CAUSE NO: G2020-0135

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

BETWEEN:

DERWIN DEXTER SMITH

Plaintiff

-and-

(1) FRANKLIN R. SMITH
(2) RICHARD SMITH
(3) The Personal Representatives of the estate of ERIC SMITH (Deceased)
(4) CAROLYN PARCHMENT
(5) NORTH SIDE WESLEYAN HOLINESS CHURCH
(6) KER HOLDINGS LIMITED

Defendants

Appearances: **Mr James Chapman of Chapmans for the Plaintiff**

Ms Nikue Assarpour of Priestleys for the First and Second Defendants

The other Defendants were not represented and did not appear

Before: **The Honourable Justice Jalil Asif KC**

Heard: **15 April 2024**

Judgment: **12 June 2024**

Wills—whether will valid where made in name different from legal name of deceased

- - - - - - - - - - - - - - - - - - - -

JUDGMENT

A. Introduction

1. Ashton Smith was born on 20 April 1921 and died on 24 November 2019. The question in this case is whether a will that he made on 19 May 2008 using the name "Ashton Smith Tatum" is a valid testamentary document. I refer to the document in this judgment as "the Will" notwithstanding that its validity is challenged.

2. The Plaintiff, represented by Mr James Chapman, contends that the Will is not valid, that Ashton Smith died intestate and that his estate should be distributed according to the intestacy rules. Mr Chapman's argument is that "Ashton Smith Tatum" was not Ashton Smith's correct legal name, and that this invalidates the Will.

3. The First and Second Defendants, through Ms Nikue Assarpour, contend that the Will is valid and should be proved in solemn form and probate granted to them. She argues that Ashton Smith informally adopted the additional surname "Tatum" and that this does not invalidate the Will.

4. For the reasons set out in this judgment, I agree with the First and Second Defendants and hold that the Will is valid.

B. Parties

5. I refer to the various participants by their first names to distinguish them from each other. No disrespect is intended to them by this.

6. The parties to the proceedings are identified below. However, the participants in the trial were limited to the Plaintiff and the First and Second Defendants only: the other defendants did not play an active role.

    a) The Plaintiff, Dexter, is the younger son and only living child of Ashton Smith from his marriage to Sylvia Vernell Smith (née Ebanks and usually known as "Nellie"). Nellie died on 15 August 2020.

    b) The First Defendant, Franklin, is Ashton's son born from another relationship before Ashton's marriage to Nellie and is the Plaintiff's older half-brother.

    c) The Second Defendant, Richard, is Ashton's nephew.

    d) The Third Defendant named is "the estate of Eric Smith", which is not in fact a legal person. Eric was Dexter's older brother and Ashton's first son with Nellie. He died in February 2016. Eric's personal representatives were not individually named as Defendants, as they should have been, nor were they identified to me.

G0135/2020 Page 2 of 19 2024-06-12

e) The Fourth Defendant, Carolyn, is Ashton's daughter born from his relationship before his marriage to Nellie. She is Franklin's younger sister and Dexter's older half-sister.

f) The Fifth Defendant is the local church that Ashton attended for a number of years.

g) The Sixth Defendant is a company, which the Plaintiff believes to be owned by Ruth Rankin, Ashton's niece and Richard's sister. In about 2016, the Sixth Defendant bought certain land from Ashton in the circumstances described later in this judgment. The land was the subject of an intended bequest in the Will.

7. Mr Chapman told me in argument that Dexter's reason for joining the various Defendants was that Ashton had made bequests to each of them in the Will, other than the Sixth Defendant, which had acquired the land which Ashton intended to be bequeathed by the Will.

8. In addition to Eric and Dexter, Ashton and Nellie also had a daughter, Novia, who died on 8 March 2000, who features in the background facts.

C. Procedural background

9. Dexter commenced Cause PA 2020-0016 on 30 January 2020 seeking Letters of Administration in respect of Ashton's estate. Richard lodged a caveat on 15 March 2020, which was not immediately served due to the Covid pandemic and the resulting restrictions on business and travel. Dexter became aware of the caveat on 7 May 2020. He filed his objection on 22 May 2020 and the court issued the warning of the caveat to Richard on 25 May 2020, to which he responded on 27 May 2020.

10. On 9 April 2020, Franklin and Richard signed an application for probate of the Will, although the proceedings were not issued by the court as cause PA 2020-0055 until 22 May 2020, no doubt due to the difficulties caused by the restrictions associated with the Covid-19 pandemic. Dexter and Nellie lodged a caveat in those proceedings, dated 5 June 2020 and filed on 8 June 2020. That cause appears not to have progressed further.

11. On 7 September 2020, Dexter commenced the current writ action with the intention, as stated in argument on his behalf, to bring the dispute over the validity of the Will before the court for resolution because Franklin and Richard had not taken steps to progress cause PA 2020-0055. Franklin and Richard in their Defence and Counterclaim assert that they were not able to progress the grant of probate in cause PA 2020-0055 because of the caveat lodged by Dexter and Nellie. They counterclaim in the writ action that the Will be admitted to probate.

12. The dispute was tried before me on 15 April 2024. It is regrettable that it has taken 3½ years to reach trial. I do not know the reasons and do not need to explore them for the purposes of this judgment, but I do wish to state clearly and firmly that family disputes about estates should be

G0135/2020 Page 3 of 19 2024-06-12

resolved far more quickly than this, so that family members know the result, can achieve closure and can move on with their lives.

13. The case was originally set down for two days, but the sensible decision by Mr Chapman, albeit very late and prompted by judicial questioning, that he did not need to cross-examine three of the Defendants' witnesses, meant that it was possible to conclude the evidence and submissions within one day.

14. The evidence before me comprised the unchallenged witness statements of Mr Bryan Hunter, Mr Rudolph Black and the Reverend Conway King and the witness statements of Franklin, Richard and Dexter, supplemented by their oral evidence and cross-examination.

D. Facts

15. There are numerous issues between the parties, many of which are not directly relevant to my decision, but which are part of the background context. I have made factual findings on these more peripheral matters where that is helpful for my decision, but I have not sought to resolve all of the contested facts.

16. Each of the witnesses who gave oral evidence was clearly trying to do their best to assist the court to reach a determination of the dispute and they were each open and candid in their responses to questions. I do not have any doubt about their honest belief in the evidence they gave.

17. Based on the documentary evidence and the witness evidence adduced in written and oral form, and on the cross-examination of the witnesses who gave oral evidence, my findings of fact are as follows.

D.1 Ashton and Franklin

18. Ashton was born on 20 April 1921. His birth certificate records his name as "Ashton Smith" and his mother's name as Maybell Smith (née Ebanks) but does not record his father's name. I note that on later documents in evidence, Maybell used the name "Mabel." In 1922, Maybell married Lorrie Tatum. Their marriage certificate was not in evidence, but this is the spelling of his name on Ashton's own marriage certificate. Dexter says his name was "Lorrimoor Tatum." The difference does not matter for the purposes of this judgment.

19. Ashton treated Lorrie Tatum as his father, and Franklin believes that Lorrie Tatum was in fact Ashton's biological father. Dexter believes that Ashton's father was someone different, namely Tydaman MacCatric Ebanks, and that Lorrie Tatum was Ashton's stepfather. Dexter seems to base this belief primarily on family and local gossip or teasing, and an alleged physical similarity between Dexter and children within the Tydaman family, which he describes in his undated witness statement. In addition, he says that he was told by Sonny Fellner, of Boatswain Bay, that Tydaman

G0135/2020 Page 4 of 19 2024-06-12

Ebanks, who was Mr Fellner's grandfather, had acknowledged on his death bed that Ashton Smith was his son. Mr Fellner was not called to give evidence regarding this statement, no doubt because it had little to no probative value. The basis for Dexter's belief as to Ashton's paternity was not explored in oral evidence. I do not need to resolve this issue to form a view about the validity of the Will, but it provides important context for Ashton's use of the name "Tatum".

20. Ashton worked as a seaman before the Second World War and from about 1945 until about 1973. He was therefore away at sea for long periods. When he was on Island, he lived in North Side, in Hutland, also described as The Hut. In about 1973, Ashton retired as a seaman and from that time onwards became involved in agriculture and became a well-known local expert at grafting fruit trees.

21. Franklin was born in 1947 and was followed by Carolyn. I did not hear evidence about their mother, and she does not feature in this case. Like his father, Franklin also worked as a seaman and did not spend much time in the Cayman Islands until about 1972, but did meet Ashton, for example in December 1965. Once Ashton and Franklin were both in the Cayman Islands more permanently from about 1973 onwards, they developed a close relationship.

22. As Ashton became older, Franklin took responsibility for helping him, and managing and funding his utilities and care needs up until about 2016. From about 2016, once a plot of land owned by Ashton was sold to the Sixth Defendant, as described below, Richard kept the net proceeds of sale for safe keeping, with Franklin's agreement, and used them to fund Ashton's living expenses thereafter. Ashton had some falls as he became older and suffered a broken arm and wrist and then a broken hip, which significantly impacted his mobility.

23. Ashton died on 24 November 2019, at the age of 98. His death was registered by Franklin. The death certificate is in the name "Ashton Smith" and he is described as "divorced." I infer that this information must have been provided to the Registrar by Franklin.

D.2 Ashton, Nellie and Dexter, and contact with Franklin

24. Ashton and Nellie married on 6 May 1954. They had three children:

    a) Eric David Ermando Smith, who was born on 5 November 1954. Eric's birth certificate records his mother as "Silvia Vernie Smith", née Ebanks, and his father as "Ashton Smith". The informant is recorded as "Ashton Smith".

    b) Novia Nellesa Smith, who was born on 26 May 1956. Novia's birth certificate records her mother as "Sylvia Vernell Smith" née Ebanks, and her father as "Ashton Smith". The informant is recorded as "Sylvia V Smith".

G0135/2020 Page 5 of 19 2024-06-12

c) Derwin Dexter Smith, who was born on 29 September 1961. His birth certificate records his mother as "Sylvia Vernall Smith" née Ebanks, and "Ashton Smith" as his father. The informant is "S Vernell Smith".

It is notable that Dexter's mother's name was spelled three different ways in these three documents, and she was the recorded informant for the last two documents, and that her name was spelled in two different ways within the third birth certificate.

25. Ashton and Nellie's family home was at The Hut, North Side. Dexter said in evidence that Nellie later told him that the house was in serious disrepair when she lived there.

26. In about 1963, Ashton and Nellie' marriage broke down. Nellie and the children moved to live with her family in West Bay. Dexter was about 2 years old at the time.

27. Dexter's evidence is that Nellie's later description of the separation indicated it was acrimonious. In his Reply and Defence to Counterclaim, Dexter pleads that:

> *"6. It is averred that Ashton Smith did not willingly (or at all) pay his debts to [Nellie] and her children, under Court Maintenance Orders or otherwise, and that he made it clear orally to [Nellie] that he 'would do what he could so she would not get a penny from him': to disinherit her as far as the law allows and not benefit her in any way financially. …"*

28. As a result of the separation, Dexter says that he *"had no life with [his] father."*

29. In about 1990, Ashton and Nellie were considering a reconciliation. Ashton told Franklin that he wanted to remarry Nellie and asked for his advice. Franklin said he did not have an opinion and Ashton should do what he wanted. Dexter's evidence was that Novia told him about the possibility of a reconciliation between his parents. He was upset at this prospect because of the way Ashton had treated Nellie when they split up. This led to the incident at Nellie's and Dexter's home in West Bay, which I describe later in this judgment. The result of that incident was that Ashton and Nellie did not reconcile or remarry.

30. Franklin and Nellie's children had contact with each other once Franklin stopped working at sea in about 1972. Franklin says that he and Eric were "like brothers" from the day that he got to know Eric. His relationship with Dexter was less close, and they had a serious disagreement over politics in the 1980s and have not spoken to each other since then.

31. Richard's father was Ashton's brother. Richard describes Ashton as having "idolised" his brother. Richard says that, as a result, he was very close to Ashton. In his oral evidence, Richard corrected his affidavit to make clear that he although he is a named beneficiary in the Will, he does not believe that he will gain personally from it. His intention as an executor is to make sure that Ashton's wishes are carried into action.

G0135/2020 Page 6 of 19 2024-06-12

D.3 The status of Ashton and Nellie's marriage

32. One of the side-issues in the trial is whether Ashton and Nellie were divorced. This particular hare seems to have been set running by Dexter. It would be relevant if the Will is invalid. If so, and they were still married when Ashton died, then Nellie (and subsequently her estate, of which Dexter appears to be the sole surviving beneficiary) would be entitled to 50% of Ashton's estate. If they were not still married when Ashton died, then Nellie would not be entitled to any share of Ashton's estate on the presumed intestacy.

33. Franklin's evidence is that he firmly believes that Ashton and Nellie were divorced for the following reasons and/or that Dexter should not now be permitted to put forward a different position:

    a) Franklin met up with Ashton when they were both on island in late 1965 or 1966. Ashton told Franklin that he and Nellie had divorced. Ashton continued to keep a house in North Side and Nellie returned to the West Bay area.

    b) In proceedings brought by Nellie in 2000 for the grant of letters of administration of Novia's estate, Ashton swore an affidavit on 17 April 2000 in which he stated that he and Nellie "have been divorced for many years."

    c) Nellie relied on the truth of Ashton's affidavit in support of her application to be the sole administratrix and beneficiary of Novia's estate and exhibited that affidavit to her own affidavit sworn on 2 May 2000 in support of that application.

    d) Nellie's death certificate states that she was divorced. Nellie's death was notified by Dexter, who must have been the source of this information.

    e) Ashton's death certificate also states that he was divorced. However, this information must obviously have come from Franklin, rather than from Ashton, as the person who notified the death so is of no additional probative value.

34. Dexter does not put forward any cogent evidence that Ashton and Nellie were not divorced. His evidence is simply that Nellie told him stories that suggested that she and Ashton might not have been divorced. The example that he gives is that, apparently, the judge hearing the matrimonial proceedings said he would *"not allow my father to divorce this good woman."*

35. Overall, Dexter's position on this issue appears to be flawed in material respects.

    a) In his undated witness statement, Dexter says that <u>since</u> the legal case started, no divorce decree has been found despite every effort being made to find out whether Ashton and Nellie were really divorced. However, in the same paragraph he then says, "I <u>therefore started</u> this

action believing that my parents might not have been divorced …" (emphasis added). That seems to be backwards in terms of cause and effect and cannot be a correct explanation.

b) Dexter says that he was told that he would learn from the proceedings whether Ashton had a divorce decree. I do not know the source of that advice, but it seems to me to be strikingly misplaced. Whether Ashton and Nellie were legally divorced is not an issue that ought to arise in the course of seeking a grant of probate of Ashton's will.

c) In response to Frankin's comment about Nellie's death certificate, Dexter says that he had not noticed that it described her as "divorced", that he was not asked about any divorce and that he does not know why Nellie is described as "divorced" on her death certificate.

Given that Dexter was the person who notified Nellie's death to the Registrar, it is incredible for him to suggest that he was not the source of this information. The Registrar would not have included it in Nellie's death certificate unless she was given that information by someone. Dexter is recorded as being the informant and is therefore the only candidate to be the source.

36. Mr Chapman pointed out that there is no record of a divorce having been finalised and no positive evidence of the divorce. He suggested in argument, without evidence, that people who have obtained a decree nisi often do not realise that it has to be made final to be effective. He surmised it is possible that Ashton and Nellie were granted a decree nisi which was not made final, without Ashton and Nellie realising, so that they believed they were divorced but were not.

37. I accept that there is some uncertainty about Ashton and Nellie's marital status in light of the absence of a formal record of a decree absolute having been granted. However, that is not the same as concluding that it is more likely than not that they remained married. I conclude on the balance of probabilities that Ashton and Nellie were divorced during the 1960s and most likely in or shortly after 1963, having regard to:

a) the clear evidence that Ashton, Nellie, Franklin and Dexter all believed that Ashton and Nellie were divorced;

b) Nellie's adoption of and reliance on Ashton's affidavit to that effect in 2000 in the proceedings concerning Novia's estate; and

c) the fact that their marital status was recorded as "divorced" when each of them died.

D.4 The incident in West Bay

38. It was common ground that there was an incident between Ashton and Dexter in West Bay in about 1990 at about the time when Ashton was considering reconciling with Nellie. Franklin was not present but says that Ashton told him the following day about what had happened. Franklin

G0135/2020 Page 8 of 19 2024-06-12

describes Ashton's account as follows. Ashton had gone to West Bay to speak to Nellie. When he arrived at her property, Dexter threatened him and said that if Ashton ever set foot in West Bay again, Dexter would *"chop his head off"*. Dexter was holding a machete at the time, and Ashton believed that Dexter meant this threat. Franklin said that Ashton was very upset by this and never got over it. Ashton never went back to West Bay and he and Nellie never reconciled.

39. Dexter's description of the incident in his evidence has some elements that are the same, but many that are different from Franklin's report of Ashton's account. Dexter says that:

   a) He was always told that Ashton and Nellie's marriage break-up was very unpleasant and that many mean things were said. One thing that stuck in Dexter's memory was that he was told Ashton had said to Nellie and McSherry Ebanks *"[Nellie and Dexter] would get a proper house only when we built one ourselves"*.

   b) Nellie's father gave her some land in West Bay. Nellie and her family scraped and saved over many years to build a house on the land. It took them until 1982 to complete.

   c) When Novia told him that Ashton and Nellie were contemplating a reconciliation, he was upset. Dexter did not want Ashton moving into a house that Nellie and her family had been forced to build without help from Ashton.

   d) When Ashton came to the house, Dexter was in the yard using a machete and "pulling bush". When Ashton was at the gate, Dexter said to him *"Do you like our house?"* Ashton said that he did and it was a nice house. Dexter then said, *"take a good look from the outside because you will never see the inside"*. He says that Ashton then turned on his heels and walked away.

   e) Dexter says that he never threatened to kill Ashton or to cut his head off.

40. I accept Dexter's account as the only direct evidence of the incident. It seems to me it is entirely possible that Ashton interpreted what Dexter said as a threat, given that Dexter was holding a machete at the time, when it was not intended by Dexter in that way. Nevertheless, it is clear that Ashton considered that his renewed presence in Nellie's life was not acceptable to Dexter.

D.5 Execution of the Will

41. At an earlier stage in the proceedings, the issues in dispute included an allegation by Dexter that the Will is a forgery. Addressing this issue seems to have occupied a lot of time earlier in the course of the proceedings, and probably a lot of expense. The hearing bundle prepared by the Defendants included a report dated 9 May 2023 from a jointly instructed handwriting expert, Mr Michael Handy. Mr Handy concluded that the signature on the Will was more likely than not to be that of Ashton. During argument, Mr Chapman confirmed that Dexter accepts Mr Handy's conclusion, and so I do not need to consider or address Mr Handy's evidence further.

42. The Will is made in writing. It bears the date 19 May 2008. It is made in the name *"Ashton Smith Tatum"*. It was witnessed by two witnesses. The first is Mr Arthur Hunter, the founding partner of the law firm Hunter & Hunter, which became Appleby (Cayman) Ltd. Mr Hunter died in November 2018 and can no longer attest to the validity of the Will. Mr Bryan Hunter, Mr Hunter's son, provided a signed witness statement dated 17 February 2023 confirming that one of the signatures on the Will appears to be that of his father. Mr Chapman did not challenge this by cross-examination of Mr Hunter.

43. The other witness to the Will was Mr Rudolph Black who worked as a household helper for Mr Arthur Hunter from 1989. Mr Black provided a signed witness statement dated 17 February 2023. He says that Ashton had worked for Mr Hunter for many years, grafting fruit trees. Mr Black would see Ashton when he was working at the property and would often speak to him. Mr Black does not recall the details of 19 May 2008, but does recall that Mr Hunter asked him to witness a will. He says it was not unusual for Mr Hunter to do so. Mr Black recalls that they met in Mr Hunter's kitchen to execute the Will. He confirms that his signature is on the Will as a witness and that his address below his signature was written by Mr Hunter. Finally, Mr Black confirms that he understands that the reason for him signing the Will was to confirm that he witnessed its execution by Ashton, that both Ashton and Mr Hunter were present at the time and that he witnessed their signatures on the Will. Once again, Mr Chapman did not challenge this evidence.

D.6 Custody of the Will

44. Richard is the only person able to give useful evidence on this topic. None of his evidence regarding his custody of the Will was challenged in cross-examination. His account is that Ashton handed him a document during one of his frequent visits to see Ashton at his home and asked Richard to take care of it for him. Richard asked what it was, and Ashton told him that it was his will. This happened many years ago, and Richard is not able to recall the date.

45. Richard did not open or read the Will and was not aware of its contents. He took it home and put it in his safe. He says that the Will remained there until Ashton died on 24 November 2019.

46. Richard expressly confirms that the document that is sought to be admitted to probate is the same document that Ashton handed to him and described as his will, and which Richard had kept in his safe since then.

47. Franklin says that he was not initially aware that Ashton had made a will. However, he learned about the possible existence of a will in about 2012, when Ashton was 86 years old, in the following circumstances. Franklin had included Ashton on his car insurance and allowed Ashton to use one of his cars. Ashton had a minor car accident in about 2012. Following this accident, Franklin's insurers insisted that Ashton be removed from Franklin's insurance policy. This caused a row between them that was resolved with the assistance of Pastor King. Pastor King confirms this in his signed witness statement dated 17 February 2023. Franklin says that during the row Ashton told Franklin that he would *"take you off my will if you don't get me insurance."* Franklin says this was the first occasion

that Ashton mentioned that he had made a will. Franklin did not see the Will and did not know its contents until Richard produced it following Ashton's death.

D.7 The content of the Will

48. The Will is as follows:

> *"I, ASHTON SMITH TATUM of The Hut, North Side in the Island of Grand Cayman, Farmer, HEREBY REVOKE all Wills, Codicils and Testamentary Dispositions heretofore made by me and DECLARE this to be my Last Will and Testament.*
>
> 1. *I HEREBY APPOINT my son, Frankin R. Smith and my nephew Richard Smith (hereinafter called "my Executors") to be the Executors and Trustees of this my Will.*
> 2. *I DIRECT my Executors to pay all of my just debts and funeral and testamentary expenses.*
> 3. *I GIVE and BEQUEATH unto the said Franklin R. Smith and Richard Smith in equal shares all of my personal estate including all of my cash in hand and in bank.*
> 4. *I GIVE and DEVISE unto my Executors all that parcel of land described as North Side Block 49B Parcel 165 upon Trust to sell, call in and convert the same into money and pay or apply the nett proceeds thereof in the following manner:*
>   *(a) Firstly to pay one-tenth of said proceeds to the North Side Weslyan Holiness Church.*
>   *(b) To pay all of the remainder of said proceeds in equal shares to my four children, namely Franklin R. Smith, Dexter Smith, Eric Smith and Carolyn Parchment.*
> 5. *I GIVE DEVISE and BEQUEATH all the rest and residue of my estate wheresoever situated including, but without limitation, my dwelling house and the surrounding parcel of land upon which it stands situated at the Hut, North Side, Grand Cayman unto my said son, Franklin R. Smith absolutely.*
>
> *IN WITNESS WHEREOF I, the said Ashton Smith Tatum have hereunto set my hand this 19th Day of May 2008.*
>
> *[signed "Ashton Smith Tatum"]*
>
> *SIGNED by the above Testator as his Last Will and Testament in the presence of us both being present at the same time who in his presence, at his request and in the presence of each other have hereunto subscribed our names as witnesses*
>
> | | |
> |---|---|
> | *[signed "A Hunter"]* | *[signed "R Black"]* |
> | *74 Coralstone Way* | *74 Coralstone Way* |
> | *Grand Cayman* | *Grand Cayman* |
> | *Co. Director* | *Household Helper"* |

49. Dexter, Franklin and Richard all say that they were surprised when they saw the contents of the Will. Franklin was surprised that Ashton had divided the majority of his estate equally between all four children. Richard was surprised to see the others in the will, especially Dexter, because he understood there was animosity between Dexter and Ashton. Dexter was surprised that Ashton had included all of his children in the Will. He was very pleased to be recognised but immediately afterwards was upset to learn that, because the land had already been sold during Ashton's lifetime, the reality was that clause 4 of the Will was ineffective.

G0135/2020 Page 11 of 19 2024-06-12

D.8 Ashton's use of the "Tatum" name

50. Franklin says that at some stage during his life, Ashton informally adopted the name *"Tatum"* in recognition of Lorrie Tatum and began to call himself *"Ashton Smith Tatum"*.

51. In about 2002, Ashton joined the Cayman Islands Veterans Association. Franklin helped Ashton with the application. Ashton submitted two relevant documents in support of this application:

    a) A Certificate of Service in the Trinidad Naval Volunteer in the name *"Ashton Smith Tatum"*. The photocopy in the trial bundle is incomplete, with the bottom of the page missing, so it is not possible see a signature or date of issue. The Certificate gives *"Ashton Smith Tatum's"* date of birth as 20 April 1921, which matches Ashton's date of birth, his place of birth as Grand Cayman and his next of kin as his mother, Mabel Tatum, which also matches. The Certificate records that he volunteered for service on 3 August 1941, when he was just over 20 years old, and served until 15 November 1945.

    b) A letter dated 21 June 1955 signed by the Acting Commissioner of the Cayman Islands addressed "to whom it may concern", stating:

    > *"This is to certify that ASHTON SMITH, bearer of British Passport No. 7006 issued at Grand Cayman on the 21st of June, 1955 is one and the same person as ASHTON SMITH TATUM, the bearer of TRNVR discharge in the personal Number of 24342. He is known to me to be using the name of ASHTON SMITH, and this Certificate is given to avoid doubt as to his right to use the discharge in the name of ASHTON SMITH TATUM."* (emphasis as per original document)

Franklin and Richard obtained these copies from the Veterans Association for the purpose of the litigation. The location of the originals is not known, and they were not available at trial.

52. Dexter does not dispute that the Certificate of Service relates to Ashton. He suggests that Ashton had used the surname *"Tatum"* when he was in Trinidad purely for convenience, because the next of kin that he identified on the Certificate was his mother, who was then known as Mabel Tatum. He said that any further significance of the *"Tatum"* name has been invented for this case.

D.9 The land sale

53. In his oral evidence in response to cross-examination, Franklin provided some background to Ashton's land ownership. Originally, Ashton had owned about 27.5 acres of land in Hutland. He offered to sell the land to Franklin, but Franklin was not interested because he thought it would be many years before a road would be built providing access. Instead, Franklin bought some land in East End and developed a farm there. Franklin understands that Ashton sold the land to Richard, Ruth and Eric instead, but is not sure about that.

54. The sale left Ashton with about 2.5 acres of land. This was sub-divided into a plot of about 0.6 acres, on which Ashton's house was standing, and an adjacent lot of about 1.9 acres. The second

G0135/2020 Page 12 of 19 2024-06-12

plot is the land referred to in clause 4 of the Will. Ashton wished to sell the second plot within the family, but none of them was interested.

55. Franklin's and Richard's evidence is that from about 2006 / 2007 onwards, Ashton tried to sell the land on the open market. Ashton marked out the boundaries and asked Franklin to arrange registration of the division of the land and to obtain valuations. Franklin obtained a valuation report, which was given to Ashton. He does not know where it is now but recalls that Ashton told him that the land was valued at CI $160,000.

56. Ashton put up "for sale" signs and waited for offers. Franklin's recollection, which is supported by Richard, is that Ashton received two offers for the land of CI $50,000 and CI $80,000. He is not clear when these offers were made. Ashton did not accept either of them. Franklin says that the "for sale" signs were still there in 2016.

57. I interpose here that this evidence demonstrates that Ashton had been trying to sell the land intended to be devised by clause 4 of the Will for approximately 2 years at the time that he executed the Will. There is nothing to suggest that he was mentally frail at that time or lacked capacity, so that he would not have been aware that clause 4 of the Will would be of no effect if the land was sold before he died.

58. Ashton's income was not sufficient to cover his living costs, which Franklin was meeting. Ashton needed to generate some cash to live on. In about 2011, Franklin suggested to Ashton that Richard should be given a power of attorney and should take over marketing and managing the sale of the land to generate the required cash. Ashton agreed and granted Richard a power of attorney to sell the land.

59. In 2016, the land had still not sold. Franklin was still meeting Ashton's living costs, but this had become unsustainable. He asked Richard to ask the family once again to share the burden, and the sale of the land was raised as a means of providing funding. Richard said in cross-examination that he spoke to a realtor about the land, who told Richard that he did not think he would be able to get the figure that Ashton wanted. Richard thought it would be better to try to sell within the family. Richard approached his sister Ruth again, to see whether she would buy the land, which she agreed to do. The purchase was effected through her company, the Sixth Defendant, and was for a price of CI $125,000.

60. Franklin said in cross-examination that he instructed Richard to accept that offer without discussing it with Ashton. He said that Ashton had already granted Richard power to sell using the power of attorney, so it was not necessary to consult Ashton as to the price, which was more than the two previous offers received. Richard handled the sale on behalf of Ashton, using the power of attorney granted in his favour. In his cross-examination, Richard agreed that he did not discuss the sale with Ashton and said that Ashton's only requirement was that the Church should receive 10% of the proceeds. Richard was conscious that members of the family tend to be long-lived, and wanted to make sure there was enough money to care for Ashton for the rest of his life.

G0135/2020 Page 13 of 19 2024-06-12

61. Dexter complained about this sale in his undated witness statement, asserting that it was at an undervalue. This allegation was based on a valuation report which Dexter's attorneys had obtained in August 2020 in respect of the land, and which was included in the trial bundle. This is unfortunate, and a waste of public funds if it was funded by legal aid:

    a) There was and is no order permitting expert valuation evidence to be adduced.

    b) The valuation report does not appear to have been prepared for submission to the Court as evidence and is not in a form suitable for that use: it is not addressed to the Court; it does not contain a statement of the expert's duties; and it is not apparent that the expert was aware of any of those duties when preparing the report.

    c) The valuer does not appear to have been told about the two offers that were received for the land and rejected by Ashton, so he has not taken those offers into account in determining his valuation figure.

    d) If the valuer had been aware of the two offers, then he would have had to have taken them into account in assessing the value of the land: the best evidence of value is what a willing buyer will pay a willing seller in an arms-length transaction after proper marketing. In this case, despite being exposed for sale over approximately 10 years, no arms-length buyer had come forward willing to offer more than CI $80,000.

62. In the event, whilst Mr Chapman cross-examined Franklin and Richard regarding the land sale, he did not press the point that the sale was at an undervalue. So far as it may remain an issue in the case, for the reasons I have set out, there is no cogent evidential support for the allegation that the sale of the land to the Sixth Defendant was at an undervalue, and the evidence regarding the previous offers received for the land leads me to conclude that the Sixth Defendant probably paid more than the land was actually worth in order to help provide additional cash for Ashton to live on.

63. As I have mentioned earlier, Richard retained the net proceeds of sale and deposited them into his account at Cayman National Bank. He says that he used the money to maintain Ashton and to pay his bills, living expenses and to provide him with a helper. The day after Ashton's funeral, Richard obtained a bank draft for CI $12,500, ie 10% of the price, in favour of the Church as per Ashton's wishes. He did not pay this earlier as he wanted to make sure that there was enough money to take care of Ashton while he was still alive. He accepts that there is a balance left on the account following Ashton's death. I remind the parties that this money was beneficially owned by Ashton and should therefore be treated as part of his estate following his death.

G0135/2020 Page 14 of 19 2024-06-12

E. <u>The Parties' contentions as to the validity of the Will</u>

E.1 Franklin and Richard's case

64. Ms Assarpour's argument is commendably brief:

   a) The Will complies with the requirements of section 6 of the Wills Act:

      i) it is in writing;

      ii) it was executed by Ashton; and

      iii) his execution of the Will was witnessed by Mr Hunter and Mr Black.

   b) Whilst Ashton's legal name was "Ashton Smith", rather than "Ashton Smith Tatum", there is evidence to show that he used the name "Ashton Smith Tatum" and the identity of the testator is supported by the inclusion of his address.

   c) The handwriting expert confirms that it is more likely than not that it was Ashton who signed the Will.

   d) The document was clearly intended to be a testamentary document and Ashton clearly intended it to have testamentary effect.

   e) The use of an assumed name does not invalidate a will.

65. In support of her last submission summarised above, Ms Assarpour relies on paragraph 63 of *Halsbury's Laws of England (2001), vol 102, Wills and Intestacy*, and the cases referred to as well as some additional cases. The learned editors of *Halsbury* state (citations omitted):

> *"63. ... Signature in an erroneous or assumed name, if intended as the name of the testator is sufficient, as is a description which sufficiently identifies the testator and is intended to represent his name. Where a testator puts his mark to a will in which he is wrongly named, the execution is valid."*

The cases referenced exemplify situations where testators executed wills using the wrong name, being described by initials instead of their name, using a mark instead of a signature, and by reference to family relationship ("your beloved mother") instead of name.

66. Ms Assarpour submitted that to the extent that there is a mismatch between Ashton's name in the Will and, for example, Ashton's name as recorded at the Land Registry in respect of land that he owned, the Court can issue a grant of probate in both names. In this regard, she showed me a precedent from *Tristram & Coote's Probate Practice (31st ed)*, Form 15, which covers this kind of situation and suggests a grant would be permissible in England & Wales expressed as:

> *"... in the name of Ashton Smith, otherwise known as Ashton Smith Tatum."*

G0135/2020 Page 15 of 19 2024-06-12

E.2 Dexter's case

67. On behalf of Dexter, Mr Chapman argues:

a) The cases that underpin paragraph 63 in vol 102 of *Halsbury* all concern situations where the will was correctly drafted but the signature was "incorrect" in some way, so that there was a "failure" of execution. He contrasts that with this case, where there is no failure of execution, but instead the document has been drafted in an incorrect name.

b) The Will is not in Ashton's true name. A will must be made in the person's correct legal name. Any grant of probate must issue in the true name of the deceased.

c) It is improbable that Ashton deliberately executed the Will in a name different from his true legal name unless he knew the document was nonsense and of no effect.

d) Drafting the Will in the name *"Ashton Smith Tatum"* when that was not Ashton's legal name was negligent, unless Ashton expressly instructed the drafter to prepare the document in that name, in which case rectification of the document is not available.

e) Allowing a grant of probate for the Will would be a disastrous precedent:

i) it would give the nod to whatever failures of "know your client" and due diligence requirements occurred which allowed the drafter to prepare the Will in the wrong name; and

ii) it would recognise and authorise failures to adhere to the strict formalities for wills, which are a long-recognised requirement and are known to be strictly enforced.

f) Mr Chapman expands on the last point by arguing that allowing probate for the Will would undermine the importance of using a person's true legal name for, for example, bank accounts, beneficial ownership records, passports, health records, insurance, professional memberships.

g) Allowing Ashton's estate to devolve on the basis of an intestacy, so that all his remaining property would be divided equally between his four surviving children, more closely reflects his intention in 2008, before the sale of the land, than the current effect of the Will as drafted, which is that Franklin and Richard take Ashton's estate between them and there is nothing for Ashton's other children.

68. Mr Chapman particularly relies on the decision of the UK Supreme Court in *Marley v Rawlings* [2014] UKSC 2, which he describes as overturning centuries of technicality in the field of wills. At the same time, as appears from the summary above, Mr Chapman submits to me that I should continue to apply a technical approach to the name in which the Will was prepared.

G0135/2020 Page 16 of 19 2024-06-12

F. Discussion and decision

69. In *Marley v Rawlings*, a husband and wife intended to execute mirror wills leaving their estates to the other spouse or to the plaintiff, a mutual friend, if the other predeceased them. The effect of this was to disinherit their children. However, due to the oversight of their solicitor, they each executed the will that had been prepared for the other spouse. Mrs Rawlings died first, and her estate was passed to Mr Rawlings without anyone noticing the error. Following the death of Mr Rawlings, the error in the execution of the wills came to light. Mr and Mrs Rawlings' children sought to challenge Mr Rawlings' will. The judge at first instance and the Court of Appeal held that the will was not valid.

70. Lord Neuberger, allowing the appeal and giving the substantive judgment of the Supreme Court, concluded that the solicitor's error was a "clerical error" within the meaning of section 20 of the Administration of Justice Act 1982 in England & Wales, and could be rectified. In the course of doing so, he stated that construction of wills should be approached in the same way as construction of other documents, rather than having its own special rules – hence Mr Chapman's submission that the case is significant as to the modern approach to the construction of wills.

71. The Cayman Islands does not have an equivalent to section 20 of the Administration of Justice Act 1982 permitting rectification of wills. It cannot be imported to the Cayman Islands via section 18 of the Grand Court Act because that only allows the adoption of matters of practice, not statutory provisions. Whilst Lord Neuberger expressed the view that there is a common law power to rectify a will, despite a number of authorities where the opposite position had been assumed, that point was not fully argued before the Supreme Court and it was not argued before me either. I therefore do not proceed on the basis that I have power at common law to rectify the Will to treat it has having been prepared and executed in the name Ashton Smith instead of Ashton Smith Tatum.

72. It is therefore necessary to consider whether the use of a name for the testator that is not their legal name necessarily renders the testamentary document invalid. Despite Mr Chapman's assertion that the various cases relied on by Ms Assarpour all concern errors of execution and therefore shed no light on this question, that does not appear to be correct. In two cases, it appears that wills were held to be valid despite being prepared in a name that was not the testator's true legal name.

73. The first is *Re Redding's Goods* (1850) 163 ER 1338. The short report of the decision is as follows:

> *"The testatrix, having duly executed her will under an assumed name, subsequently altered the will by erasing that name and signed her true name. However, the witnesses dd not subscribe the will as altered. The English Court held that probate was granted as it originally stood, as the court considered the assumed name might be regarded as the mark of the testatrix."*

Whilst not expressly stated, I infer that the will in that case must have been prepared in the testatrix's assumed name – otherwise there would have been an immediate mismatch between the name in which it was prepared and the name she used when first executing it, which would surely have been raised as an issue.

G0135/2020 Page 17 of 19 2024-06-12

74. The court, in 1850 when it still took a technical approach to the construction of a will, did not suggest that the use of an assumed name in the will as originally drafted and executed rendered it invalid. To the contrary, the court upheld the validity of the will.

75. Similarly, in *Re Rouse's Goods* (1864) 164 ER 1127, the report records:

> *"The testator put his mark to a testamentary paper in which he was throughout described as 'CB'. The English Court held that the court, being satisfied on affidavit that the testator duly executed the paper by mark* animo testandi*, granted probate thereof as his will."*

It seems to me to be clear from this report that the testamentary document in this case named the testator as "CB", not his legal name, yet the court granted probate – presumably in his legal name rather than in the name "CB".

76. I take from these cases that the crucial features for a will to be valid are the identification of the testator, however that is done, coupled with the testator's intention that the document shall have testamentary effect.

77. In this case, it is clear that those requirements are satisfied.

    a) Ashton is unambiguously identified as the testator – indeed Mr Chapman conceded that there is no issue that it was Ashton who executed the Will, and that Dexter's case concerns only the consequences of using an incorrect name; and

    b) Ashton clearly intended the Will to have testamentary effect – that is what the document says on its face, he signed it, and he did so with the added formality of signing it before witnesses who attested to his execution of the Will.

78. I do not agree with Mr Chapman's submission, which was unsupported by any authority, that a will can only be valid if prepared in the legal name of the testator. Imposing that requirement seems to me to be a retrograde step in the modern approach to the validity of wills, and contrary to the intention expressed by Lord Neuberger in *Marley v Rawlings*.

79. Accordingly, I reject Dexter's claim and allow Franklin's and Richard's counterclaim that probate of the Will should be granted in solemn form. As Ms Assarpour suggests, I will order that the grant shall be *"in the name of Ashton Smith, otherwise known as Ashton Smith Tatum."*

80. I will hear the parties further on consequential orders and on the issue of costs.

Dated the 12th day of June 2024

G0135/2020 Page 18 of 19 2024-06-12

THE HONOURABLE JUSTICE JALIL ASIF KC
JUDGE OF THE GRAND COURT

G0135/2020 Page 19 of 19 2024-06-12