physical and mental decline on the part of Mr. Babrow.

[60] Further to this there is the allegation here that Mr. Babrow was isolated from his family and subject to Ms. Liburd's total domination. Counsel's submissions also refers to Ms. Liburd's personality. I do not agree with these assertions. The evidence suggests that the very witnesses who appeared for the claimants were all able to visit Mr. Babrow whenever they were on the island. As late as 2018 and 2019, Mrs. Leader and Mrs. Firebrace were able to not only visit Mr. Babrow but they stayed at his residence during their visit to Anguilla. Mrs. Leader and her family were able to take Mr. Babrow out for a meal and observe his demeanour. Mrs. Leader was even able to take Mr. Babrow to the hospital. To my mind, that was a perfect opportunity to raise concerns about the medical condition of an aged family member who was not only in serious physical and mental decline, but whose abuse Mrs. Leader had allegedly only recently witnessed and claimed to have been shocked by.

[61] Mrs. Firebrace and Mrs. Richardson pointed to the fact that information in relation to Mr. Babrow's condition was relayed through his daughter. This suggests to me that at least one of Mr. Babrow's own children was in communication either with him or Ms. Liburd to get information on his wellbeing. It must be observed that in addition to the nephews who appear to me to reside in Anguilla, there are additional nieces and nephews who reside overseas. It seems more likely to me that some measure of communication of Mr. Babrow's wellbeing would be channeled through at least one of his own children rather than the multiplicity of nieces and nephews who did not reside on the island and who never appeared to have been actually responsible for his own wellbeing. It is also not lost on the court that none of his own children, who perhaps have a greater moral stake in his estate, have joined in this litigation to set Mr. Babrow's own testamentary actions aside.

[62] There is also very little to no evidence here upon which the court can rely to impinge Ms. Liburd's personality. As I have said, the only allegation being made here was one conversation allegedly witnessed by Mrs. Leader. I have doubts about the veracity of what she had to say, given that she herself didn't even seek to intervene or to assist Mr. Babrow on that occasion. However, the evidence does not rise to the level of proof that Ms. Liburd was abusive towards Mr. Babrow or that she totally dominated him. There is another allegation that Ms. Liburd made Mr. Babrow believe that his family had abandoned him. I must confess that for my part, if the evidence for the claimants is to be believed, then they were clearly prepared to witness his decline and abuse and do little to help. However, there is little no evidence upon which this Court can rely to infer that Ms. Liburd had ever engaged in the habit of having Mr. Babrow believe that he was abandoned by his family. The evidence even suggests that there had been communication with Mr. Babrow's daughter.

[63] I therefore do not accept much of the evidence of the claimants regarding Mr. Babrow's mental decline to be true. However, Mr. Babrow was 94 years old at the time of the execution of the codicil and he did have some health issues which had been highlighted by his medical doctor. He also died approximately 6 weeks after the execution of the codicil. These facts are sufficient to call upon the 1st defendant to prove that Mr. Babrow had the mental capacity to execute the codicil.

[64] I state however, that the evidence presented for the defence appears to me to be more credible in relation to the events leading up to the execution of the codicil. I accept that the golden rule of testamentary capacity was not followed in detail. However, that does not mean that the evidence presented by Mr. Lake and Mr. Babrow's own medical doctor can simply be cast aside. I find both of these witnesses to have given credible and independent evidence and I accept them as telling the truth of what they observed.

[65] From the evidence of Mr. Lake and his assistant, Ms. Pemberton, it appears that Mr. Babrow had persisted for a number of months in seeking Mr. Lake's attention

in assisting with alterations to his last will and testament. He made his first attempt to speak with Mr. Lake in February 2020 and the codicil was not executed until November of that year. This hardly paints a picture of one who is under some measure of undue influence to radically alter his will in favour of Ms. Liburd. He took his time and persisted in communication with the person he trusted to carry out his wishes. In addition to that, Mr. Babrow expressed what I consider to be a consistent and corroborated concern to Mr. Lake which formed the basis of his desire to make alterations to his will. Not only did he inform Mr. Lake that he was concerned about making more provision for Ms. Liburd, but years prior to that he also made Mrs. Leader promise that the family would not be unkind to Ms. Liburd insofar as her occupation of premises owned by him after his death is concerned. He expressed the same concern to his own medical doctor when he visited on 23rd November, 2020. This is clearly something which Mr. Babrow had given significant thought.

- [66] Mr. Lake had known Mr. Babrow for a number of years and indicated that they were friends and cousins. It was he who assisted in the drafting of the 2017 will, which the claimants wish the court to accept. Mr. Lake states that there was nothing about Mr. Babrow's demeanour which raised any red flags in his mind as to his mental capacity. He only asked that Mr. Babrow visit the doctor because of his age. He visited Mr. Babrow at his residence and took instructions from him there in the presence of his assistant, Ms. Pemberton. Ms. Liburd was not present at that time and there was nothing to give Mr. Lake the impression that she was exerting any influence over Mr. Babrow in the decision he was about to make. Ms. Pemberton gives similar evidence in relation to her own observations of Mr. Babrow at the time.

- [67] As it relates to Dr. Adams' evidence, I accept that he was telling the truth of his encounter and examination of Mr. Babrow. Dr. Adams claims to have misplaced his notes of the examination but could recall what transpired on 23rd November,

2020. It would certainly be best to have contemporaneous notes available and I take this into account in the assessment of his evidence. However, Dr. Adams had been

Mr. Babrow's doctor from 2012. He recalls Mr. Babrow entering his office on that day and that he walked in unassisted. He greeted Dr. Adams in his usual way and sat himself down on the chair. Dr. Adams described Mr. Babrow's physical movements as being age appropriate with no red flags being raised in his mind as a medical practitioner.

[68] Dr. Adams stated that Mr. Babrow's speech was slower over the years due to age but there was nothing wrong with its clarity and coherence. Mr. Babrow was oriented in time, place and person. He knew he was in his doctor's office. He engaged on basic historical facts and displayed no short term memory loss. Despite the submission of counsel for the claimants, I do not accept that Dr. Adams' examination was insufficient. He states that he did not see it necessary for further psychiatric evaluation of Mr. Babrow because he was satisfied with the basic tests he normally performs in the first instance and no red flags were raised in his mind. Mr. Babrow informed him that he was intending on making changes to his will and that he wanted to make more provision for Ms. Liburd. This corroborates what was expressed to Mr. Lake as well as the concern Mr. Babrow had raised with Mrs. Leader. I accept the evidence of Dr. Adams as being credible.

[69] I note here that counsel for the claimants has submitted that Ms. Liburd was present when Mr. Babrow was examined by Dr. Adams. I do not accept that the evidence establishes this fact. Whilst the evidence indicates that Ms. Liburd took Mr. Babrow to the doctor, there is nothing here to suggest that she was in the room when the examination was being done. Also, an issue was made of the fact that Mr. Babrow had been prescribed Lorazepam. However, Dr. Adams indicates that this prescription was to be taken by Mr. Babrow as it was needed and not necessarily on a regular basis. Despite what may have been the potential side effects of Lorazepam use, there is no evidence here to suggest that Mr. Babrow

was suffering from those effects at the time he gave instructions for changes to his will, when he was examined by the doctor or when he actually executed the codicil. I bear in mind the nature of the drug and the fact that Mr. Babrow executed the codicil on the same day he was visited by the doctor.

[70] I also state that the fact that Dr. Adams did not review the previous will and witness the execution of the codicil does not invalidate the process. It is perhaps best practice to do so, but the court is entitled to examine the evidence in its totality. To my mind, there is significant consistency in what Mr. Babrow claims he wanted to do over a period of time and to different independent persons. I am therefore prepared to find that the changes to the codicil was his own independent desire and is a reflection of his testamentary wishes.

[71] There is also an allegation being made here that Ms. Liburd was present when the codicil was being executed. I do not accept this to be the case. The evidence of Ms. Pemberton was that Ms. Liburd came to the house whilst Mr. Babrow was reading the prepared document and he immediately stopped. He told Ms. Liburd that he had guests at the time, exchanged a few words with her and then she left. That does not suggest that Ms. Liburd was present when Mr. Babrow was reviewing the document and executing the codicil. It is also suggested that the codicil was not explained to him by Mr. Lake. However, I note here that there is consistency in the instructions which Mr. Lake received and what was in the codicil. Mr. Babrow read the codicil out loud and in the presence of two witnesses. I repeat that on balance I am satisfied that he was aware of what was contained in the will and that it reflected his own desires.

[72] It is argued on behalf of the claimants that Mr. Babrow had stated that the reason he wanted to make changes to his will was that he wanted Ms. Liburd to have her own place. From the evidence it appears that Ms. Liburd already owned her own home. I take it that much of the cross-examination on this point was to point out an alleged irrationality of that desire on the part of Mr. Babrow. Why provide a house to Ms. Liburd on that basis when she already had her own home? Counsel also

wishes for the court to consider the fact that Ms. Liburd had already been given property on Parcel 41 and money in the bank. With this new codicil, she was now being given the “lion’s share” of Mr. Babrow’s estate. I wish to make a few points in relation to those submissions.

[73] Firstly, it is unclear to me as to whether Ms. Liburd was in fact bequeathed the lion’s share of Mr. Babrow’s estate. The value of the properties on Parcel 41 for example was not presented to the court. I am unable to state that what she in fact received under that will was more valuable than what had been left for Mr. Babrow’s children and nephews. There was also money in the bank, the value of which was not placed before me. There is a residual clause and it is not even clear as to whether the properties outlined in the will and codicil was all Mr. Babrow owned at the time of his death. Very importantly, there is no evidence of what Mr. Babrow’s debts were. These certainly have to be paid before the property can be distributed to anyone.

[74] Secondly, one must also place what Mr. Babrow is alleged to have said to Mr. Lake, Dr. Adams and Mrs. Leader into context. What he seemed to have been more concerned with was the fact that Ms. Liburd may eventually be forced to give up the properties he left for her on Parcel 41. He expressed that concern based on the behaviour he observed from his nephews. He also stated that he felt he had not made adequate provision for Ms. Liburd, given how well she had treated him over the years. When it was stated therefore that he wanted Ms. Liburd to have her “own place” it doesn’t stand to reason that he was referring to her having her own home. I find that on balance Mr. Babrow expressed that desire and what was contained in the codicil was what he wanted to do of his own volition. The court should not interfere with his express wishes.

[75] I make one more point here. Much was made in the evidence about the disinheritance of the claimants. Evidence was led in relation to the family home. Mrs. Leader for example stated that she was not surprised that Mr. Babrow had expressed a desire to leave the family home for members of the family to have

access to. This is a home which was built by his parents. However, the evidence suggests that Mr. Babrow may very well have bequeathed the original family home to members of his family. That home was built on Parcel 41 and all that was left for Ms. Liburd on that parcel were buildings containing certain businesses. The rest was left for the benefit of Mr. Babrow's children and nephews. I have my doubts as to whether the home was included in what was bequeathed to Ms. Liburd.

[76] I also wish to note that I have carefully considered the submissions of counsel for both parties and the authorities referred to. I have not repeated them all in full. I do however conclude that there are significant distinguishing features between the facts in many of these authorities and what has been represented to me in support of the claimants' case.

Conclusion

[77] In conclusion, I state that the court does not accept the evidence presented by the claimants that Mr. Babrow was in mental decline at the time he executed the codicil. I also do not find that there is evidence to substantiate the allegation of Ms. Liburd unduly influencing him in any way. However, I appreciate that Mr. Babrow was 94 years old at the time of the execution of the codicil. That, among other facts which I have highlighted earlier, would have been enough to ensure compliance with the Golden Rule of testamentary capacity. However, it is curious to note that Mr. Babrow was already 91 years old when he executed the will and there is little to no evidence to suggest that the Golden Rule was observed in 2017 upon its execution. Much of the evidence led in this case to invalidate the codicil would also invalidate this will. Yet there is no desire to do so.

[78] However, lack of compliance with this rule in its totality does not automatically invalidate the will or the codicil. In the present case, whilst the rule was not observed in its entirety, I am nonetheless satisfied with the evidence of Dr. Adams and Mr. Lake. Even though the burden of proof shifts to those wishing to propound the

codicil, I am satisfied that the evidence presented by the defence proves to the relevant standard that Mr. Babrow had the capacity to give instructions as contained in the codicil and that this document adequately expresses his own desires. I am also not satisfied that there is proof of undue influence in this case.

[79] The final point I make relates to the question of Mr. Babrow's closeness to the claimants and the fact that he was unlikely to have disinherited them. There are seven (7) claimants in total and evidence was only led by two of them in relation to their relationship with Mr. Babrow. Apart from the fact that they were named in the 2017 will there is little to no evidence to show his level of closeness to the majority of the claimants. As it relates to Mrs. Leader and Mrs. Firebrace, I have outlined my assessment of the evidence and given due regard to what they had to say. I also accept that Mr. Babrow did in fact sign the will in the presence of two (2) witnesses, despite what may be differences in his signature; bearing in mind that Mr. Babrow was already 94 years old. I am not satisfied that the evidence was such to lead the court to invalidate Mr. Babrow's codicil for all the reasons I have already outlined. I accept that the will, together with the codicil, is a reflection of his true desires.

[80] In the circumstances, the case is dismissed with prescribed costs ordered against the claimants as I am not satisfied that the costs of this litigation ought to be borne by the estate. Costs are to be on the default value of EC\$50,000.00 and the court therefore awards costs in the sum of EC\$7,500.00 to be paid to the defendants, jointly by the claimants.

Ermin Moise
High Court Judge

By the Court

Registrar