

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

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

SLUHCV2009/0370

BETWEEN:

THEODORA JEAN

Claimant

and

VALENTINE MONTOUTE

Defendant

Consolidated with

SLUHCV2009/0605

BETWEEN:

**VALENTINE MONTOUTE
VICTORIA SIMON a.k.a. VICTOIRE SIMON
GEORGINA ANTHONY
STEPHANIE MONTOUTE-CALDERON
VIRGINIA MELIUS a.k.a. VIRGINIA MICHAUD
JOSEPH MONTOUTE
FRANCES POLIUS
ANNE HUSBANDS
IDA PAUL**

Claimants

and

THEODORA JEAN

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Dexter Theodore, QC of Counsel for the Claimants/Defendant, Valentine Montoute and others

Mrs. Andra Gokool-Foster of Counsel for the Defendant/Claimant, Theodora Jean

2018: April 27, 30
2019: March 18.

JUDGMENT

- [1] **CENAC-PHULGENCE J:** This judgment concerns two claims which were consolidated by Order dated 23rd June 2010. The first was filed by Theodora Jean (“Theodora”) against her brother Valentine Montoute (“Valentine”) seeking an order that the caveat filed by him against the Estate of their late father Augustin Montoute (“Augustin”) be dismissed; that Valentine and all other persons be prohibited from filing any further caveats in respect of her application for Grant of Probate in Augustin’s Estate; that she be at liberty to proceed with the said application and be granted probate of Augustin’s Last Will and Testament dated 2nd May 2006, in which she is named sole Executrix and beneficiary; that certain items removed from their parents’ home be returned; interest and costs (“the Caveat Claim”). The second claim was filed by Valentine and eight of their siblings against Theodora, seeking declarations that Augustin’s Last Will and Testament, dated 2nd May 2006 be set aside as having been procured by Theodora’s undue influence; an account of sums removed from certain bank accounts; repayment of the sum of \$81,110.91 together with interest thereon; and costs (“the Undue Influence claim”). For the sake of convenience, I will refer to the parties by their first names.
- [2] These claims are of some vintage having been filed in 2009. It is therefore important to provide a brief history of the matter. Case management directions were first given in September 2011 and from that date this matter was plagued with adjournment after adjournment. There were as many as five (5) vacations of trial dates which had been set by the Court for a myriad of reasons. In 2017, after addressing the pending application to strike out the Undue Influence Claim, the matter was case managed once again and scheduled for trial in 2018. The trial took place on 27th and 30th April 2018, the Court having first considered an application to strike out various parts of the claimants’ witness statements on 25th April 2018. The defendant, Theodora and the claimants, Valentine Montoute et al filed closing submissions after trial on 1st June 2018 and 11th June 2018 respectively.

The Undue Influence Claim

Background

- [3] The claimants allege that from about 1996 Augustin suffered from hypertension, congestive cardiac failure, renal impairment, and cancer of the prostate. By virtue of his advanced age and ill-health, he was under Theodora's daily care, including bathing, feeding and so on. They also allege that from around 2003, Theodora controlled and managed Augustin's finances, his wife Anesta Montoute ("Anesta") having fallen seriously ill in or around 2003. Augustin and Anesta had been joint owners of several immovable properties and funds in certain bank accounts. The claimants say that Augustin reposed trust and confidence in Theodora to manage his affairs.
- [4] The claimants allege that in or around 2003, Augustin closed his joint accounts with Anesta. He re-opened new accounts, which he requested two of the claimants, Victoria Simon ("Victoria") and Georgina Anthony ("Georgina"), as well as Theodora to hold jointly with him. They say however that these accounts were later closed without their knowledge. Further, on or about 2nd May 2006, Augustin executed a Will in which he purportedly appointed Theodora Executrix and left all his property to her. The claimants allege that the execution of this Will and the withdrawal of funds from the accounts were procured by Theodora's undue influence over their elderly and ailing father.
- [5] The claimants set out particulars of undue influence, among them that Theodora: (1) moved into their parent's home in 2003, despite other siblings and a caretaker caring for their parents; (2) set out on a campaign to poison Augustin's mind against them by accusing them of stealing his belongings, knowing that he hated a thief; (3) purchased alcohol for Augustin, knowing that he was an alcoholic, against doctor's orders and even though he would become ill; (4) derided Augustin for weeping for his wife after she suffered a serious stroke; (5) baptised Augustin, who had been a devout Catholic, in the Baptist Church against his wishes; (6) bossed Augustin around, who reacted submissively; (7) took control of Augustin's rifle and shot and

killed at least five cats and several dogs in the yard; (8) put Augustin in fear for his own life and health so that he obeyed her commands; (9) purchased caskets for Augustin and Anesta while they were still alive; (10) accused the claimants of kidnapping Anesta, of having caused her stroke, and of having intentions to kill her; and (11) prevented Augustin from visiting Anesta on an occasion while she was staying with Victoria. The claimants contend that when Augustin executed the impugned Will, he was never afforded the opportunity to consult an independent legal adviser, and was under the dominance of Theodora.

[6] Theodora, in her defence, denies the allegations of the claimants. She avers that Augustin was only diagnosed with prostate cancer in 2008, and remained in good health and able to care for himself until close to his passing. She says that Augustin utilized the funds in his accounts to provide for his and Anesta's maintenance and medical expenses. Theodora avers that she has always assisted her parents with maintenance of their home and management of their affairs. She did so without expectation of receipt of compensation and solely out of love and affection. She says that none of her siblings assisted or participated in their parent's lives in this way, except for infrequent and intermittent periods.

[7] Theodora avers that the claimants' relationship with Augustin broke down irretrievably due to their demands that he give them his assets during his lifetime; disclose the contents of his Will and bank accounts; and change his Will to suit them. Upon his refusal, he was met with their disrespect, verbal and physical abuse, and the removal of Anesta from their home. Theodora avers that she did not accompany Augustin, nor was she present at the offices of, nor did she have any discussions with the executing Notaries of Augustin's Will. She insists that Augustin was of sound mind, memory and understanding at the time of giving instructions to the executing Notaries, as he was throughout his lifetime.

Issues

[8] The issues for determination are whether:

- (i) Augustin's Will, dated 2nd May 2006 was procured by Theodora's undue influence; and
- (ii) Any sums withdrawn from Augustin's accounts were procured by Theodora's undue influence?

The Law

- [9] In **Wingrove v Wingrove**¹ Sir James Hannen defines undue influence in the following manner:

"...to be undue influence in the eye of the law there must be – to sum it up in one word – coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or she make a Will in a particular person's favour, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced in to doing that which he or she does not desire to do that it is undue influence."²

- [10] As to the extent of actions which may amount to undue influence, Sir J. P. Wilde in the case of **Hall v Hall**³ said the following:

"Even a reprehensible placing of pressure on a testator will not always be undue influence so as to avoid the will: '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. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping distress of mind or social discomfort, these, if carried to a degree in which the freeplay of the testator's judgment, discretion or wishes is overborne will constitute undue influence, though no force is either used or threatened. In a word a testator may be led but not driven and his Will must be the off-spring of his own volition and not the record of someone else's."

¹ (1885) 11 P.D. 81.

² At page 82.

³ [1868] LR 1 P&D 481.

[11] In **Killick v Pountney and Another**,⁴ which was cited in the Eastern Caribbean case of **Johnston v Eno and Rooth**⁵ the Court stated:

"I can readily accept that if there is evidence showing the exertion of improper pressure in relation to the execution of a Will, it will be easier and sometimes very much easier where the testator is enfeebled in body or mind and all the more so if he is enfeebled in both body and mind, to find that such influence was in all the circumstances undue and to adopt Viscount Haldane's words, that it was by means of the exercise of that influence that the Will was obtained. This is because ... a lesser degree of pressure or inducement may suffice to produce the desired result where the testator is feeble in body or mind than would be required were he in vigorous health. But no amount of evidence of bodily or mental infirmity will of itself establish undue influence in the absence of some independent evidence tending to show the exercise of an improper influence."

[12] Regarding the burden of proof to be met, the Court in **La Tanya Hughes v Clement Hughes**⁶ had this to say:

"The burden of proof is not on the propounder to disprove the allegation of undue influence. It is on the person alleging undue influence. Any challenge to a will based on undue influence must be alleged and proved. The burden is not discharged by showing merely that the beneficiary had the power unduly to overbear the Testator's will; it must be shown that in the particular case the power has been exercised and that it was by means of the exercise of that power that the will was obtained..."⁷

and:

"There is no presumption of undue influence; what is required is positive proof of coercion."⁸ (my emphasis)

[13] In **Craig v Lamourex**⁹ it was said:

"...in order to set aside the Will of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis."¹⁰

⁴ [1999] Lexis Citation 2547.

⁵ High Court Civil Claim No. 199A of 2002 (St. Vincent and the Grenadines) at paragraph 68.

⁶ Claim No. ANUHCv2010/0455.

⁷ At paragraph 65.

⁸ At paragraph 67.

⁹ [1920] AC 349.

¹⁰ At page 357.

[14] The decision in **Edwards v Edwards**¹¹ is instructive and is worth being examined in more detail. In **Edwards**, the deceased had initially executed a will leaving her residuary estate in equal shares to her three sons. The deceased had a close relationship with two of her sons, yet shortly before her death she made a new will leaving her entire estate to her third son, despite an obviously strained relationship with him. At the same time, she also started making false allegations against the son to whom she was closest, accusing him of stealing things. The Court, on the evidence before it, found that there was no other reasonable explanation for the deceased's behaviour other than her mind had been deliberately poisoned by her third son. On that basis the Court held that the deceased's purported last Will had been affected by her third son's undue influence.

[15] The Court set out the relevant principles for proving undue influence:

- “ 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 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, 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;

¹¹ [2007] All ER (D) 46 (May).

- 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."¹² (my emphasis)

The Evidence

The Claimants

[16] Of the nine claimants, seven provided witness statements/summaries. However, Georgina passed away before the trial and Ida Paul's ("Ida") witness statement was struck out on a preliminary application prior to the commencement of the trial, with the result that their witness summaries/statements are not considered. Victoria, Frances Polius ("Frances"), Virginia Melius ("Virginia"), Anne Husbands ("Anne"), and Stephanie Calderon ("Stephanie") attended trial. Their statements/ summaries were admitted into evidence and they were cross-examined. Their summaries/statements repeated much of the averments contained in their statement of claim.

[17] Victoria, Frances, Anne and Stephanie all gave evidence that although all the siblings did not provide full-time care to their parents; they all contributed in whatever way they could. They all had a good relationship with their parents prior to their mother Anesta falling ill in or around 2002. This they say is when trouble began.

[18] Anne and Stephanie say Augustin had trusted Anesta completely; he had been solely dependent on her for everything. When Anesta's illness worsened, his whole

¹² At paragraph 47.

world fell apart. He panicked and cried frequently although his children promised to assist him. They say at this time Theodora took control of Augustin. Stephanie says that although Augustin was sick, he could help himself, but that Theodora insisted on feeding, bathing and putting his clothes on him. She treated him like a child.

- [19] They say it was agreed among them, and in or around 2003, Victoria, Georgina and Theodora took turns managing their parent's chores and providing daily care for them. They also employed a caretaker to assist them. They gave evidence that around this time, Augustin had closed his joint bank accounts with Anesta. He re-opened bank accounts jointly with Victoria, Georgina and Theodora to enable them to do business for him and his wife, in light of Anesta's illness and their age.
- [20] Victoria, Frances and Stephanie say that thereafter Theodora took control of all her parent's possessions – bank books, Wills, keys to all the cabinets and wardrobe where their mother kept money, and all important documents. They say that Theodora had Augustin sign withdrawal slips so that she could withdraw monies from the accounts. Frances even accused Theodora of taking various household items including groceries from her parent's home. Stephanie said Theodora ensured they had to ask her for everything, and no other sibling could interfere without her permission.
- [21] They all say that Theodora would tell Augustin that they were stealing his possessions - his gold, money, clothes and various household items. Victoria said that she heard Theodora tell Augustin that Georgina embezzled money; and that Theodora had accused Georgina of stealing bank books, \$4,000, keys, and household items from their parents. She also said that Theodora had once told her that the others had stolen Anesta's gold. They say that when Theodora made such accusations against them, Augustin supported Theodora one hundred percent in what she was saying. They say that Augustin, following Theodora, also started calling them thieves. Victoria says that Augustin would echo whatever Theodora

said. They say that after Augustin died, they found all the items that Theodora had accused them of stealing hidden in garbage bags in the cupboard and under his bed.

- [22] Stephanie and Frances say that when they visited Augustin and Theodora was not present, Augustin was happy to see them, affectionate, pleasant, would talk and laugh with them and even encourage them to spend more time with him. However, when Theodora was present, he would become cold, aggressive and hostile towards them, say unpleasant things about them and call them thieves. Frances even alleges that Augustin would physically attack – often swinging his walking stick at them, and chase them from his house. They say that Theodora would laugh, call them names, use obscene and abusive language toward them, and also tell them to get out of *her* house. Augustin would repeat everything Theodora said. Stephanie says Augustin would cry and say that Theodora was in control; that it was Theodora's house and ask them to leave.
- [23] Frances, Anne and Stephanie say the loving father they knew had been transformed. Frances said it was like Theodora had a compelling power on her father, that he had developed a fear of her and did exactly what she wanted or said. Victoria said that Theodora began to treat Augustin the way their mother had, that is, in a controlling way.
- [24] Victoria says in June 2004 as a result of Theodora and Augustin's abuse she stopped visiting her parents. Frances similarly said that Theodora and Augustin prevented her and the others from caring for her mother appropriately.
- [25] They say that Theodora bought alcohol and encouraged Augustin to drink it against doctor's orders. Stephanie says Theodora would get Augustin drunk and then call the others thieves, and that Augustin would join in.

- [26] They also gave evidence that Theodora had re-baptised Augustin in another religion against his will and that Theodora threatened him into doing so. They said that Augustin was very upset about it, such that he cried. He did not know which religion or the name of the pastor. They said Theodora forced Augustin to go to various churches, watch cricket and go on tours and trips, leaving Anesta at home alone.
- [27] They all also gave evidence that Theodora had Augustin's rifle which she used to shoot and kill the house cat and several dogs. They said Augustin had been afraid of Theodora because of this. On one such occasion after an altercation with Virginia, Theodora shot and killed the yard dog. The police were called who came and removed the rifle and ammunition which Theodora retrieved from under Augustin's bed. They say Augustin appeared relieved when the rifle was removed.
- [28] They say Theodora started telling them to get out of their parent's home, calling it her home and vowed that no one would put her out. Victoria says Theodora always said that when their parents died, they would get nothing. Stephanie also said that Theodora accused Georgina and Victoria of plotting against her to take control of Augustin and to overthrow her in the house. Anne said that Theodora always said she was in control and the other siblings would not win. Anne said she asked Augustin why he was allowing Theodora to do all this and he replied 'what can he do; there is nothing he can do.'
- [29] Stephanie claims that in 2002, Anesta told her in the presence of Theodora, Georgina and Augustin that she was not satisfied with the way in which Theodora was handling her affairs. She says Anesta instructed Theodora to hand over the keys for one of her parent's Gros Islet properties to her. Stephanie says she collected the rent and gave one of the tenants notice to quit. She also notified Augustin that the house could not be rented unless repaired. She said however, Augustin said he did not have the money to do the repairs because all the money he had was to take care of himself and his wife. She says he instructed her to make

the repairs because he and Anesta had agreed in their Wills that the house would come to her.

[30] She said she agreed, however, having gotten estimates of the cost, she informed her father that it was a family house and the Will did not mean anything to her. She says that she had spent money on the house before and all she had from him was word of mouth. She said as a result she did not repair the house and it was not rented.

[31] She said that in 2004 at a family meeting and later in July 2004, she was asked again by Augustin and Theodora to do the repairs as Augustin needed the money to care for himself and Anesta. She said she told Augustin that she would not repair the house based on what she learned at the family meeting held on 13th March 2004 from which it appeared that Augustin had become very indecisive in the handling of his affairs. Stephanie said that she needed to secure herself before she would put her life savings into a family house. She said although Augustin had told her that he and Anesta had Wills leaving the house solely to her, she heard that another Will had been made leaving the house to her and Georgina. She said she indicated that she would help with repairs since Augustin needed the money but suggested that Georgina assist with the cost. She says Georgina agreed and gave her a cheque in the sum of \$5,000 in November 2004. However, upon learning of the extent of the repairs necessary, Georgina told her that she could not continue to spend all that money on the house because Augustin says one thing now but changes his mind very often. She says Georgina told her that Theodora had a lot of influence over Augustin and was telling him lies about them. She says that Georgina said that based on the meeting of 13th March 2004, there was no guarantee that she would be compensated for moneys spent on the house.

[32] Stephanie says she explained this to Augustin and Theodora and that they instructed her to prepare the document for Augustin to sign. She said she prepared the document, they approved it; it was signed by Augustin and witnessed by

Theodora. Stephanie says this was a business agreement between herself and Augustin.

- [33] She says it took her one year of her savings to repair the house while she was paying Theodora the rent for her father every month, and when the house was completed it was rented. She says she never breached the agreement and she is surprised her father left the property in his Will to Theodora.

The Defendants

- [34] Mrs. Edith Petra Jeffrey Nelson ("Mrs. Nelson"), the Attorney-at-Law whom Augustin instructed to prepare his Will and Theodora provided witness statements/summaries which were admitted into evidence at trial. Both were cross-examined.

Mrs. Nelson

- [35] Mrs. Nelson's evidence was that she met Augustin in or around April 2006 when he came to her in relation to filing an injunction to have his wife, who was at the time with one of his daughters, returned to him. She said she found him to be very alert and expressed himself very clearly. She said that several times thereafter, Augustin called her office for extended periods of time. During these conversations, he always expressed grief over the treatment meted out to him by his children. She said two things stood out: his affection for his wife, and his bitterness towards his children for their wickedness to him and his inability to forgive them for separating his wife from him. She said that Augustin expressed that only one child supported him that he and his wife should be together. He always indicated that Theodora was the one doing everything for them and did not want anything in return.
- [36] She said that on another occasion also in April 2006, Augustin came to her office and gave instructions for preparation of his Will. At the time he was alone with her in her office. She said based on his instructions she prepared the Will. She then brought the Will to his home on 2nd May 2006 in the company of Ms. Michelle Gloria Louis, an Attorney whom she requested to co-sign the Will. She says she read the

Will over to him in the presence of Ms. Louis. No one else was present in the room with them. After reading the documents to him, Augustin confirmed that the Will was prepared as he had instructed. He thereafter affixed his signature, which was then witnessed first by Ms Louis and then by her. She said Augustin was very clear in his intentions. She is of the view that there was no influence in his decision to make his Will other than the conduct of the children he disinherited.

Theodora

- [37] Theodora maintained that of all the siblings she assisted her parents in their daily care the most and that her parents requested that she assist them with managing their affairs. She maintained that her siblings visited but did not assist in day to day care of their parents.
- [38] She said her parents remained fiercely independent people until their death and were displeased with her siblings' attempts to control them and their assets. She said her siblings only wanted to participate in their parent's lives when they were benefitting from the receipt of money or transfer of property to their names.
- [39] She denied making allegations of theft against them to Augustin. She said he discovered his belongings were missing and asked them about it. On occasions that he made inquiries, she witnessed Georgina disrespecting him and telling him he did not have a right to ask about his property. She said her siblings demanded bank books from their parents and dictated to them what they should do with their property. This caused a lot of contention. She says that the family meetings which took place between 2004 and 2006 were significant. Rules and regulations were created and there were agendas and minutes of the meetings. In these meetings, decisions were made about their parent's properties. Her siblings dictated to Augustin what he should do with his property while he was alive and capable of managing his affairs. At all times there were discussions of how her siblings wanted to divide his properties and they demanded he change his Will accordingly. She

said they tried to control Augustin and that he rebelled against their actions and protected his independence.

- [40] She says that her father made his Will in her favour because he was unhappy with the way her siblings treated him and not because she sought to influence him. She says they concocted a web of lies of alleged manipulation by her of Augustin. She says she did the things she did for her parents out of love and without expecting anything in return. She said this is the reason Augustin left his property for her benefit. If the claimants had behaved differently, Augustin would have divided his property equally, because prior to their misconduct, their parents, they had treated them equally and had no favourites.

Analysis

- [41] The claimants seek to paint a picture of a previously close-knit family, with the claimants being devoted to their parents; however, that Theodora poisoned their father's mind against them, through manipulation and deceit.
- [42] They paint Augustin as a weak, feeble-minded and submissive man, having no mind of his own, and accustomed to being controlled, first by his wife, and thereafter by Theodora. They say that Theodora poisoned Augustin's mind towards them by constantly speaking ill of them, telling lies on them, in particular accusing them of stealing his belongings, knowing that he hated a thief; accusing them of causing his beloved wife's stroke; and even wanting to kill him and his Anesta.
- [43] Further, they accuse Theodora of a course of conduct that induced fear and submissiveness in an already physically and mentally weak Augustin. This included getting Augustin drunk, knowing he was an alcoholic and pumping him with lies against them; possessing a rifle which she used to shoot and kill dogs and cats and which put him in fear of his life; forcing him to be baptised in a different religion; and brainwashing him into believing that she was in control of him; that the family house was her house; and that his other children were only out to take what they could

from him. If they are to be believed, the claimant's allegations against Theodora rise to the level of wickedness.

[44] Theodora denies all of these allegations. She claims that she provided the daily care her parents required and assisted them with managing their affairs at their request. She says Augustin trusted her to do so. She did all this out of love and affection and for nothing in return.

[45] From the outset, having observed the witnesses at trial, the defendant's witnesses appeared forthright and honest in giving their evidence, even under cross examination. The same cannot be said for the claimants' witnesses. The claimants' evidence on the whole reminds of a puzzle with each claimant representing a carefully crafted puzzle piece to then be put together to paint a picture of a sinister Theodora. Individually, the claimants each seemed as assertive and of strong character as they claim Theodora is; perhaps just a family trait. Therefore, as a matter of credibility, the Court finds the defendant's witnesses to be witnesses of truth and more credible than the claimants together.

[46] The Court finds support for this conclusion on a closer examination of the evidence, which reveals quite the contrary of the claimant's allegations and supports the defendant's narrative. In this regard, the Court places great weight on the minutes of the several family meetings held in March 2004. The Court notes that these minutes are contemporaneous with the period over which the claimants say Theodora carried out her course of manipulation and deceit. It is also reasonable to infer that these meetings and minutes addressed and recorded what would have been deemed serious family concerns of the day. Meetings for which Minutes are provided were held on 13th March 2004, 14th March 2004, 21st March 2004, 24th March 2004, 28th March 2004 and 21st February 2006. The Court makes a few observations on the minutes of these meetings.

[47] Of particular significance was the meeting of 13th March 2004, the minutes of which was organized into several sections, the first headed *Recommendations on Agenda and Decisions Taken*, under which were the following subheadings - *Financial Matters, Bank Books, Will, Communication and Other Matters*. Under the subheading *Will*, was a further subheading – *Decisions Taken on Adjustment*.

[48] Under the subheading *Financial Matters*, the minutes recorded that Theodora reported to the meeting the breakdown of the monthly expenses for the care and maintenance of Augustin and Anesta:

“Theodora reported that the total monthly income amounts to \$1000.00 from house rents collected. Half of this (\$500.00) is paid to the Helper Indira monthly. The telephone bill is \$90.00 monthly and the electricity bill is being paid. After expenses a balance of about \$300.00 is left for groceries and miscellaneous items for the balance of the month. This amount is insufficient.

It was suggested that Theodora and the Helper should make groceries on the balance of \$300.00 and that the sisters’ grocery contributions should help the situation...

It was suggested that a sum of \$200.00 monthly be withdrawn from one account named the ‘withdrawal only’ account. Theodora should determine when there is a need to make this withdrawal in order to help the financial crisis...”

[49] Under the subsection entitled *Bank Books*, the minutes record:

“Theodora was asked by the Chairperson to submit that bankbooks to the meeting. There was some hesitancy. She indicated that the bankbooks were the personal property of mum and dad and that she would only reveal them if Dad ask[s] her to.

Frances indicated that the meeting was not to waste each other’s time, but rather to get results and arrive at an agreeable solution in the interests of peace...

Theodora at this point asked Dad whether it was alright to reveal the bankbooks and he agreed. The books were given to daddy by Theodora who in turn handed it to the Chairperson... The information was revealed as follows:-

...

There was no objection from the parties present for Theodora to continue to hold the bankbooks in her possession. It was recommended that one bankbook be kept as a withdrawal account and the other three remain as savings. The monies left over on the accounts after death should go towards other expenses..." (my emphasis)

[50] Under the subsection entitled *Will*, the minutes record that Augustin gave permission for the Wills to be revealed and the Wills were read to the meeting and notes of the dispositions were made. The minutes continue:

"After the reading of the Will it was suggested that some of the contents where gifts were given in two's or three's were not in the interest of peace and that the Will should be amended and recommended to Dad for a possible change.

Decisions taken on adjustment –

- Stephanie decided to give up her 1/11 share in exchange for the house and land in Gros Islet. This share is to be shared equally among the other sisters and brother alive.
- Virginia decided to give up her 1/11 share in exchange for the house and land in New Village. This share is to be shared equally among her sisters and brother living.
- Georgina agreed to give up her share in Gros Islet to Stephanie.
- Victoria agreed to give her share in New Village to Virginia and not to Theodora.
- Theodora was reluctant to give up her share in New Village saying that her mother had given it to her as a special gift. But with some explanation by the Chairperson and support from other members of the gathering, she agreed, with hesitation.

It was also suggested that to cut down on high cost of [a] lawyer, surveyor and other fees after death of parents, it would be best to subdivide the land in parcels controlled by a clause. In doing so each person will be given a block and parcel number and after the death of parents things will be made less expensive.

Daddy agreed to this but said it would be at the expense of the children and not his. This was agreed upon...

It was suggested that a lawyer be called as soon as possible for the drawing up of a new Will to accommodate changes..." (my emphasis)

[51] Under the heading *Other Concerns*, suggestions were made in the event of sickness of mum and dad; that they should be given a proper balanced diet; and a note was

made that though some children have more leisure time to spend with mum and dad does not mean that they care less.

- [52] It was recorded that Anne asked Georgina: “it is said that you were the one who caused mummy to get the stroke, did you or did you not?” to which it was recorded that Georgina gave “some long explanation” and then denied it. It was also recorded that Helena¹³ reported that “she and other persons had brought colognes for mummy and it was disappearing.” It was recorded that “Theodora then in an offensive mood confirmed that she was the one who had been taking them to her house. She says that they were being used by other persons other than by mummy and no one will make her return them.”
- [53] From the minutes of this meeting it can be inferred that, as Theodora avers, she was the one who assisted Augustin and Anesta in their daily care and maintenance. She was the one who was able to report these details to the family and the claimants seem to have accepted Theodora’s role in this regard. There is no record of any objection or discontentment where this is concerned.
- [54] Further, contrary to the claimant’s allegations that Theodora unilaterally took control of important documents without their knowledge and approval, the claimants were aware that these documents were in Theodora’s possession, and with the apparent knowledge and approval of Augustin. No objection was expressed by them; in fact, the claimants consented to her continued possession of the bank books. Also, the Minutes also recorded that “the Will and other documents ...should be left at mummy and that the key be kept by Theodora.”
- [55] It is also revealed that the claimants were kept abreast of their parent’s finances; they knew what their income was and how it was being spent. Further, they had input in these matters as they made suggestions and decisions as to how their bank accounts should be managed. Though Theodora may have had physical

¹³ From the funeral announcement of Augustin, Helena appears to be his daughter in law.

possession of the bankbooks, the evidence does not suggest she was in total control. Theodora's deference to Augustin when it came to revealing the bank books to the Meeting also shows her appreciation that she took her instructions from him as it related to managing his affairs. This evidence negates a finding that Theodora exerted undue influence over Augustin resulting in the removal of certain sums from his bank accounts. To the contrary, the evidence suggests the sums in these accounts were used by Augustin to care for and maintain himself and Anesta, and that there may even have been a deficit. The claimants acknowledge a financial crisis. However, their attitude towards this appears to be one of financial constraint, rather than using all resources available to make their parents as comfortable as possible.

[56] The claimants held the meetings for the sole purpose of taking decisions as to how Augustin's money and property should be divided among them. Victoria on cross-examination admitted this saying: "the meeting was solely about the change of the Will", her siblings "were agitated about the Codicil and wanted it framed differently." She described the meeting as "an 'everybody wanted to know atmosphere' – a tense moment." On cross examination it was put to Frances that she did not really care whether her father agreed to the 'decisions on suggestions', to which she replied "it really did not matter to me"; "at one of the meetings daddy was present and he was privy to what was being discussed and was privy to the agenda, and based on this I would say it mattered." She was pressed: "did you just tell the Court it would not have mattered if your father accepted the suggestions", she replied "yes".

[57] The claimants showed little or no deference to Augustin's wishes and sought to dictate to him how to manage his assets both while he was alive and upon death. Stephanie insisted in cross-examination that they were just making suggestions. However, this is not supported by the minutes of the meetings and the tone and atmosphere which seemed to pervade. The callous manner in which the claimants spoke about their parent's death in Augustin's presence, their sole concern for division of their parent's property and money and saving themselves expense upon

their death is despicable and would reasonably upset anyone. This meeting lasted some 6 hours and 15 minutes and the minutes span some five and a half pages. Matters relating to their parent's health and well-being featured on page 5 of the minutes under the subheading *Other Concerns*, and merely consisted of two short bullet points. That to my mind speaks volumes.

- [58] What is notable from the minutes of the meeting on the following day, 14th March 2004, was Stephanie's circulation of a document entitled "'Her Opinion' on 'Things that the Montoute family should get done immediately' that is 'Amendments to Last Will and Testament of Mama and Daddy.'" More significant is Augustin's response to the "decisions and agreements taken at the last meeting." It was reported he said: "The Will is not changing and I have said so before, and this is final. I have nothing more to say." It was then reported that "this was followed by some unpleasant comments directed at the gathering by Daddy."
- [59] Augustin's response is contrary to the claimant's weak, feeble-minded and submissive portrayal of him. It also confirms the defendant's evidence that Augustin did not like the meetings and was upset that his children were dictating to him how to divide his money and property. This was also confirmed by both Frances and Stephanie in cross examination, where they admitted that it was Augustin's expressed opinion at the meeting of 14th March 2004 that he was not interested in it and did not like the meetings and was upset and showed displeasure.
- [60] The meeting of 21st March 2004 was in similar vein. Additionally, a report was made by Stephanie that Augustin was "complaining of not being able to sleep when Georgina is at home, he does not want her at home because she casts remarks at him and gets him upset." This confirms evidence given by Theodora. More importantly it can be inferred that Augustin was not as weak minded as the claimants seek to portray. It is likely that if Augustin had the same or any complaints against Theodora such as the claimants allege, he would have similarly voiced those concerns.

- [61] Furthermore, the Court is on the view that in the same way that Georgina was confronted about allegedly causing Anesta's stroke and casting remarks which upset Augustin; and Theodora was confronted about taking Anesta's cologne; had the allegations about Theodora's manipulation and deceit been true, she would have been similarly confronted. Given the seriousness of the allegations and the impact it would have had on Augustin's decisions relating to his property, which appeared to have always been the claimants' primary concern, it is curious, to say the least, that these matters did not arise. This was raised in the cross examination of Victoria, Frances and Anne. However, none could provide a convincing answer; the responses ranged from the allegations not being on the agenda to being uncertain whether the allegations were true.
- [62] The claimants have sought to imply that Augustin's physical condition made him more susceptible to being influenced by Theodora. They gave evidence of him being diagnosed with hypertension and having a problem with his prostate which resulted in him having to wear a catheter for the rest of his life. They also say that Augustin was diagnosed with congestive heart failure and used a stick/cane to walk. There is however no evidence from the claimants that Augustin suffered from any mental illness or incapacity. This is supported by the report of Dr. Naomi Jn. Baptiste which shows that in October 2006 (after making his Will) when Augustin was seen by her, he was fully conscious and lucid; he was able to produce several life events without difficulty; he had no major problems with remote and recent memory. Dr. Jn. Baptiste concluded that Augustin's cognitive facilities were in tact and very good for his age and that he was quite capable of making decisions regarding the management of his affairs, both financial and otherwise.
- [63] This suggests to me that the fact that he may not have been physically well certainly did not affect the functioning of his mind as seen from his apparent strong views on issues at the family meetings.

- [64] The law is that in order to establish the presence of undue influence, it is not enough to establish that a person has the power to overbear the will of the testator. It must be shown that the Will was a result of the exercise of that power.¹⁴ The influence must amount to coercion destroying free agency. Even procuring the execution of a Will by wheedling one's way, even by reprehensible means, into the affections of a vulnerable testator, does not necessarily amount to coercion sufficient to set aside a Will.¹⁵
- [65] Mr. Dexter Theodore QC, ("Mr. Theodore") counsel for the claimants, in his closing arguments suggests that the facts of the case and the evidence are inconsistent with any other hypothesis other than that Theodora unduly influenced Augustin. He submits that as early as 1982, Augustin had executed a Will in which he left whatever interest he had in certain properties to all of his children and then as late as March 2004 affirmed that he had no intentions of changing his will or the 2002 codicil even if in his instructions to Mrs. Nelson¹⁶ he intimated that at the family meetings in 2004 his children were treating him like a child and making unreasonable demands. Mr. Theodore QC also submits that in those instructions Augustin makes reference to things that his children did but nothing is mentioned about Virginia, Ida or Valentine and therefore questions why Augustin would have disinherited them.
- [66] I have to disagree because although the instructions do not mention Virginia, Ida and Valentine by name, Augustin does say that 'my children with the exception of Theodora have shown little interest in the wellbeing of my wife and I throughout the years and now seem to want to cash in as my wife and I fade away'. This is a profound statement which raises a very real hypothesis that Augustin disinherited his other children at least as regards his share of property because he felt that Theodora was the one who had cared for him more than any of the others. It is

¹⁴ Larina Jacobs-Lamothe v Janet Hendricks and others Claim No. BVIHCV 2015/0169 at paragraph 88.

¹⁵ Larina Jacobs at paragraphs 90-91.

¹⁶ See Instructions given by Augustin to Mrs. Nelson, pages 69-73 of Trial Bundle C.

evident from all the Land Registers exhibited¹⁷ that the properties are all community property owned by Augustin and Anesta. Therefore, Augustin could only will to Theodora his share in those properties. Augustin must have known that Anesta's Will was still valid and that her half share would stand to be distributed in the manner provided in her Will and codicil. The making of the 2006 Will could simply have been Augustin's way of ensuring that he recognised the invaluable contribution of Theodora in taking care of him and Anesta which is clear from what he says in his instructions to Mrs. Nelson. Certainly, he is allowed to do this given the concept of freedom of testamentary disposition. This is yet another hypothesis which displaces Mr. Theodore's submission that the facts of this case are inconsistent with any other hypothesis other than that the Will was procured by the undue influence of Theodora.

[67] This Court does not accept the claimant's allegations against Theodora of manipulation and deceit designed to control Augustin and poison his mind against them. This Court accepts the defendant's evidence that the claimants sought to control Augustin by dictating to him how he should dispose of his property and money while he was alive and upon death. This Court finds that Augustin was aggrieved and deeply hurt by the uncaring, greedy and selfish behaviour of the claimants and accepts the defendant's evidence that this is why he disinherited them. This Court accepts Mrs. Nelson's evidence that she prepared the Will as instructed by Augustin and that he understood and approved the Will. The Court accepts that Theodora was not present at the meeting at which the instructions for preparing the Will were given or at its execution. Therefore, this Court is of the view that there is no sufficient evidence before the Court that suggests that Augustin was coerced, or otherwise induced to make dispositions he did not wish or intend to make.

[68] On the evidence presented, the Court finds that the claimants have failed to discharge the burden of proof. There is no cogent evidence of any actual undue

¹⁷ Pages 83 to 89 of Trial Bundle C.

influence exerted by Theodora over Augustin in relation to the making of his Last Will and Testament dated 2nd May 2006. Further no sufficient evidence was adduced in relation to Theodora's alleged undue influence in removal of sums from Augustin's bank accounts.

The Caveat Claim

- [69] Having found that the claimants in the Undue Influence Claim have failed to establish that Augustin Montoute's Last Will and Testament, dated 2nd May 2006 was procured by undue influence, which is therefore not liable to be set aside, it follows that Theodora must succeed on the Caveat Claim. Theodora is therefore entitled to have the caveat against Augustin's Estate dismissed and to proceed with an application for Grant of Probate as duly appointed Executor under the Will.

Improbation

- [70] A substantial part of the submissions of counsel for the defendant, Theodora, Mrs. Andra Gokool-Foster was in relation to the issue of improbation which the Court had already decided on the application to strike out the claim which had earlier been filed. In that regard, given the outcome of the claim, there is no need to make any further comment save that the issue of the applicability of improbation proceedings was decided in the case of **George Poleon (by his personal representative, Paulina Poleon) v Joseph Joshua Poleon et al**¹⁸ which supports the decision of this Court on the strike out application. As the authenticity of the Will is not what was being challenged, the issue of improbation does not arise on this claim.

Conclusion

- [71] Based on the foregoing the Court makes the following orders:
1. The Last Will and Testament of Augustin Montoute dated 2nd May 2006 is declared valid.
 2. The claimants are not entitled to any account of sums or repayment of the sum of \$81,110.91.

¹⁸ SLUHCv2013/0422, delivered 11th May 2018, unreported.

3. The claimants shall pay the defendant prescribed costs on Claim No. SLUHCV2009/0605.
4. The caveat filed by Valentine Montoute against the Estate of the late Augustin Montoute is dismissed.
5. Theodora Jean, as the duly appointed Executor of the Will of the late Augustin Montoute, is at liberty to proceed with an application for a Grant of Probate of the Last Will and Testament of Augustin Montoute dated 2nd May 2006.
6. The defendant shall pay the claimant prescribed costs on Claim No. SLUHCV2009/0370.

[72] From whichever perspective one views this matter, be it the claimants or the defendant, it is a very sad one where discord has for many years struck at the very core of a family unit and destroyed its very fabric and it is my hope that all the parties can still find a way as far as is possible to live peaceably with each other.

[73] Finally, I wish to sincerely apologise to counsel and the parties for the delay in delivering this judgment.

**Kimberly Cenac-Phulgence
High Court Judge**

By The Court

Registrar