REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2010-04703

IN THE MATTER OF THE ESTATE OF ELVINA MCKENZIE OTHERWISE ELVINA MC KENZIE

AND

IN THE MATTER OF THE ESTATE OF GEORGE MC KENZIE

BETWEEN

(1) OSMOND MC KENZIE
(2) HARVEY MC KENZIE **Claimants**

AND

MONA MCKENZIE
(in her capacity as the Executrix of the Estate of GEORGE MCKENZIE, deceased) **Defendant**

Before the Honourable Mr. Justice Vasheist Kokaram

Appearances:
Ms R. Bissessar for the Claimants
Ms P. Persad Maharaj for the Respondent

JUDGMENT

1. Great care should be used by testators and those advising them, in the use of words in drafting their will. These are the words of the testators which will become their edict from beyond the grave. The message should be clear and unambiguous. However, this is not always the case, such is the nature of our language and although tempting, we no longer can ask the departed "what did you mean?" Ambiguity in language gives rise to controversy, as it has in this case. In this case the Court is now entrusted with the task of determining what

the words "unable to serve" means in the last will and testament dated 14th September 1990 of Elvina McKenzie ("the 1990 will"). The Court is guided by the overarching principle that effect must be given to the intention of the testator, not in the mind of the testator at the time she made the will, but that declared and apparent in her will.

2. The Claimants in these proceedings are challenging the Defendant's status as executor of the estate of Elvina McKenzie ("the deceased"), who departed this life on 6th December 2004. By its fixed date claim form, the Claimants claimed the following relief:

(a) Death certificate of George Winston Mc Kenzie also called George W. Mc Kenzie	16/06/2010
(b) Last Will and Testament of Elvina Mc Kenzie	14/09/1990
(c) Last Will and Testament of George Winston Mc Kenzie also called George W. Mc Kenzie	06/05/2009
(d) Grant of Probate with respect to the estate of Elvina Mc Kenzie – L 808 of 2008	28/08/2009
(e) Letter to Ronnie Bissessar, Attorney-at-Law for the Claimants from Messrs. Daltons, Attorney-at-Law for the Defendant	23/06/2010
(f) Letter to Mr. Ronnie Bissessar, Attorney-at-Law for the Claimants from Messrs. Daltons, Attorney-at-Law for the Defendant	17/08/2010
(g) Letter from Mr. Ronnie Bissessar, Attorney-at-Law for Claimants to Messrs. Daltons, Attorney-at-Law for the Defendant	24/08/2010

3. The Claimants, Osmond and Harvey Mc Kenzie are the two surviving sons of the deceased and are named as "substituted" executors in the deceased's last will and testament dated 14th September 1990 ("the 1990 will"). Their brother, George W. Mc Kenzie, ("George") who was named as the first or "instituted" executor, obtained a grant of probate but died on 16th June 2010 without completing the administration of the deceased's estate. The Defendant, Mona Mc Kenzie is his wife and presently occupies the principal asset of the 1990 will, a dwelling house and the family home, situated at No 31 Scott Street, San

Fernando ("the said premises"). She contends that as executor of her husband's estate, she is entitled to continue the administration of Elvina's estate. The Defendant filed her counter claim seeking the following orders:

(a) Probate Search Request in the estate of George Mc Kenzie also called George Winston Mc Kenzie also called George W. Mc Kenzie-16/12/2010.

(b) Proceedings in Claim No. CV 2006--04038; Osmond Mc Kenzie and Harvey Mc Kenzie-v-George Mc Kenzie.

(c) Letter dated 26th June, 2007 from Messrs. Daltons to Mr. Ronnie Bissessar, Attorney-at-Law for the Claimants re: breakdown of costs incurred by George Mc Kenzie in respect of, inter alia, the estate of Elvina Mc Kenzie-26/06/2007.

(d) Letter dated 27th March, 2008 from Messrs. Daltons to Mr. Ronnie Bissessar, Attorney-at-Law for the Claimants re: breakdown of expenses incurred by George Mc Kenzie as Executor of the estate of Elvina Mc Kenzie as at that date-27/03/2008.

(e) Letter dated the 2nd September, 2008 from the Law Chambers, Ronnie Bissessar, Attorney-at-Law for the Claimants to Messrs. Daltons re: valuation and sale of the property located at No. 31 Scott Street, San Fernando-02/09/2008.

(f) Letter dated 9th February, 2010 from Messrs. Daltons to Mr. Ronnie Bissessar, Attorney-at-Law For the Claimants Re: valuation and sale of the Property located at No. 31 Scott Street, San Fernando-09/02/2010.

(g) Letter dated 28th May, 2010 from Mr. Ronnie Bissessar, Attorney-at-Law for the Claimants to Messrs. Daltons Re: agreement that Messrs. Raymond and Pierre and Associates conduct the Valuation of the property located at No. 31 Scott Street, San Fernando and thereafter the executor proceed with the sale-28/05/2010.

4. By the terms of the 1990 will, the premises was devised to the deceased's three sons as joint tenants with a proviso that the property not be sold unless "it is mutually and sincerely agreed among all my three sons that this property be sold…" It appears that the sons had exercised that option and there were promises

made by the Defendant in an exchange of correspondence, to carry out a sale of the said premises as executrix of the estate. This means that she must eventually vacate the said premises. However, it seems that by virtue of her purported status as executrix of the estate of the deceased, she has decided to remain in occupation of the said premises to "preserve" the asset. It is in that unfortunate context that a determination of who is lawfully entitled to administer the deceased's estate, assumed great significance for the parties and hence the main issue for determination.

5. However, there are a number of procedural hurdles that have been raised by the Defendant before dealing with the main issue that divides these parties. Those procedural issues shall be dealt with at the end of this judgment, as in managing this case, the main issue in this claim was identified in the case management conference as one concerning the interpretation of the 1990 will and the competing claims by the parties to the executorship of the deceased's estate. As the facts were largely uncontested, the parties agreed that the matter could conveniently be disposed of without oral evidence and by considering the parties agreed statement of facts, bundle of documents and written submissions in determining that main issue.

6. The main issue for determination can be framed as follows:

> Whether the persons(s) lawfully entitled to administer the estate of the deceased are:
>
> (a) the Claimants named in order of priority in the 1990 will as the substituted executors and who are deemed to be substituted in that order of priority upon the death of the first Executor, George Mc Kenzie; or
>
> (b) the Defendant as the Executor of the estate of George Mc Kenzie and so continuing the chain of his executorship.

7. This main issue is to be resolved from a proper interpretation of the clause appointing the executor in the 1990 will, which provided as follows:

> **"I nominate the following person or persons to serve as executor and trustee of this will, George W McKenzie, son. If this person is unable to serve, then I nominate the others to serve in the order I list them as follows:**
>
> **1. Osmond O. McKenzie, son**
> **2. Harvey H. Mc Kenzie, son".**

Further in the context of George Mc Kenzie having obtained probate of the deceased's estate, but not having fully administered her estate, the very narrow question that arises in interpreting this clause is "what does the phrase unable to serve" mean?

8. I understand the Defendant's position to be a simple one. The words "unable to serve" means where there is an inability by the executor to assume the responsibility of executorship. The main thrust of the Claimants case, however, is that the intention to be gleaned from the will, is that if the instituted executor is unable to serve in his role as executor for whatever reason, whether reluctance, renunciation, incapacity or death, then the substitutes or alternates are to be permitted to act.

9. The Court in my view must take a common sense approach to construction. It usually sits in the "armchair of the testator" and try to determine, as best as it could with its rules of interpretation, what was the testator's intention from the words used to express that intention. The authors of **Williams on Wills** have set out a modern approach to the construction of wills based on the judgments of Lord Hoffman in **Manni Investment Company Limited v Eagle State Life Assurance Company Limited and Investors Compensation Scheme Limited v West Bromwich Building Society** [1997] AC 749.

> "Jettisoning the old intellectual baggage of legal interpretation, the applicable principles are as follows:
>
> (a) Interpretation is the ascertainment of the meaning which a document would convey to a reasonable person having all the background knowledge, which would have been made available at the time the will was made.
> (b) The admissible background knowledge includes "absolutely anything which would have affected the way which the language of the will would have been understood by a reasonable man".
> (c) The law excludes from the admissible background, declaration of subjective intent (but in the case of a will made by one party, no two subjective intent can in certain circumstances be looked at.
> (d) The meaning which a will would convey to a reasonable man is not the same thing as the meaning of its word. The meaning of words is a matter of 'dictionaries and grammars'; the meaning of the will is what having regard to the relevant background, the testator would reasonably have been understood to mean; the background may not merely enable the reasonable man to choose between the possible meanings of words which

are ambiguous, but even to conclude that the testator must, for whatever reason, have used the wrong words or syntax.

(e) The rule that words should be given their natural and ordinary meaning reflects the common sense proposition which we do not easily accept. People have made linguistic mistakes, particularly in formal documents. On the other hand if one would nevertheless conclude from the background, that something must have gone wrong with the language, the law does not require judges to attribute to the estate that which he plainly could not have had".

10. In this case no evidence was led as to the background to the execution of this will. The Court is left with the words used in the will and its rules of construction examined later in this judgment. In my view, the words of the will must be interpreted to determine what the testator intended as her "scheme of representation". Indeed such a scheme would, if effect to it is given, act as a substitute to the statutory formula of the chain of representation in section 14 in the Wills and Probate Act Chapter 9:03.

11. In my view, examining the will as a whole, the words "if this person is unable to serve" means if the nominated executor is unable to serve as executor for whatever reason. It covers a variety of circumstances and ironically, is wider in effect than if an express provision was made for the death of the testator. An inability to serve can arise in a variety of ways and is not restricted by death.

12. It was in my view, the intention of the testator gleaned from the words used in her will, that she wanted her three sons to be her executors by naming one as the instituted executor and the others as substituted executors in the first and second degree. In using those words" unable to serve" the testator is ensuring that one of the three must be able to serve as executor. In other words, if the instituted executor is unable to carry out the duties of the executor, then the substitutes will so serve.

13. Take the instance of the instituted executor obtaining probate and leaving the country permanently, expressing a desire no longer to serve or becoming an imbecile without having done anything with the estate or completing the administration. Is it that upon his death, his executor now continues the chain of representation or the substituted executor in the first or second degree shall continue the administration of the estate because of the instituted executor's inability to serve? I believe it is the latter. The plain and literal meaning of the clause is that the other executors will continue the probate or take probate if the first executor cannot serve as the executor for whatever reason. Therefore, if the

executor dies without taking probate, can it be said that he is able to serve? It is true that there is a presumption that once the condition of service has been satisfied, then he has fulfilled the condition of the will and only on the failure of that condition with the appointment, then move to the other persons named in the said will. But firstly the condition of service has not been satisfied in this case. To serve as executor contemplates a continuing act of service until the object of the service is complete, the administration of the estate. Second, the presumption will be overridden by the intention of the testator to be gleaned from the will that the substitutes will take on the death of the instituted executor. This is consistent with the application by the reported cases as it is with common sense.

Agreed facts

14. The agreed facts are as follows:

    (a) Elvina McKenzie had three known children, the 1st Claimant, 2nd Claimant and George McKenzie.
    (b) The 1st Claimant, 2nd Claimant and George Mc Kenzie are brothers.
    (c) George McKenzie was the husband of the Defendant.
    (d) The Defendant, Mona McKenzie was the lawful wife of George McKenzie, deceased late of No. 31 Scott Street, San Fernando and the Executrix and Trustee named in the 1990 Will.
    (e) Elvina McKenzie departed this life on 06th December 2004.
    (f) George McKenzie departed this life on 16th June 2010.
    (g) The Last Will and Testament of Elvina McKenzie dated 14th September 1990 was proved in the High Court in proceedings instituled as L-808 of 2008 and a grant of probate was issued in favour of George McKenzie.
    (h) The principal asset under the 1990 Will was the property situated at No. 31 Scott Street, San Fernando.

    It was a term of the Last Will and Testament of Elvina McKenzie dated 14th September 1990 that the Testatrix nominated the following person or persons to serve as executor and trustee of this Will, George McKenzie, son, and if this person is unable to serve, then the Testatrix nominated the others to serve in the order listed as follows, Osmond O. McKenzie and Harvey McKenzie.

Agreed documents

15. The parties agreed a bundle of documents and there were tendered and marked A and B respectively. Those documents included the following:

(1) Fixed Date Claim Form and Statement of Case 12/11/2010

(2) Affidavit of Testamentary Script of Osmond Mc Kenzie 13/12/2010

(3) Notice to Claimants of entry of Appearance by the Defendant 29/11/2010

16. These facts and documents therefore formed the evidence in this case. On this basis the parties were prepared not to lead any oral evidence but to rely on these facts and documents in support of their respective propositions. The Claimant's Attorney-at-Law did, however, indicate that there were some documents that were in reference to previous probate proceedings.

Submissions

17. The Claimants' submissions can be briefly summarised as follows:
    (a) George's appointment as executor is based on his capacity to serve.
    (b) The will is conditional and so upon his death then the second claimant is entitled to apply for the administration of the estate.
    (c) They are therefore entitled to a cessate grant.

18. The Defendant's submissions are to the following effect:
    (a) George's death did not amount to him being unable to serve. At the time of his death, George was the duly appointed executor and had been actively dealing with the estate.
    (b) The acceptance by George, the instituted executor, of his executorship meant that the condition of law for the substitute executors did not arise.
    (c) The will failed to make an express provision that on the death of the executor although he has already proved the will, then the substituted executor can accept and take the role of the executorship.

Executorship

19. In the appointment of an executor, the testator may appoint several persons as executors as the deceased did in this case. In such a case there are instituted and substituted executors. The instituted executor in the first degree is the first person named as executor but if he or she cannot be executor the other named executor is said to be substituted to the second degree and in the event he cannot be executor the other named executor substituted in the third degree and so on. See **Williams, Mortimer and Sunnucks on Executors, Administration and Probate 2008 Ed at 3-10 and Parry and Clark on Law of Succession 11th Ed 18-44 pg. 428.**

20. Substituted executors cannot propound the will until the claims for the person first named as executor have been considered, either that the executor has been cited and he refused or he dies in the testator's lifetime. **Williams, Mortimer and Sunnucks on Executors** expressed it in this way at para. 3-10:

> "If an instituted executor once accepted the office and afterwards dies intestate the substitutes are prima facie all excluded because the condition of law (if he will not or cannot be executor) was once accomplished by such acceptance of the instituted executor".

21. **Williams** is clear on the position on the death of the executor as it relates to other substituted executors:

> "where a testators appoints an executor, and provides that, in case of his death, another should be substituted, on the death of the original executor, although he has proved the will the executor so substituted may be admitted to the office if it appears to have been the testator's intention that the substitution should take place on the death of the original executor, whether happening in the lifetime of the testator or afterwards".
>
> [1]Essentially therefore the general rule is that where there are instituted and substituted executors, once the instituted executor has proved the will, the substitutes are prima facie all excluded unless the testator provides that a substitution should take place on the death of the executor although he has proven the will, if that was his intention in the will.[2]

22. The case law to support those propositions in **Williams** are all ancient and cryptic statements made in rather neutral proceedings. Either the parties were in agreement or there was, as in **Re Hair**, no appearance by a Defendant or other interested parties. Counsel for the Defendant in this case sensibly warns against adopting propositions of law from other cases without reference to their particular facts and circumstances and of course the wording of the wills under consideration. No authority was cited, however, in which the issues in this case were canvassed and tested and I was unable to unearth any in my research. It

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[2] 4.16 A person may appoint an executor to act alone, or in conjunction with others, or several may be appointed successively. Thus A may be appointed, but if he is unwilling or unable to act (or failing him), B, but if he is unwilling or unable to act (or failing him), C. In such a case A is said to be the instituted executor, and the substituted executor cannot obtain probate until the right of the first named to do so has been superseded, eg. he has renounced or he is dead. If an instituted executor once accepts the office and afterwards dies, the substitutes are, prima facie, all excluded, because the condition of law (if he is unwilling or unable to act) was extinguished by the acceptance of the instituted executor. See also para 4.198 as to reservation of power to one of two instituted executors.

does appear, however, that in all the authorities referred to by the authors of **Williams** to support their proposition of law, that the Courts took a common sense approach.

23. There are three "problem areas" which I have gleaned from these authorities when dealing with instituted and substituted executors named in a will: firstly, where the instituted executor dies during the lifetime of the substituted executor but before taking probate; secondly, where the instituted executor dies after the substituted executor has died but before taking probate; and thirdly, where the instituted executor dies during the lifetime of the substituted executor, but after taking probate. Our case deals with the latter of these three scenarios. It would appear as well, that in all three scenarios the Court is engaged in an exercise of interpreting the will.

24. The substituted executor, the Claimants in this case, cannot propound the will until the claims of the first named executor have been considered. This can be either citing him to accept or refuse or that he died within the lifetime of the testator. See **Re Betts** 30 LJPM & A 167 and paragraph 3-10 **Mortimer**. The authors go on to point out that this substitution will occur if this appears to be the intention in the will. Even in cases where the executor dies in the lifetime of the testator, the Court still is concerned to determine whether the testator intended the substitute to obtain probate. See for example **Re Betts**. In that case the testator appointed James Jocelyn as the executor and "should he decline or consider himself incapable of acting, "then I appoint his son, Edward Jocelyn". James died during the lifetime of the testator. It was argued that it was clear from the will that Edward should be granted probate as substituted executor. Interestingly the Judge Ordinary refused to take into account, an affidavit that said that the testator treated Edward as her future executor after the death of James. The Judge proceeded to interpret the clause in the will from the words used in the will itself.

> "In the absence of any authority, I think that the good sense of the clause appointing Edward Jocelyn the substituted executor is that if James Jocelyn could not or would not act as executor Edward should be the executor. Construing it literally it requires that he should either decline or should consider himself incapable to act. Suppose James had survived the testatrix and had become an imbecile he could neither have declined nor considered himself incapable of acting for he would not have been able to decline or to consider anything and yet in that case there can be no doubt that the deceased would have wished Edward to be her executor."

25 Probate was granted to the substituted executor Edward on the basis that the Court was able to glean that this was the intention of the testator when he set up his own "scheme of representation" in his will.

26 The Judge Ordinary in his reasoning also dealt with the second scenario where the instituted testator who dies after the death of the testator who had not taken probate. Again the answer lies in interpreting the will to determine the scheme of representation. Similarly, even where the instituted executor was alive after the death of the testator in **Re Hair**, the Court conducted an interpretation of the will to determine the intention of the testator.

27. The authorities of **In re Goods Johnson and In re Goods Foster** deal with scenarios after the death of the testator where the testator provided for a scheme of representation by a chain of executors in his will and where the instituted executors, having taken probate, died before completing the administration of the estate. In both cases the Court dealt with the problem as one of construction of the will. It is apparent that the priority is to give effect to the intention of the testator in reference to the "chain of representation" established in section 14 of the Will and Probate Act. This trumps any other rule or policy. Sir C Creswell in **Johnson** stated:

> "I proceed entirely upon the case cited as to the construction of the will. I should be very loathe to take any presumed policy of the Court of probate as my guide. Here are ample grounds to satisfy me as to the intention of the testratrix. *In the Goods of Lighton* there were, in fact, two decisions, for there was a grant of the Irish Court in the first instance, and that was acted upon by the Judge of the Probate Court in this country. Here there are ample grounds to satisfy me as to the intention of the testatrix. Blake, the father, was trustee and executor of the person from whom she received a considerable amount of property in a complicated state; and John Joseph Blake, as his father's partner, was conversant with the whole business. These are very good reasons why the testatrix should have desired him to succeed his father as her executor, and I cannot consider such substitution as limited to the casualty of the father's decease in the lifetime of the testatrix".

28. In the **Goods of GH Foster** [1869-72] L.R. 2 P. & D. 304, the words used in the will were that the substituted executor would serve "in default" of the executor. This phrase is as open ended as "unable to serve". In both scenarios the Court must first interpret the will to determine what the testator meant in using those words. A default in **Goods of GH Foster** arose by the executor's death. Lord Penzance opined:

> "This is a question of construction as to what the testator meant when he said, "I appoint my wife sole executrix, and, *in default* of her, I appoint John Knowles and Richard Foster to be executors". John Knowles and Richard Foster were persons whom it was reasonable the testator should appoint as executors; but he chose to give a preference to his wife, as I understand the will, so long as she was able to act. The question is, whether the substitution was to take place only in the event of her not acting at all, or whether, as has happened, in the case of her death, after having taken probate. The Court will not construe the words of a will in a technical spirit, but will endeavour rather to carry out the real object of the testator. I think it is reasonable to hold that the testator intended that his wife should administer so long as she could, and that, in the event of her death either before or after taking probate, he substituted other persons. I am prepared to make the grant."

29. The question asked by Lord Penzance is the same enquiry that must be conducted here "**whether the substitution was to take place only in the event of George serving or whether, as has happened, in the case of his death after having taken probate."**

30. From this reasoning therefore it is taking too simplistic a view, that the testator must always state expressly in his/her will that a substitution shall take place upon the death of the instituted testator before the issue of substitution can arise. In the case of the death of the instituted executor, having taking probate, the substituted executors are not automatically disentitled from assuming executorship. In such a scenario, the Court is being asked to allow the chain of representation provided for in section 14 of the Act, to trump the scheme devised by the testator himself. The Court will not do so unless the testator so intended in his will. It is always a question of interpretation.

The interpretation:

31. It is accepted by both parties that George was appointed as the instituted executor. The will does not expressly say that a substitution is to take place on the death of George. The full terms of the will are set out herein:

Last Will and Testament

THIS IS THE LAST WILL AND TESTAMENT OF ME, ELVINA MCKENZIE OF SAN FERNANDO, TRINIDAD.

1. I HEREBY REVOKE ANY PRIOR WILLS AND CODICILS.

2. I NOMINATE THE FOLLOWING PERSON OR PERSONS TO SERVE AS EXECUTOR AND TRUSTEE OF THIS WILL, George W. McKenzie, son. If this person is unable to serve, then I nominate the others to serve in the order I list them as follows:

1. **Osmond O. McKenzie, son**
2. **Harvey H. McKenzie, son**
3. **PERSONAL PROPERTY, RESIDUARY ESTATE, AND HOUSEHOLD ITEMS DISPOSITION.**

Except for my home at 31 Scott Street, San Fernando, Trinidad, I give all my furniture, furnishings, household items, cash savings, investments and retirements savings and any other personal items to be divided equally among my three sons, George W. McKenzie, Osmond O. McKenzie, and Harvey H. McKenzie. In the event that any of my three sons should predecease me, his share shall be divided equally among his issue to be held in trust by my Trustee until they attain the age of majority.

My house at 31 Scott Street, San Fernando, Trinidad, on my death should be established in joint tenancy among my three sons, George W. McKenzie, Osmond O. McKenzie, and Harvey H. McKenzie. It is my wish that this property not be sold. If, however, after my death it is mutually and sincerely agreed among all my three sons that this property be sold then the monies derived from this sale must be divided equally among my three sons. In the event that any of my three sons should die while the house at 31 Scott Street, San Fernando, Trinidad is still not sold and remains in the joint ownership of my three sons, the decision on the disposition of the house is to be made only by my surviving sons and the monies derived from this sale must be divided equally among my three sons or their estate.

I sign my name to this Will on the 14th day of September 1990 at San Fernando, Trinidad.

Elvina McKenzie

32. Some common aides to interpretation wills in this context are-

- Words are given the meaning which is found rendered necessary by the context of the while will. Intention is collected from the entire will.
- The words used are in the first place given their grammatical meaning. This is by no means a hard and fast rule.
- The court may make reasonable inferences from a particular passage comparing that inference with what is apparent in other parts of the will.

See **Mortimer on Wills**

33. It is clear to me that the scheme devised by the deceased was for one of her three sons to administer this estate. They are the three named as the executors in different degrees. They are the three prominently featuring in this will as the favoured three who will benefit jointly in the personal and real estate with their issue and estate respectfully benefitting in the event of their demise. The decision with regard to the said premises is to be taken jointly by these three sons. Any decision on the disposition of the house is to be made only by her surviving sons. It will indeed be practical and efficient if one of these sons who have been given the authority to make the decision to sell the house also be the executor of the estate. The authorities referred to by the Defendant, unfortunately, do not support her case. I cannot see any other preferred scheme as intended by the testator except that the substituted executors will serve in the event of the death of the instituted executor.

34. The term “serve” or “service” means, according to the Oxford dictionary, to be a “servant”, to “execute a command”, to “obey a will", to “perform the duties of office”. It cannot be said that upon his death, George, the instituted executor, is able to “serve” as executor. Additionally, it is wrong in my view, to say that simply obtaining probate and not having fully administered the estate means that the executor has served the will of the testator or completed his duties of service. His service as executor is ongoing until completed. His death renders him unable to serve as executor and so the substituted executor as contemplated by the testator must take his place.

Preliminary issues

35. I see no merit in the preliminary issues as (a) the action is brought against the Defendant in her representative capacity; (b) both Claimants are equally entitled as substituted executors under the will and therefore have an interest in these proceedings. As such they are properly named as parties to the action; and (c) there is a counter-claim seeking an interpretation of the will. In any event, these procedural issues take back seat to the main contest which the parties had agreed at the case management conference which is the proper interpretation of the will. It is hoped that that ruling brings closure to this matter and the administration of the estate can be completed in good order.

Conclusion

36. My findings and orders are as follows:

(a) The Court interprets the words "unable to serve" in the last will and testament of Elvina Mc Kenzie as meaning unable to serve for whatever reason including the death of the instituted testator, George Mc Kenzie.

(b) That Osmond Mc Kenzie, the substituted executor named in the first degree in the said will of Elvina Mc Kenzie dated 14th September 1990 do apply for probate of the will of the said Elvina Mc Kenzie.

(c) I will hear counsel on costs.

37. I thank both counsels for their extremely helpful submissions.

Dated: April 20, 2011.

Vasheist Kokaram
Judge