BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 4 of 2010

BETWEEN:

LEVERE KING **Appellant**

AND

LESTER MASSIAH **Respondent**

Before: The Hon. Marston C.D. Gibson, Chief Justice, The Hon. Sherman R. Moore and the Hon. Sandra P. Mason Justices of Appeal

2012: February 8; March 14; May 9

2014: May 9

Mr. Clement Lashley, Q.C., Miss Jennifer King and Miss Honor Chase for the appellant

The Respondent not appearing in person or by Counsel

DECISION

Factual Background

[1] **MOORE JA:** The facts and evidence are set out comprehensively in the decision of the trial judge. What we outline below is a brief summary thereof.

[2] Carmen Norrine Phillips (testatrix) died in Barbados on 25 August 2001 at the age of 80 years. She was a retired elementary school teacher and at the time of her death she resided in a nursing home. Until she was removed to the nursing home she lived largely alone at Howell's Cross Road in the parish of Saint Michael.

[3] The testatrix made her will on 28 February 2000 by which time she was aged, infirm and blind and assisted by household staff comprising a maid and a night nurse.

[4] The testatrix appointed Lester Massiah ("Lester") of Ivy Main Road, Saint Michael and Gloria Best of Brooklyn, New York, USA as executors of her will. Except for her Hyundai Excel motor car which she bequeathed to Lester, she gave, devised and bequeathed her real and personal property, including her bank accounts to O'Donovan Yarde (O'Donovan) and Tamara Yarde (Tamara) whom she described as "my nephew" and "my niece", respectively. In fact, they were not related to her. They were born in St. Lucia and came to Barbados with their parents. The testatrix worshipped at the Seventh Day Adventist Church at Brittons Hill, St. Michael. O'Donovan and Tamara were pupils of the Seventh Day Adventist School and they also worshipped at the Church. The testatrix befriended them and eventually they lodged at her house and the friendship grew. At the time of the making of the will O'Donovan lived at the Ivy Main Road and Tamara lived in Brooklyn, New York.

[5] The respondent applied to have the will propounded and the appellant issued a caveat, the respondent issued a warning to the executor who then entered an appearance.

[6] The testatrix was the appellant's sister and he used to visit her regularly and take her to the doctor in his motor car. He was not a beneficiary under her will. Although the appellant visited his sister regularly the first time he met O'Donovan was at the testatrix's funeral.

High Court Action

[7] On 10 May 2005 the appellant as plaintiff, issued a writ. By an amended statement of claim filed on 02 July, 2008, the plaintiff claimed (a) that the will had not been duly executed in accordance with statute law and the general law; or alternatively, (b) that the execution of the will had been obtained by the undue influence of a beneficiary; and (c) that the will was not the will of the Deceased.

[8] By amended defence and counterclaim dated 23 October 2008, the respondent denied the appellant's claim and prayed for the court to pronounce for the validity of the will in solemn form.

[9] On 3 March 2010, **Richards J** dismissed the appellant's claim. It is from that order that the appellant has appealed to this Court for an order that the decision of the trial judge be set aside and judgment entered in favour of the appellant with costs.

Judge's Reasons

[10] In her reasons for decision the trial judge said at paragraph 92 to 94:

> "[92] The Court prefers the evidence of Mr. Yarde and Ms. Best, and finds as a fact that the Deceased executed the will after it was read to her by the lawyer, and after he had asked her a number of questions. The provisions of the will are not complex, and a blind testator, with full mental capacity, would have had no difficulty in understanding this will when it was read.
>
> [93] It must be noted that this will was not executed in secret. Ms. Eversley was in the house at work and near to the activity at the dining table. There is no evidence of any attempt made to hide the proceedings from Ms. Eversley. Had there been any clandestine purpose on the part of Mr. Yarde or any other person, the will could have been executed at a time when Ms. Eversley was not at work. She usually left around midday on her work days, and there was a gap of approximately eight hours before the night nurse came in to work.
>
> [94] Whatever suspicions were raised either by the inadequate attestation clause in the will, or by Mr. Yarde's involvement in the execution of the will, have been adequately explained and addressed to the satisfaction of the Court. The Defendant has discharged the burden of proof, and he has established on a balance of probabilities that the deceased knew and approved the contents of the will. The statutory and other legal requirements for execution of the will were observed. Therefore the will was duly executed."

The Appeal

[11] When this appeal first came on for hearing Mr. Patrick Phillips, attorney-at-law, attended Court and said that he had appeared on behalf of the respondent in the Court below but had no instructions to defend the appeal because he had not heard from O'Donovan since June 2011. Mr. Philips had already written the Registrar the following two letters:

"January 23, 2012

Registrar of the Supreme Court

Supreme Court Complex

Whitepark Road

St. Michael

BY FAX & MAIL

Dear Madam

Re: Civil Appeal No. 4 of 2010 – Levere King v. Lester Massiah

I refer to the Notice of Hearing dated the 26th October, 2011 which was mailed to this law chambers on the captioned matter.

I write to advise that I have been trying to contact Mr. O'Donovan Yarde, my client herein since October, 2011 without any success. Mr. Yarde resides in the Island of St. Lucia and all my correspondence and telephone calls to him have gone unanswered. Mr. Yarde who carries on an international consultancy business, has not been in contact with this law chambers since June, 2011.

In the circumstances, I have received no instructions from him on the conduct of this matter neither can I say that he has any further interest in the outcome of the same.

In light of the foregoing, I will however crave leave that the matter be granted a short adjournment to a date in the month of May, 2012, to facilitate further efforts to contact my client."

Yours faithfully

Patrick McI. Phillips

January 31, 2012

Registrar of the Supreme Court

Supreme Court Complex

Whitepark Road

St. Michael BY FAX & MAIL

Dear Madam

Re: Civil Appeal No. 4 of 2010 – Levere King v. Lester Massiah

I refer to my letter to you dated January 23, 2012 on the captioned matter wherein I advised that I have not been instructed on the conduct of the same.

In addition to the above, I am appearing for the Applicant in the High Court trial entitled CV 1774 of 2005 – Lorna Vanella Moore vs. Von Wilfred Callender on the 6th, 7th and 9th of February, 2012.

In view of the foregoing, I would not be in a position to attend the adjourned hearing date of the 8th February, 2012 on such short notice.

Yours faithfully

Patrick McI. Phillips

cc: Mr. Clement Lashley

[12] This matter was adjourned on two further occasions and even though he had been notified of the adjourned dates Mr. Phillips never appeared. In the end, in order to further accommodate Mr. Phillips as requested in his letter dated January 23, 2012 above, the appeal was adjourned to 9 May 2012. On that day it was heard in his absence with the respondent unrepresented. That fact, however, having regard to the entirety of the case, in no way affected its outcome.

[13] The grounds of appeal are as follows:

"a. The decision of the Court is against the weight of the evidence.

b. The learned trial judge having made a finding that the attestation clause to the will does not state that the deceased was blind and that the will was read to her prior to its execution and that a well grounded suspicion had been raised the said Court relied on conflicting evidence by O'Donovan Yarde, the bearer of the will and the main beneficiary – and Stella Best and found as a fact that the deceased executed the will after it was read to her by the Lawyer and after he had asked her a number of questions.

c. There is no clear evidence that the will was read back to the Testatrix and that she had the degree of appreciation of its contents and effect necessary to establish knowledge and approval of its contents.

d. That the learned trial judge failed to pronounce against the validity of the will notwithstanding that the "golden rule" was not followed in this case in that there is absolutely no clear evidence that the will was read back to the Testatrix and she appeared thoroughly to understand the same and that she approved the contents. There is absolutely no evidence that any questions such as "why, what, who or when" so as to establish that the Testatrix could hear and understand the provisions of the will which was allegedly read back.

e. That the learned trial judge erred in law in holding that the party propounding the will and taking a benefit under it who also was instrumental in its procuration, preparation and execution had discharged the burden of proving affirmatively that the Testatrix knew and approved its contents.

f. The judgment is unsatisfactory be (sic) means of material inconsistencies or inaccuracies."

[14] Taken together, the grounds raise the sole issue of whether the testatrix knew and approved the contents of the will. It is that issue that we discuss below.

[15] In light of the importance which the attestation clause assumes in this appeal, we consider it useful to set it out:

> "Signed by the testatrix the said CARMEN NORRINE PHILLIPS in the presence of us both present who in the presence of the Testatrix have hereunto subscribed our names as witnesses."

The Law

[16] In the case of **E. Jack, N. Jack and Dora Supersad v Irving Supersad, 1954 LRBG 38 (Supersad)** the West Indies Court of Appeal citing Lindley LJ in **Tyrell v Painton (1894) P 151 at 157** stated:

> "It is well settled law that the *onus probandi* lies in every case on the party propounding a will and in "all cases in which circumstances exist which excite the suspicion of the Court, and wherever such circumstances exist, and whatever their nature may be it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will".

[17] **Rule 15 of the Supreme Court (Non-Contentious) Probate Rules 1959 (NCPR)** provides as follows:

> "If the testator was blind or the will was executed by a testator subscribing his signature by means of a mark, then one of the subscribing witnesses or the person who has appended the name of the testator must by affidavit depose to the fact that the will was read over to the testator and approved by him before its execution."

[18] The learned authors of **Williams on Wills Volume 1 Ninth Edition (Williams)** state, inter alia, at paragraphs 5.1 and 5.2 of Chapter 5:

> "[5.1] **Knowledge and approval** - Before a paper is entitled to probate the court must be satisfied that the testator knew and approved of the contents at the time he signed it. It has been said that this rule is evidential rather than substantive and that in the ordinary case proof of testamentary capacity and due execution suffices to establish knowledge and approval, but that in certain circumstances the court requires further affirmative evidence. It was at one time thought that the fact that the will had been duly read over to a capable testator on the occasion of its execution, or that its contents had been brought to his notice in any other way, should when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof. However, the better view now seems to be that such a circumstance raise but a prima facie presumption of knowledge and approval ...
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> [5.2] ... when affirmative evidence of knowledge and approval of the contents of a will will be required include the following: testators who are deaf and dumb, or blind, and when the person who prepared the will received a benefit under the will."

[19] In England, the source and genesis of the **NCPR**, the requirement for affirmative evidence of knowledge and approval, is highlighted by the case **In Re Sellwood (1964) 108 Sol J 523 (In Re Sellwood)** where Sir Jocelyn Simon P held that the will had been duly executed and pronounced for it in solemn form. In that case the testatrix, Beatrice Sellwood, who was eighty-six years of age, blind and bed-ridden, executed a will. She was unable to write her name but, with assistance, put a mark on the will. The will was prepared, and its execution arranged for, by a solicitor. The attestation clause ran thus: "Signed by the said Beatrice Sellwood with her mark as and for her last will and testatment after the same had first been read aloud to her (she being unable to read by reason of blindness) when she appeared fully to understand and approve the same and signified her understanding and approval thereof in the presence of us both being present at the same time who at her request and in her presence and in the presence of each other have hereto subscribed our names as witnesses".

[20] The legal burden and the evidential burden are discharged by an attestation clause such as that in **In Re Sellwood**. A similar attestation clause is recommended in Form B22.7 at paragraph [222.9] of **Williams** for use where the testator is blind. On this point the law of Barbados follows the law of England and this Court can take cognisance of such an attestation clause because it gives effect to the spirit and intendment of **rule 15** of the **NCPR** and, as far as humanly possible, removes doubt as to the testator's knowledge and approval and as to the due execution of the questioned document.

Discussion

[21] In order to determine the issue raised on the grounds of appeal we must consider the trial judge's findings of fact. For that purpose we find it helpful to set out below those paragraphs of the trial judge's decision that we think will assist us in that determination.

[22] At paragraphs 39 to 42 of her decision, the trial judge, under the heading **"The Evidence Not Presented"**, said:

> "[39] In non-contentious probate matters, one of the witnesses to the will of a blind testator is required to depose by affidavit that the will was read over to the testator and approved by the testator prior to its execution. Rule 15 of the Supreme Court (Non-Contentious) Probate Rules, 1959, requires that:
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> > "If the testator was blind ... then one of the subscribing witnesses ... must by affidavit depose to the fact that the will was read over to the testator and approved by him before its execution."

The witness Janice Roett testified that she received an application for probate of the will. Curiously, there is no evidence as to whether a rule 15 affidavit was filed when the application was made for the grant of probate or before this matter became contentious.

[40] The Court notes that in cases such as this, it is not unusual for the attorney-at-law who prepared the will to give evidence as to the instructions taken from the testator and the circumstances under which the will was prepared, witnessed and executed. In Martin v Hope (1992) 27 Barb. L.R. 82 Belgrave J. heard the evidence of counsel who prepared the will of a testator who was not of sound mind when he made his will. Counsel gave evidence of preparing the will in circumstance (sic) that appear to him to be suspicious. The Jamaica Supreme Court also accepted the evidence of an attorney-at-law regarding the execution of a will prepared by her in Gregory and Montague v Sollas (JM 2005 SC111)**.**

[41] The disputed will in this case was prepared by counsel who appeared on behalf of the Defendant in this matter. This same counsel was also present at the execution of the will. Perhaps he was unable to assist the Court with oral testimony about the circumstances under which the will was prepared and executed, because he had undertaken the conduct of the Defendant's case in this Court. The Court, therefore, was deprived of critical evidence from the legal expert who was intimately involved in the preparation and execution of the will.

[42] No evidence was given by the Defendant in this case. The Plaintiff made no allegations against the Defendant either personally, or as an executor of the will, or as a beneficiary under the will. The Defendant was not present when the will was executed. But as the individual who played a pivotal role in the running of the Deceased's household, his perspective on the events that led to this dispute may have been useful to the Court".

[23] At paragraphs 76 to 81 and 84 of her decision, the trial judge, under the heading **"Knowledge And Approval"**, said:

"[76] The relevant legislation does not require a formal attestation clause. Section 61(1)(c) of the Succession Act provides that "no form of attestation shall be necessary." But having included an attestation clause in the will, the absence of a statement in that clause, to the effect that the Deceased was blind and that the will was read over to her, put the Court on inquiry as to whether the Deceased was aware of the contents of the will and approved of the will.

[77] The omission of the statement from the attestation clause, coupled with the apparently conflicting evidence of individuals present at the execution of the will, and the involvement of a major beneficiary in the preparation and execution of the will, excited the suspicion of the Court. Therefore, as the propounder of the will, the Defendant was required to prove the knowledge and approval of the Deceased when the will was executed. (See Guardhouse v Blackburn (1866) LRI P & D 109 at 116). In Fincham v Edwards ((18420 2 Curt. 63) (sic), Sir Herbert Jenner Fust opined that:

> "... when the Court is asked to grant probate of a will of a party totally or almost blind, it must be shown, to the satisfaction of the Court, that the contents of the will are conformable to the instructions and intentions of the deceased."

[78] Three alternatives were available to the Defendant. He was required to satisfy the Court, on a balance of probabilities, either that the will was read back to the Deceased, or

that the Deceased gave instructions for the will that were embodied in the will. The Defence relied on the evidence of two individuals to establish that the contents of the will were read back to the Deceased. These individuals were Mr. Yarde and Stella Best.

[79] Mr. Yarde recalled the lawyer going through the will, speaking to the Deceased, and asking her a number of questions. He could not say what the questions were, but he believed that the lawyer read out the will. (See paragraph [32] supra). The Court approached Mr. Yarde's evidence with a measure of caution. As a major beneficiary under the disputed will, this young man has an interest in the Court ruling in favour of the validity of the will. His evidence also revealed that he conveyed the instructions of the Deceased to a lawyer, that he contacted one of the witnesses to the will on behalf of the Deceased, and that he was present at the execution of the will.

[80] The law is that where a person prepares a will for a testator and takes a benefit under the will, a suspicion is created that must be removed by the person propounding the will. (See Barry v Butlin (1838) 2 Moo PCC 480 at 482, 483). In this case Mr. Yarde did not prepare the will, but he contributed to its preparation by taking instructions to the lawyer who drafted the will. Mr. Yarde was a lay intermediary who repeated the Deceased's instructions to a lawyer.

[81] The Privy Council has held that such a situation provides:

> "Opportunities for error in transmission and of misunderstanding and of deception ... and the Court ought to be strictly satisfied that there are no grounds for suspicion, and that the instructions given to the intermediary were unambiguous and clearly understood, faithfully reported by him and rightly apprehended by the solicitor, before making any presumption in favour of validity." (per Lord Normand in Battan Singh v Amirchand [1948] A.C. 161 ,169)**.**

[84] The Privy Council in Battan Singh required a court to be "strictly satisfied that there are no grounds for suspicion". This high burden of proof may be met in the present case by evidence that the will was read back to the Deceased. Mr. Yarde gave such evidence. However, the Court has pointed out the reasons for adopting a cautious approach to his evidence. But although cautious, the Court observed Mr. Yarde's demeanour as he gave his evidence, and he was found to be both frank and straightforward with the Court. He readily agreed that the Deceased could have been taken to the lawyer's office in the same way that she was taken to the doctor in February 2000. He could not recall what questions the lawyer asked the Deceased before the will was executed and he did not think that any questions were asked about her relatives or care givers."

[24] The principles to be applied when a Court of Appeal is required to consider findings of fact by a trial judge arose for consideration in ***Philip Greaves v Hamel Lorde and Others, Civil Appeal No. 34 of 2005 (unreported)*** where after a comprehensive review of the law ***Sir David Simmons CJ*** at paragraphs [3], [13] and [14] said:

> "[3] It is a commonplace that an appellate court is generally slow to interfere with findings of a trial judge on questions of fact and is particularly reluctant to interfere with findings on damages. The legal principles indicating the proper approach to appeals in such circumstances have been settled in many well-known cases in the Commonwealth – see, for example, ***Benmax v. Austin Motor Co. Ltd. [1955] A.C. 370; Saunders v. Adderley (1998) 53 WIR 15; Watt v. Thomas [1947] 1 All ER 582; Sumair Singh v. Chase Manhattan Bank (1991) 45 WIR 220; Eudese Ramsay v. St. James Beach Hotels Services Ltd. (Magisterial Appeal No. 4 of 1999 unreported decision of this Court 26 June 2002); Flint v. Lovell [1935] 1 K.B. 354; Davies v. Powell***

Duffryn Associated Collieries Ltd. [1942] 1 All ER 657.

> [13] There is legislation which authorises the Court of Appeal to make its own decisions on issues of fact. Among the powers of the Court of Appeal are the powers "to draw any inference of fact that might have been drawn, or give any judgment or make any order that might have been given or made by the original court, and make such further or other order as the case requires." S. 61(1)(e) of the Supreme Court of Judicature Act, Cap. 117A. This provision recognises that where inferences are to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge. An interesting recent decision of the Judicial Committee of the Privy Council in a negligence appeal which raised only issues of fact is ***Martin Rago v. Indra Ragoonath [2003] UK PC 29.*** There, the Board reversed the decision of the Court of Appeal of Trinidad and Tobago and restored the judgment of Bereaux J at first instance.
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> [14] In applying this provision where the correctness of a finding of primary fact or of inference is in issue an appellate court cannot deal with the issue purely on the basis of a discretion. The appellate court must do more. It must determine whether the finding or inference is wrong while paying due deference to the advantages enjoyed by the trial judge and the overriding caveat that an appellate court should not interfere "unless it is satisfied that the judge's conclusion lay outside the bounds within which reasonable disagreement is possible" (per ***Mance LJ*** *in* ***Todd v. Adams & Anor [2002] 2 Lloyd's Rep 293*** at para. 129)."

[25] That principle had attracted the attention of the West Indies Court of Appeal in **Supersad** in which the trial judge had pronounced for the force and validity of the alleged last will and testament of a deceased person. In that case the Court said at page 39 -40:

> "This Court is always reluctant to dissent from the conclusion on a question of fact at which a judge who has seen and heard the witnesses has arrived, but "If", as Viscount Simon points out in *Watt (or Thomas) vs. Thomas (1947) 1 All E.R. 582 at p. 583*, "there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate to so decide, but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

[26] The testatrix in this case, was the sister of the appellant. It is quite likely that in making her will she would have regarded him as the main object of her bounty. The trial judge found no evidence of undue influence and with that finding we agree. However, there are circumstances to excite the suspicion or vigilance of the court sufficiently to prevent the court from being satisfied of the discharge of the legal and evidential burdens that the will was duly executed.

[27] The first circumstance is clearly detailed in paragraph 77 of the trial judge's decision where the judge referred (a) to the "omission of the statement from the attestation clause", (b) the "conflicting evidence of individuals present at the execution of the will" and (c) the "involvement of a major beneficiary in the preparation and execution of the will". O'Donovan had transmitted the instructions for the making of the will to the attorney-at-law who drew it and O'Donovan was also present at its execution.

[28] The second circumstance is that the testatrix was old, frail, infirm and blind and **rule 15** of the **NCPR** had not been complied with.

[29] The third circumstance is that O'Donovan and his sister, Tamara, were sometime lodgers of the

testatrix and they were not related to her yet they were really the only beneficiaries of her generous bounty.

[30] Those circumstances must excite the suspicion of the Court and such suspicion must be removed by the party propounding the document before the Court can be satisfied of the due execution of the document.

[31] The trial judge in coming to the conclusion that the testatrix knew and approved the contents of the will and that the statutory and other legal requirements for execution of the will were observed must, despite her careful consideration and thorough exposition of the relevant law, have ignored (a) the failure to comply with the requirement of **rule 15 of the NCPR**; (b) the fact that the Court, "was deprived of critical evidence from the legal expert who was intimately involved in the preparation and execution of the will." (c) the role of O'Donovan in the preparation and execution of the will, and his uncertainty as to what transpired during the said execution; and (d) the absence of evidence from the respondent (executor) who, though not present, "when the will was executed" was "the individual who played a pivotal role in the running of the Deceased's household" and whose "perspective on the events that led to this dispute may have been useful to the Court", and must have relied entirely on the "conflicting evidence of individuals present at the execution of the will".

[32] In similar circumstances as those in the instant case, ***The West Indies Court of Appeal*** in **Supersad,** in allowing the appeal and annulling the plaintiff's claim for a Grant of Letters of Administration, said at page 41:

> "The learned trial judge in coming to the conclusion that the document of the 16th September, 1948, is the true last will and testament of the deceased relied entirely on the evidence given by the subscribing witnesses Edward Bissoo and David Lallmansingh whose testimony he accepted as to the execution of the will by the deceased. He had the advantage of seeing and hearing these witnesses, which this Court has not had, and on their testimony there would be no doubt that the will was proved if there were no circumstances on the other side to impeach it. In this case there are such circumstances and they are, in our view, so gravely suspicious and raise such a reasonable doubt that, had the learned trial judge applied the principle of law which we have enunciated above, and which we think he should have applied, he must have come to the conclusion that the Court was called upon to pronounce against the document dated the 16th September, 1948. We have no hesitation in pronouncing against the document propounded by the respondent as the last will of Lucilia Salomon".

[33] We agree with this statement. We hold that the circumstances of this case are gravely suspicious and raise such a reasonable doubt. We are of the view that, had the trial judge applied the principle of law relating to knowledge and approval enunciated in this judgment and so clearly set out in her decision and which she ought to have applied, she would have pronounced against the document.

Disposal

[34] In the foregoing circumstances, the appeal is allowed. The order of the court below is set aside and the appellant's claim for a Grant of Letters of Administration to the estate of the testatrix is allowed.

[35] The appellant shall have his costs in this Court and the court below to be paid out of the estate of the deceased. The parties may make written submissions on quantum of costs.

Chief Justice

Justice of Appeal

Justice of Appeal