

SUPREME COURT OF SEYCHELLES

Reportable

[2023] SCSC 58
(CS No. 29 of 2021)

In the matter of:

Judette Maria
(rep by Mr. F. Bonte)

Plaintiff

Versus

Patricia Mathiot
(rep by Ms. . Camille)

Defendant

Neutral Citation: *Judette Maria v Patricia Mathiot* (CS No. 29 of 2021) [2023] SCSC 58 (30 January 2023)

Before: Andre JA (sitting as a Judge of the Supreme Court)

Summary: Inheritance – Validity of Will – Challenge of appointment of executor

Heard: 28 November 2022 (last sitting to fix Judgment date)

Delivered: 30 January 2023

ORDER

The Court makes the following orders:

- (i) The plaint is partially allowed as follows:
- (ii) The order of the Court Burhan J dated 5 October 2020 appointing the defendant as executrix to the estate of the deceased Donald Mellon is set aside. Hence as of the date of this Judgment, the defendant Patricia Sheila Mathiot is no longer the executrix of the estate of the deceased;
- (iii) This court declines to accede to the prayer to nullify all acts caused by the defendant in her capacity as executrix to the estate of the deceased for the reasons given.
- (iv) The plaintiff's prayer that she be appointed executrix will be granted upon the filing of the following documents namely, the death certificate of the deceased; the conveyance, deed of title, or other document showing the entitlement of the deceased to ownership of the immovable property; the bank statement, savings book or certificate of deposit showing ownership of any movable assets of the

deceased, consisting of money, cash or securities; the marriage certificate of any surviving spouse of the deceased; the death certificate of the deceased's spouse, if any; birth certificates of all heirs; and affidavits of alias where necessary in order to explain or reconcile any differences or discrepancies in names which appear in the supporting documents **(as per Practice Direction 1/1989)**.

- (v) Upon appointment subject to the criteria above (to be fulfilled by the plaintiff), the plaintiff will have to ensure that as executrix to the estate of the deceased is managed and distributed according to law.
- (vi) Costs awarded in favour of the plaintiff.

JUDGMENT

ANDRE JA

Introduction

- [1] This judgment arises out of a plaint filed by Judette Maria (hereinafter referred to as the plaintiff) on 6 April 2021 against Patricia Sheila Mathiot born Mellon (hereinafter referred to as the defendant).
- [2] The plaintiff challenges the appointment of the defendant as executrix to the estate of the late Donald Mellon (hereinafter referred to as the “deceased”). The plaintiff claims that the deceased died testate and moves the court for the following orders. That the Court declares the Court order of 5 October 2020 appointing the defendant as executrix to the estate of the deceased as null and void; ordering cancellation or setting aside of the appointment of the defendant as executrix to the estate of the deceased; declaring that all acts and registration caused by the defendant in her capacity as executrix to the state of the deceased are null and void; ordering the appointment of the plaintiff as executrix to

the estate of the deceased to manage the estate and distribute the remainder to the children of the deceased according to law; any other order as the court deems fit; and the whole with costs.

[3] The defendant by way of a statement of defence filed on 9 July 2021 denies the plaint and contests the validity of the Will.

Background

[4] In gist, the background of the case as per the pleadings reveal as follows. Ms. Judette Maria, the plaintiff, and the late Donald Mellon, the deceased were in a concubinage relationship from May 2007 until the Deceased's death on 29 January 2020. The deceased had executed a Will bequeathing all his movable and immovable property to the plaintiff, expressly excluding all three of his adult children from inheriting therefrom. Following the deceased's passing, the plaintiff presented the Will to the Court, wherein it was judicially validated and registered accordingly.

[5] After registration of the Will, Ms. Patricia Sheila Mathiot, the defendant and the deceased's first-born daughter, without giving notice to the plaintiff, petitioned the Court for appointment as executrix to the deceased's estate. On the 5th of October 2020, the Court granted the order. Consequently, the defendant undertook her executrix duties, culminating in, among others, the registration of two immovable properties, two local business accounts, and a motor vehicle in the defendant's name. The plaintiff approached this Court praying for the following:

- (a) Declaring that the order of the Court dated 5 October 2020 appointing the Defendant as Executrix to the estate is null and void;
- (b) Ordering cancellation or setting aside of the appointment of the Defendant as Executrix to the estate of the Deceased;
- (c) Declaring that all acts and registration caused by the Defendant in her capacity as Executrix to the estate of the Deceased are null and void;

- (d) Ordering the appointment of the Plaintiff as Executrix to the estate of the Deceased to manage the estate and distribute the remainder to the children of the Deceased according to law;
- (e) Any other order as the Court deems fit; and,
- (f) The whole with costs.

[6] The defendant raised in *limine litis* as follows:

- (a) The Plaintiff discloses no cause of action;
- (b) The laws of Seychelles do not recognise “declarations of intention;” and,
- (c) The Court has no power to make the order sought in the plaintiff’s prayer (d) as the Plaintiff ought to make an application to the Court for her appointment in that respect.

[7] On 28 July 2021, this Court declared that the preliminary points raised by the defendant would be adjudicated separately from the main application. The Court found that the document left by the deceased **was a Will**, as it was entitled as such. More so, the Will was accepted and judicially validated by a Judge of this Court, and consequently, considered as having complied with all the requirements of a valid holographic will. Accordingly, this Court held on 28 December 2021, that the defendant’s contention that the plaintiff disclosed no cause of action had no merit, but that the facts of this case *per contra* raised a valid cause of action. The matter was set down for the determination of the merits on 15 March 2022.

Legal analysis and Discussion of evidence

[8] I now turn to the merits of the case. Notwithstanding the aforementioned Court order of 28 December 2021, the defendant insists that the “document” was not a Will. In her submissions filed with this Court on 20 May 2022, the defendant contends that owing to the fact that the plaintiff’s attorney advised the plaintiff that the document was not a valid Will suggests that it was not valid, and therefore the deceased died intestate. Questions on whether the form of a Will drafted satisfies the conditions for validity is an issue to be

determined by the Court. Thus the mere fact of the Will being judicially validated and subsequently registered is an acknowledgment of its acceptance by the Court and is therefore enforceable. Further, pursuant to **Article 1323 of the Civil Code of Seychelles Act, 1976 (“the Civil Code”)**, the onus of proving that a holographic will is genuine is on the party who claims that it is so (*Didon v Gappy (1947) SLR 148*). This Court held that such onus was discharged. Wherefore, the Court has already made a declaration on the issue of the validity of the Will, there is no need to rehash this issue.

[9] Having resolved the above, the question for determination is whether appointment of the defendant as executor in the deceased’s estate was illegal, and resultantly, null and void. In terms of **Article 1025 of the Civil Code**, the appointment of an executor must be confirmed by a Seychelles Court. This position was settled in the case of *Maeschig v Colling (2004-2005) SCAR 293*, where the Court stated that an executor has no capacity to enter into agreements until the appointment is confirmed by a court.

[10] In the present case, requisite confirmation per **Article 1025** and the *Maeschig* case was acquired by the defendant. Consequently, the defendant was endowed with the necessary authorisation enabling her to take on the role of executrix and perform the functions thereon. The resulting question is whether such confirmation as an executor was valid, taking into account plaintiff’s assertions of defendant having acquired it surreptitiously and by duplicitous means.

[11] **Article 1026 of the Civil Code** is instructive in the manner of appointment of executors in situations where the testator has not nominated an executor in his will as is apparent in the present case. To that end, the article states:

“If the succession consists of immovable property, or of both immovable and movable property, and if the testator has not appointed a testamentary executor or if an executor so appointed has died or if the deceased has left no will, the Court shall appoint such an executor, at the instance of any person or persons having a lawful interest.” [Emphasis added]

[12] The above position was confirmed in *Ex Parte Jean (1994) LSC 437 [13]*, wherein the court held further that the executor may be appointed **without the consent of any heirs**. In the present case, the defendant approached the Court as an heir of the deceased together with her siblings. Understandably so, as **Article 723 of the Civil Code** states as follows:

“The law regulates the order of succession amongst legitimate heirs, natural children, and the surviving spouse; in default of such persons the property passes to the Republic.” [Emphasis added]

[13] On the basis of the information given to it by the Defendant, the Court approved the defendant’s application to be executor of the deceased’s estate. The consequence of such an appointment was that defendant took on the role, and was able to effect the transfer of the deceased’s property to her name as per **Article 724(4) of the Civil Code** which states

“If any part of the succession consists of immovable property, the property shall not vest as of right in any of his heirs but in an executor who shall act as fiduciary...” [Emphasis added]

[14] Similarly, this provision is echoed in **Article 774(2) of the Civil Code** which provides:

“A succession consisting of immovable property only or of both movable and immovable property shall devolve upon an executor who shall act as a fiduciary, as laid down in article 724 of this Code.” [Emphasis added]

[15] The principle embodied in these articles is that the executor of a deceased person is his legal representative for all purposes and all the property of the deceased person vests in him as such. That is to say, the articles make it clear that the executor shall be the legal representative of the deceased for all purposes and in respect of all the properties of the deceased person.¹ The residual question remains: whether the defendant’s appointment as executrix was valid.

¹ Parry, DH, *Williams on The Law of Executors and Administrators*, 13th Edn., London: Stevens & Sons Ltd, 1953, 1.

[16] Referring to the aforementioned **Article 1026** which makes it clear that any party with a “**lawful interest**” in a deceased’s estate may apply for appointment as executor. The next enquiry relates to what constitutes “lawful interest”? In an Australian case of **Violi v Berrivale Orchards Limited [2000] FCA 797; (2000) 99 FCR 580**, Branson J said:

“It seems to me that “lawful interests” are to be distinguished from “legal interests”. I do not consider that s 5(3)(b)(i) calls for a legal interest in the sense of a legal right, title, duty or liability. Rather I consider that “lawful interests” within the meaning of the paragraph are interests which are not unlawful. The expressions “legitimate interests” or “interests conforming to law”, in my view, convey similar meanings to the intended meaning of “lawful interests” in the paragraph.” [Emphasis added]

[17] This Court should ascribe a similar meaning to “lawful interest” in Article 1026 as described in the above case. Regardless of the fact that the plaintiff never married the deceased, and thus lacking “legal rights” [**Article 32 of the Constitution of Seychelles** does not elevate concubinage to the legal status of marriage] thereto, would have “legitimate interests” as one who shared Deceased’s life for more than 12 years in a romantic partnership, with the concomitant commingling of their finances and personal lives together. Similarly, in **Essack v Fernandez (16 of 2005) (16 of 2005) [2006] SCCA 18 (28 November 2006)**, the Court of Appeal determined the meaning of ‘lawful interest’ as enshrined in Article 1026, and held as follows:

“[It] transpires that a person with a lawful interest within the meaning of Article 1026 is not somebody who has an actual or potential hereditary right in the estate to be administered. It is someone who in good faith has a legitimate concern that in the administration of that particular estate, the provisions of the law will be complied with. An actual or potential heir may be one such person but not necessarily so. That is, indeed, reflected in all the decisions given by the Supreme Court on the matter.” [Emphasis added]

[18] This position was confirmed in **Ex-Parte: Jeanine Cesar & Or [2022] SCSC 367** and in **Ex Parte André Baillon ([2021] SCCA 33 (13 August 2021))** where in both instances the

Court declared that once the Court is satisfied that the two conditions are met, that is, that the applicant has a lawful interest as defined above and is not subject to a legal incapacity, the Court is bound to appoint the executor to ensure that the estate of the deceased is wound up and distributed according to the rules of succession.

[19] Given the authority provided by these cases, the defendant's appointment would be assured and safely established. She both has a legitimate interest and was not incapacitated in any way to preclude her from the role. But what of the proven facts that the defendant's appointment was tainted with untruths or rather lack of disclosure of material information?

[20] The facts of this case are almost similar to those of the South African case of ***M J v Master of the High Court and Others (15699/2017) [2019] ZAWCHC 8*** where the Applicant, a former partner of the deceased, and father of their minor child, apparently unbeknownst to the deceased's family, nominated his attorney, Mr. Pinini, as executor of the estate and letters of executorship were duly issued to Mr. Pinini on 14 April 2016. It would appear that the applicant nominated Mr. Pinini as executor without consulting the deceased's family notwithstanding the fact that the minor child had been out of his custody and control for some months and indeed within the custody and control of the deceased's family (specifically Mr. K, the Deceased's brother) from early December 2015 for a period of some five months. Mr K duly launched an application in the Western Cape High Court for the removal of Mr Pinini as executor in the estate in terms of section 54(1)(a)(v) of the Administration of Estates Act, 1965 (hereafter "the AEA"). That section provides, *inter alia*, that an executor may be removed from his office by the court 'if for any other reason the court is satisfied that it is undesirable that he should act as executor of the estate concerned.' The application was opposed by Mr Pinini. Judgment was handed down by Mantame J on and culminated in, *inter alia*, the following order:

- (a) That it was undesirable that Mr Pinini should act as executor of the Estate;
 - (b) That Mr Pinini was removed from the office of the executor of the estate forthwith;
- and,

- (c) That he was ordered to return his letters of executorship to the Master within three days of the order.

[21] In para 58 of her judgment, Mantame J found as follows:

“The fact that first respondent is unable to separate his role as an executor of the deceased estate and his role as an attorney of second respondent points to one direction that he is not fit to continue his role as executor of the deceased estate. Besides the process leading to his appointment as an executor is very much controversial. It is clouded by dishonesty, untrustworthy conduct and misrepresentation of facts ...

[59] ... In the present case, the misconduct committed is very serious and has gross dishonesty and conflict of interest situations. In light thereof, it would be undesirable for first respondent to continue in the office as executor and would detrimentally affect the total worth of the estate, judging from the treatment of second respondent by the first respondent who is living in the deceased’s property rent free.” [Emphasis added]

[22] The Master subsequently sent a Notice of Removal to Mr. Pinini informing him of his removal as executor of the estate in terms of section 54(1)(b)(v) of the AEA and pursuant to the order of Mantame J. That section provides that an executor may be removed by the Master “*if he fails to perform satisfactorily any duty imposed upon him by or under this Act or to comply with any lawful request of the Master*” Following failed attempts to appeal Mantame J’s decision, the Master issued letters of executorship to Ms. Thobejane after she had been nominated for that position by the deceased’s family.

[23] In an appeal against the Master’s decision, the applicant alleged that the Master’s failure to inform him, presumably prior to the nomination and appointment of Ms. Thobejane, of his intention to do so and/or his failure to furnish reasons for his (the applicant’s) exclusion are:

- (a) Procedurally unfair;

- (b) Biased or suspected to be reasonably biased
- (c) Irregular;
- (d) Influenced by an error of law; and
- (e) Arbitrary or capricious.

[24] The court held that the Master considered himself bound by the judgment of Mantame J, as the upper guardian of all minor children, insofar as she also found that in those circumstances the applicant lacked *locus standi* to act on behalf of the minor child. The Master further relied on Mantame J's finding that the 'collusion' between the applicant and Mr Pinini was so glaring that it led the Court to conclude that, apart from any other factors, Mr Pinini had not performed his fiduciary duties properly.

[25] The Master also placed reliance on the following findings which appear from the judgment of Mantame J at para 54:

"It seems, when the Master of the High Court Cape Town appointed first respondent (Pinini) as an executor of this estate, the true state of affairs was not presented to the Master. First, and / or second respondent (the applicant) who reported the death of the deceased, completed the death notice, next of kin affidavit, completed an inventory, nominated the executor, conveniently did not advise the Master that this minor child second respondent (the applicant) is professing to be representing is not even living with him; second, he has no interest in her well-being and as a result does not have contact with this child; third, does not contribute to the care and maintenance of this child and fourth the death of the deceased did not even take place in the jurisdiction of this Master."

[Emphasis added]

[26] The Master stated further that Ms. Thobejane was appointed as executor after she was nominated by the deceased's father and her six siblings. He pointed out further that the applicant was neither the deceased's spouse nor her blood relative; moreover, it would appear that he did not have de facto guardianship of the minor child, who was the sole beneficiary of the deceased estate. In the premises the Master considered himself entitled to appoint the second respondent (Ms. Thobejane) as the executor of the estate after his

office received the requisite surety and an adequate bond of security. The Master denied that the applicant was entitled to nominate his preferred candidate for executorship to compete with Ms. Thobejane. He pointed out that the applicant had nominated Mr. Pinini, who was appointed as the executor on information that was found by the Court to have been false and which misled the Master, subsequent to which he was removed by order of Court. Finally, the Master noted that Mr K is the brother of the deceased and that the minor child resides permanently with him and his family in Midrand and that the Court had clearly found that he was in fact the guardian of the minor child. This viewpoint appears to have been endorsed by McCurdie AJ who stated as follows:

“The second respondent (the present applicant) is not a beneficiary in the estate of the ‘deceased’, nor is he, as matters stand, the recognised guardian of the minor child who is the beneficiary of such estate. In fact, the second respondent does not appear to have any legal interest in this matter.” [Emphasis added]

[27] Underscoring the importance of disclosure of material facts, in the UK case of ***Tweed v Parades Commission for Northern Ireland*** [2006] UKHL 53, the House of Lords held:

“The disclosure of documents in civil litigation has been recognised throughout the common law world as a valuable means of eliciting the truth and thus of enabling courts to base their decisions on a sure foundation of fact.” [Emphasis added]

[28] The court went on to state that the test of whether there ought to be a disclosure, in the given case, is whether disclosure appears to be necessary to resolve the matter fairly and justly. Both sides must show their whole hand and disclose all relevant evidence, whether it is helpful or harmful to their cases.

[29] A Canadian Superior Court decision of ***Blake v Blake*** 2019 ONSC 4062, Justice Peter Daley held that lawyers are obligated to make the court aware of **all legally relevant authorities, even if it undermines their client’s case**. This rule holds regardless of whether opposing counsel cites the authority or not. If a lawyer fails to meet this obligation, their client may face the consequences.

[30] From the above-quoted cases, parallels may be made with the present scenario. The defendant approached the Court knowing that the deceased left a Will judiciously titled “My Last Will and Testament”, not to mention the contents thereof, or the fact that they, as the deceased’s children, were estranged from their father, and that the plaintiff was deceased’s life partner for many years. Instead, the defendant opted not to apprise the Court of the above critical information, which the Court would have taken cognisance of, resulting in the order made on the basis that the deceased died intestate. The aforesaid undoubtedly would have shed more light on the issues at play. Additionally, the defendant failed to disclose and/or to notify the plaintiff of the proceedings culminating in her appointment, thus depriving the plaintiff, clearly a party with “lawful interest” an opportunity to plead her case before the Court. These were material omissions. Defendant’s conduct can rightly be interpreted as being deceptive to the Court, and her appointment is worthy to be set aside.

[31] The above sentiments find validation in the case of ***Davison v Davison (MC 19 of 2020) [2021] SCSC 643*** where the petitioner argued: that the respondent’s appointment as executrix of the deceased was unlawful and contrary to law as the law permits only a maximum of three executors to be appointed and the three testamentary executors had been appointed before the respondent; that Allcar then CJ erred in stating in his Order of 16th November 2006 appointing the respondent as executrix that the deceased died intestate when the deceased had left a will which had been transcribed and registered on 5th January 2006; and, further that he erred in granting the motion *ex-parte* because both counsels for the respondent and the petitioner were known to the Court and were readily available for service of summons. After citing the case of ***Attorney General v Marzorcchi & Anor (SCA 8/1996) [1998] SCCA 6 (9 April 1998)***, Carolus J held that:

“it cannot be denied that a procedural irregularity has occurred in that the petitioner and his co-executors were not heard in these proceedings. Had they been heard presumably they would have raised the legal points against the appointment of the respondent as executrix of the deceased that they are now raising in support of their application to have the Order set aside.

*I am of the view that such procedural irregularity is of such a nature, in the words of Silungwe J.A. in **Attorney General v Marzorcchi** (supra), “that taints the validity of the proceedings and renders them a nullity” and consequently the ensuing order should also be treated as a nullity and set aside.” [Emphasis added]*

[32] As a result of the Court’s pronouncement of the nullity of Allear then CJ’s Order of 16th November 2006 appointing the respondent as executrix of the estate of the deceased, the court held that “the appointment of respondent falls and she can no longer perform any acts in that capacity from the date of this judgment.” The second part of the petitioner’s prayer was that the court finds that the respondent had never been executrix. The court found this to be problematic by virtue of an executor being a fiduciary representing the deceased’s estate. In the present case, by virtue of Article 1028, the plaintiff as executrix was under an obligation to act as a fiduciary of the succession and was bound by the rules relating to the functions and administration of fiduciaries. As to her fiduciary duties:-

“she was under a duty to hold, manage and administer property forming part of the succession honestly, diligently and in a business-like manner as if she was the sole owner thereof; to render full and regular account of her management of the property until termination of her functions, and to render account of her administration at the end of her functions. As an executrix she also had power to sell property of the succession subject to certain conditions. See Articles 825, 826 and 827.”

[33] In the present case, it has been illustrated that the defendant has already performed acts in furtherance of her role as executrix. Some of these acts even involve third parties who might not have known that her executrix position was tainted with irregularities. These acts cannot be declared a nullity, therefore. Carolus J in **Davison** went on to state that:

“It is recognized that the nullity of an “acte juridique” i.e. a contract, has certain undesirable effects in that execution or part execution of the contract may already have occurred prior to it being declared null, and that to revert to the situation existing before such execution may cause great prejudice to the parties or even third parties.

[34] While the court in Davison declined to pronounce all acts performed by the Respondent as nullity as it had no knowledge of which acts she had already performed and which may have been contractual affecting unsuspecting third parties, the court declined to make such an order. Correspondingly, in the present case, the Court is satisfied to withdraw such letters of executorship from the Defendant, without nullifying such acts which she has already performed.

[35] The Court thereby sets aside the Order of Burhan J dated 5th October 2020, appointing the Defendant as executrix of the estate of the late Donald Mellon, as a result of which as from the date of this judgment, the defendant Patricia Sheila Mathiot is no longer executrix of the estate of the late Donald Mellon.

Appointment of Plaintiff as Executor?

[36] The above facts delineate how the defendant through her conduct disqualified herself from eligibility for the role of executrix. What if the plaintiff's prayer to this Court that she be appointed executrix in the stead of the defendant? It has already been demonstrated that the plaintiff was a party with a lawful interest in so far as it has been established that she lived with the deceased as husband and wife for over 12 years, the two supported each other financially, jointly renovated parts of their home, extended the house, bought a motor vehicle together, etcetera. Plaintiff's relationship with the deceased is distinguishable from that illustrated in *Arrissol v Dodin (2004–2005) SCAR* where, *in case*, the couple lived in concubinage and each bought different properties in their own names. Herein the court held that:

“no legal rights are created or arise from the mere existence of a state of concubinage. Therefore, the only cause of action available to the plaintiff was ‘de in rem verso’ which alone could operate in assisting her to obtain compensation for the actual and ascertainable loss she suffered.”

[37] In the above case, the trial judge found that the plaintiff could not have brought a real action for a right of co-ownership as she had no legal right to the land, which was registered in the sole name of the defendant.

[38] Defendant has not disputed the plaintiff's assertions that the deceased and his children were estranged and had not had contact for years. This explains the deceased's apportioning his property as he did in his will. Even though the defendant opposes the plaintiff's claim, nothing in the Civil Code requires the person who applies for the appointment of an executor to obtain the consent of all other parties interested in the succession. Further, the defendant has failed to show cause as to why the application should not be allowed as per the case of *Pillay (1995) SLR 86*. Thus the plaintiff's prayer that she be appointed executrix will be granted upon filing the following, per **See Practice Direction 1/1989**:

- (a) The death certificate of the deceased.
- (b) The conveyance, deed of title, or other document showing the entitlement of the deceased to ownership of immovable property.
- (c) The bank statement, savings book, or certificate of deposit showing ownership of any movable assets of the deceased, consisting of money, cash, or securities.
- (d) The marriage certificate of any surviving spouse of the deceased.
- (e) The death certificate of the deceased's spouse, if any.
- (f) Birth certificates of all heirs.
- (g) Affidavits of alias where necessary to explain or reconcile any differences or discrepancies in names that appear in the supporting documents.

Allocation of the deceased's Property

[39] The Plaintiff in paragraph 16 of her claim averred that "*she is ready and willing to give all three children their due shares of the estate as required by law*" However, during examination in chief, the plaintiff insisted that the deceased's property should devolve in terms of the testator's intention – meaning that she should receive all the property bequeathed to her in terms of the will.

[40] **Article 745 of the Civil Code** is informative when it comes to how the property of a deceased devolves amongst his or her heirs despite a testator's will or wishes, to wit:

“Children or their descendants succeed to their father and mother, grandfathers and grandmothers or other ascendants without distinction of sex or primogeniture, even if they are born of different marriages.

They take in equal shares, and per head, if they are all of the first degree and inherit in their own right; they take per stripes when all or some of them inherit by representation.”

[41] Where the constitutionality of this article was challenged in the case of ***Durup & Ors v Brassel & Anor (Constitutional Court Case 5 of 2012)***, the Court held the following:

“It is not disputed that the law of reserved heirs is a limitation to the exercise of an owner of property of his or her rights to dispose of property by way of gifts inter vivos or by will, which is guaranteed under Article 26(1) of the Constitution. Such a limitation entails a violation of Article 26(1) if it does not fall within one of the exceptions provided for in clause 2 of Article 26. This Court therefore, has to examine whether the limitation is "prescribed by law" and the aim or aims is necessary in a democratic society.”

[42] The court further observed that the law of reserved heirs under the umbrella of Article 913 of the Civil Code recognises the special link that exists between parent and child without regard to the age of the child and the distinction of sex. It is grounded on the principle of equality among heirs, subject to Article 760 of the Civil Code. Article 913 of the Civil Code provides that no distinction shall be made between legitimate and natural children except as provided by Article 915-1 of the Civil Code.

[43] The rationale for this position is not difficult to decipher given that the State recognises that the family is the natural and fundamental element of society and undertakes to promote the legal, economic and social protection of the family under Article 32(1) of the Constitution. This limitation contained in Article 913 of the Civil Code affords the widest possible legal, economic and social protection to the family, which is the natural and fundamental group unit of society and is therefore, in the public interest under Article

26(2)(a) of the Constitution. Hence in the present case, the Code as it stood then sought to ensure that the issue of a deceased person or his descendants are not left out in the cold when such parent dies simply because they loathed bequeathing their property to them. As stated by the Court this plays a social and economic role to ensure that the family is not left destitute at the whim of the testator – hence forces the hand of the deceased to provide for their own.

[44] Similarly, the plaintiff will have to bear these in mind as the Court will not decide contrary to the law prevalent at the time of the deceased's passing.

Conclusion and final determination

[45] Noting the analysis of the evidence on the issues which fall to be determined in the present case, this Court finds allows the plaint and makes the following orders:

- (1) The order of the Court Burhan J dated 5 October 2020 appointing the defendant as executrix to the estate of the deceased Donald Mellon is set aside. Hence as of the date of this Judgement, the defendant Patricia Sheila Mathiot is no longer the executrix of the estate of the deceased.
- (2) This court declines to accede to the prayer to nullify all acts caused by the defendant in her capacity as executrix to the estate of the deceased for the reasons given.
- (3) The plaintiff's prayer that she be appointed executrix will be granted upon the filing of the following documents namely, the death certificate of the deceased; the conveyance, deed of title, or other document showing the entitlement of the deceased to ownership of the immovable property; the bank statement, savings book or certificate of deposit showing ownership of any movable assets of the deceased, consisting of money, cash or securities; the marriage certificate of any surviving spouse of the deceased; the death certificate of the deceased's spouse, if any; birth certificates of all heirs; and affidavits of alias where necessary to explain or reconcile any differences or discrepancies in names which appear in the supporting documents **(as per Practice Direction 1/1989)**.

(4) Upon appointment subject to the criteria above (to be fulfilled by the plaintiff), the plaintiff will have to ensure that as executrix to the estate of the deceased is managed and distributed according to law.

(5) Costs awarded in favour of the plaintiff.

Signed, dated, and delivered at Ile du Port on the 30 day of January 2023.

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ANDRE JA
(Sitting as a Judge of the Supreme Court)

