REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2016-03339

IN THE MATTER OF THE ESTATE OF ANNETTELENA ELTINE CHARLES late of No. 12 Pearl Avenue, Battoo Lands, Marabella, in the City of San Fernando, Trinidad, who died on the 26th day of August, 2014.

BETWEEN

GEMMA ATTALE **Claimant**

AND

MICHELLE PAULINE RUSSELL LWISEH **Defendant**

Before the Honourable Madame Justice Margaret Y Mohammed

Dated this 25th September, 2018

APPEARANCES:
Mr. Edwin K. Roopnarine instructed by Ms. Candice Deen Attorneys at law for the Claimant.
Mr. Mark Seepersad Attorney at law for the Defendant.

JUDGMENT

1. The Claimant was the only child of Annettelena Eltine Charles ("the Deceased") who passed away at the age of 98 years on the 26th August 2014. At the time of the Deceased's passing there were two Wills purportedly made by the Deceased. A Will dated the 5th January 1972 ("the 1972 Will") where the Deceased left the bulk of her estate to the Claimant, her only child and a Will dated the 12th August 2014 ("the 2014 Will") where the Deceased purportedly left her entire estate which consisted of a house and land situated

at Battoo Lands, Marabella ("the Marabella property") to the Defendant and her two children, persons whom she first met on a bus in 2011. The Defendant applied for a Grant of Probate of the 2014 Will in August 2015 and the Claimant filed a caveat in March 2016 indicating that she has an interest in the Deceased's estate. In the instant action, the Claimant seeks to have the 2014 Will set aside, and for the Court to propound the 1972 Will in solemn form.

2. The Claimant claimed that as the lawful daughter of the Deceased she has always had a good relationship with the Deceased even after she migrated to the United States of America, since she visited the Deceased and also spoke to the Deceased over the telephone. According to the Claimant, the Deceased was also the Executrix of her sister's estate and that the Deceased's sister died on the 7th day of April, 2004 leaving a Will dated the 8th day of October, 1976 in which the Deceased was the sole executrix, and this said Will, left a property situate at No. 159 Southern Main Road, Marabella to the Claimant. The Claimant claimed that the Deceased's sister's estate was applied for and granted to the Deceased on the 23rd day of July, 2004. The Deceased and the Claimant between the period April 2004 and February, 2005 visited the offices of J.B. Kelshall and Company, Attorneys-at-Law together to transact all legal affairs in relation to the Deceased's sister's estate.

3. The Claimant claimed that when the Deceased died she was unable to travel to attend the funeral since she was diagnosed with breast cancer and undergoing medical treatment in preparation for the surgical removal of her left breast. The Claimant only returned to Trinidad four days after the funeral of the Deceased when Mr. Raymond Carvalho, an elder of the Jehovah's Witnesses Faith, produced to her, the 1972 Will where the Claimant is the beneficiary of the Marabella property.

4. The Claimant claimed that the Defendant was neither the friend nor care giver of the Deceased and that the Defendant stole moneys from the Deceased. As such, the Claimant asserted that the 2014 Will was not duly executed in accordance with the **Wills and Probate Act**[1]; the Deceased was not of sound mind, memory and understanding when the

[1] Chapter 9:03

2014 Will was executed since she was 98 years old, she was physically and mentally incapacitated as to be able to understand the nature of her act and the extent of the property she was disposing off; the Deceased did not know and approve of the contents of the 2014 Will and; the 2014 Will was obtained by fraud and/or undue influence.

The Defence and counterclaim

5. The Defendant has counterclaimed asking the Court to pronounce against the force and validity of the 1972 Will and to pronounce for the force and validity of the 2014 Will.

6. The Defendant claimed that she first met the Deceased in 2011 on a bus. She became friendly with the Deceased and visited her at home. She was the only real caregiver and a close friend of the Deceased. She asserted that the Claimant is the adopted daughter of the Deceased and that the Deceased and the Claimant were estranged for over 30 years. She contended that the Deceased never wanted the Claimant to attend her funeral when she died and she did not want the Claimant to enter into the house on the Marabella property.

7. The Defendant also asserted that the Deceased did not require a care giver as she was physically and mentally competent to tend to herself and her affairs until about the week of 11th August, 2014 when the Deceased had difficulty moving around and complained of being weak resulting in the Deceased remaining bed ridden until her death on the 26th August, 2014. She further asserted that up to the 25th August, 2014 the Deceased remained fully mentally competent to conduct her own affairs and demonstrated same by her conversations with the Defendant and others. The only complaint of the Deceased was that she was physically weak and that there was no need to have a medical doctor present at the execution of the 2014 Will or have a medical report supporting the Deceased's competency of mind. As such the Defendant asserted that the Deceased knew and approved of the contents of the 2014 Will. The Deceased discussed the contents of the 2014 Will with the Defendant a week prior to her death and that the 2014 Will was the product of free will, informed decision making with full knowledge and approval of the Deceased. The Defendant also contended that she was not aware of the preparation and execution of the

2014 Will by the Deceased. She later approached the Deceased with the information as to the discovery of the 2014 Will and the Deceased indicated that the 2014 Will contained her wishes to be carried out following her death and the Deceased specifically mentioned her decision to give the Marabella property to the Defendant and her children.

Reply and Defence to Counterclaim

8. The Claimant in essence repeated that the 1972 Will was the only valid Will.

The issues

9. Based on the pleadings the following issues arise for determination by this Court:
   (a) Was the 2014 Will executed in accordance with the law?
   (b) Did the Deceased know and approve of the contents of the 2014 Will?
   (c) Was the Deceased of sound mind, memory and understanding when she executed the 2014 Will?
   (d) Was the execution of the 2014 Will obtained by the undue influence and fraud?

10. There are several questions of fact to be determined based on the conflicting evidence in this matter. In determining questions of fact, the Court is guided by the learning in the Privy Council decision in **Horace Reid v Dowling Charles and Percival Bain**[2] which laid down guidelines to be followed by the trial judge in assessing the credibility of evidence where there is actual conflict. The Board said that the trial judge must check the impression that the evidence of the witnesses make upon him against-
   (a) Contemporary documents, where they exist;
   (b) The pleaded case; and
   (c) The inherent probability or improbability of the rival contentions.

11. In the Court of Appeal judgment of the **Attorney General of Trinidad and Tobago v Anino Garcia**[3] the Court stated that in determining the credibility of witnesses, the Court

[2] App No. 36 of 1987
[3] Civ appeal 86 of 2011

is entitled to draw negative inferences where there is a conflict of facts on the pleadings; where there are discrepancies between the pleaded case and the witness statements and any admissions made by a witness during cross-examination.

The witnesses

12. At the trial, the Claimant gave evidence in support of her case. She also called two witnesses; Dr. Sylvester and Mr. Raymond Carvalho. She was given permission to rely on a witness statement of Ms. Jennifer Lumkin who was unable to attend Court due to her terminal illness. The Defendant gave evidence in her defence and she called her husband, Mr. Ilead Lwiseh, Mr. Arthur Gaskin and Ms. Brenda Modeste.

Was the 2014 Will executed in accordance with the law?

13. The Defendant has the burden to prove that the 2014 Will was executed in accordance with the law[4]. The burden is discharged by proof of due execution. Section 42 of the **Wills and Probate Act**[5] provides that the following requirements must be fulfilled for a Will to be valid namely:

    (a) The will must be in writing; and
    (b) Made by a person of the age of 21 years or more;
    (c) The will must be either signed at the foot or end by the testator or by some other person in his presence and by his direction;
    (d) Such signature must be made or acknowledged by the testator in the presence of two or more witnesses of either sex competent to attest a will according to the law of England, present at the same time; and
    (e) Such witnesses must attest and subscribe the will in presence of the testator and of each other but no form of attestation shall be necessary.

[4] Barry v Butlin (1838)2 Moo Pcc 480
[5] Chap 9:03

14. **Halsbury's Law of England**[6] at paragraph 895 states that there is a presumption of due execution where the Will is regular on the face of it, with an attestation clause and the signature of the testator and witnesses in the proper places.

15. The 2014 Will was a typed document and when it was allegedly made by the Deceased, she was 98 years old. The signature of the Deceased is at the foot of the 2014 Will and the signature of the two witnesses namely Brenda Modeste and Hazel Edwards are appended after the attestation clause which states "SIGNED" by the above named Testatrix as her last Will and Testament in our presence who in her presence and of each other have hereunto subscribed our names as witnesses.

16. Therefore, on a balance of probabilities the 2014 Will was signed by the Deceased in the presence of the witnesses and each other in compliance with section 42.

Did the Deceased know and approved of the contents of the 2014 Will?

17. **Williams on Wills**[7] under the rubric of " Knowledge and approval" states:

> "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 in certain circumstances the court requires further affirmative evidence."

18. Therefore where there is doubt or suspicion cast on the circumstances under which the Will was prepared and executed, affirmative evidence is required to remove such doubt.

19. **Halsbury's Laws of England**[8] at paragraph 907 describes the approach as:

[6] 4th ed
[7] 8th ed Volume 1 at paragraph 5.1 page 51
[8] 4th ed Vol 17

> "Whenever the circumstances under which a will is prepared raises a well-grounded suspicion that it does not express the testator's mind, the court ought not to pronounce in favour of it unless the suspicion is removed. Thus where a person propounds a will prepared by himself or on his instructions under which he benefits, the onus is on him to prove the righteousness of the transaction and that the testator knew and approved of it. A similar onus is raised where there is some weaknesses in the testator which, although it does not amount to incapacity, renders him liable to be made the instrument around him; or where the testator is of extreme age; or where knowledge of the contents of the will is not brought home to him; or where the will was prepared on verbal instructions only, or was made by interrogatories; or where there was any concealment or misrepresentations; or where the will is at variance with the testator's known affections or previous declarations or dispositions in former wills or a general sense of propriety." (Emphasis added).

20. Therefore the general rule is that whenever circumstances under which a Will is prepared raise a well-grounded suspicion, that it does not express the testator's mind, the Court ought not to pronounce in favour of it unless the suspicion is removed.

21. It was submitted on behalf of the Claimant that there were several suspicious circumstances in this case. In particular Counsel for the Claimant argued that the 2014 Will left out the Deceased's only child, the Claimant, and she left all her property to the Defendant who was neither related nor a close friend of the Deceased. There was secrecy surrounding the execution of the 2014 Will since the Claimant, Ms. Lumkin and members of the Church who cared for the Deceased on a daily basis, did not know about the 2014 Will. The 2014 Will was made when the Deceased was 98 years old and 14 days before she passed away. At the time the Deceased executed the 2014 Will she was in poor health and it was not executed in the presence of a medical doctor to support the Deceased's state of mind.

22. Counsel for the Defendant submitted that the Claimant has failed to raise any suspicious circumstances surrounding the execution of the 2014 Will since the estate of the Deceased was a relatively small estate where the principal asset was the house and land; the Deceased had indicated to two witnesses that she intended to leave the house to the Defendant and

her children; the Deceased was estranged from the Claimant when she made the 2014 Will; the 1972 Will was made when the Claimant and the Deceased were not estranged and some 40 years before the 2014 Will; the house in the 1972 Will was not in existence when the 1972 Will was made; the Defendant did not have control of the Deceased when she made the 2014 Will; the Deceased was not in poor mental and physical health since the Deceased executed a Power of Attorney in favour of Ms. Lumkin in June 2014; and any secrecy relating to the preparation and execution of the 2014 Will was intended by the Deceased. The Deceased prepared a letter appointing the Defendant as her agent to collect rent. To the best of the Defendant's knowledge, the Deceased was never in a position not to collect rent and such an authorization was not necessary. The letter of appointment had never been given to the Defendant and she found same among the same papers in which the Wwill was found.

23. **Tristram and Coote's Probate Practice**[9] states as follows:

> "Where a will is propounded which raises the suspicion of the court that it does not express the mind of the testator, the onus is on those who propound it to remove the suspicion…."

24. In my opinion the Defendant failed on a balance of probabilities to remove the suspicion associated with the 2014 Will for the following reasons:

No reasonable explanation for excluding the Claimant from the 2014 Will

25. It was not in dispute that in the 1972 Will the Deceased appointed her sister Clementina Atherly as her executrix. She declared that she owned two properties namely the Marabella property and a dwelling house situate at Reid Lane D'Abadie on rented lands of one Henry. In the 1972 Will, the Deceased gave both properties to the Claimant. She also gave her residuary estate to the Claimant and she gave the sum of five dollars to her husband Oswald Charles. She stated in the 1972 Will that the reason for the small disposition to her husband was because she was separated from him for the past 20 years. On the face of the 1972

[9] 29th Edition at paragraph 3.151

Will, the Deceased gave the bulk of her property to the Claimant, her daughter, and she gave a small sum to her other next of kin, her husband, with an explanation for the small gift. She also appointed her sister as the executrix.

26. In the 2014 Will, the Deceased appointed the Defendant who it was not disputed, is not related to her as the Executor, and the Defendant and her two minor children as the sole beneficiaries of her entire estate which is stated to include the Marabella property. Noticeably missing in the 2014 Will is any mention of the D'Abadie property, any gift to the Claimant who was the Deceased's sole next of kin and any explanation for the omission of the Claimant, which the Deceased did in the 1972 Will when she gifted a small sum to her husband at the time.

27. While I accept that the period between the 1972 Will and the 2014 Will was significant namely 42 years, in my opinion, the lack of an explanation in the 2014 Will for the Deceased totally disinheriting her sole next of kin and her only daughter, the Claimant, raises suspicion since the entire estate, including the Marabella property was not insignificant but valuable.

28. The explanation for the Deceased disinheriting the Claimant came from the Defendant, her husband Ilead Lwiseh, Mr. Gaskin and Ms. Brenda Modeste, one of the witnesses of the 2014 Will. The Defendant's, her husband's and Ms. Modeste's evidence were that the Deceased complained that she and the Claimant were estranged and that they did not share a relationship. The Defendant said that the Deceased had mentioned to her that she had an adopted daughter. However the Deceased and her adopted daughter, the Claimant, had a quarrel when the Claimant realized the Deceased was not her biological mother. She said the Deceased told her that the Claimant went away to the United States of America to live, taking the Deceased's money out of a bank account which the Deceased had. I do not attach any weight to this aspect of the Defendant's evidence, since as the sole executor and main beneficiary, of the 2014 Will she stands to benefit. As such, her evidence is self-serving. Similarly, as the spouse of the Defendant, Mr. Lwiseh's evidence is also self-serving since his two children are beneficiaries under the 2014 Will.

29. With respect to Ms. Modeste's evidence, I had considerable reservations in accepting Ms. Modeste's evidence as being credible. According to Ms. Modeste, she and the Deceased were friends since 2005. They talked when the Deceased visited her home "a good few times". It is also her evidence that over the years she and the Deceased used to meet and she also visited the Deceased's house. She testified that in early 2014 she met the Deceased again in the mall. However, during cross examination, she confirmed that she did not attend the funeral of the Deceased. In my opinion, if Ms. Modeste and the Deceased shared a close relationship such as to confide in her about the latter's daughter, then Ms. Modeste's would have either attended, made an effort or have a reasonable explanation for not attending the Deceased's funeral. However there was no such evidence from Ms. Modeste. Further, it was not plausible that she met with the Deceased in 2014 in the mall, since it was the evidence from the witnesses for the Claimant, the Defendant and Mr. Gaskin that after the Deceased sustained a fall in 2012, her mobility was limited which is the reason the said witnesses and members of the Deceased's church visited her at home.

30. Mr. Arthur Gaskin was a bus driver who said he met the Deceased since she would ride on the bus he was driving. He said that they became good friends and that she gave him money to buy things for his children. Mr. Gaskin's evidence in chief was that, on one of these drives, in one of their conservations, the Deceased mentioned an adopted daughter who she said she did not want to have anything to do with anymore over a falling out of some money in an account belonging to the Deceased. In another conversation he said that she informed him that she was going to leave the Marabella property for the two children which he took to mean the Defendant's two children. She also told him that she intended to make a Will to leave the Marabella property for the children but that she was not telling the Defendant since she would "know in time".

31. However in cross examination Mr. Gaskin admitted that he has a hearing problem and he had to focus on the road when he drove the bus to look out for traffic and children. He also stated that the Deceased sat at the back of him and the first few seats in the front of the bus are sideways. He said that when he was driving he was facing forward and the driver's seat is the same level as the front seat which were behind him

32. In my opinion it was not plausible that Mr. Gaskin was able to hear, understand and converse with the Deceased which he sought to portray. I therefore did not accept his evidence that the reason the Claimant was excluded from the 2014 Will was because she and the Deceased were estranged. Mr. Gaskin's focus had to be on the road while he was driving the bus. During cross examination, Mr. Gaskin indicated that he had a hearing problem and even during the trial where the Courtroom was quiet, Mr. Gaskin who was relatively close in proximity to Counsel for the Claimant, still had difficulty hearing. In my opinion, given the noise associated with the bus which Mr. Gaskin drove, the other traffic on the road and his focus on the road, it was not possible for him to engage in lengthy conversations with the Deceased as described by him.

33. On the other hand, the Claimant's evidence was that although she lived abroad she still maintained a close relationship with the Deceased. She said she visited the Deceased. She and the Deceased went to Messrs. JB Kelshall Attorneys at law in 2005 to look after the estate of the Deceased's sister Clementina. The last time she saw the Deceased was in or around July 2013 as she became too ill and weak to travel. The purpose of her visit as she stated under cross examination was due to the passing of her father in law. However she said she knew that the Deceased became ill in or around the beginning of 2013 due to a fall she sustained. She further says it was in that same year that the Deceased informed her that she had prepared a Will for her and left it with the Elders of her church. Although she was not physically present with the Deceased when she died or in the months leading up to her death, she testified that she would call often and was told of the Deceased's condition by Jennifer Lumkin and other elders of the church.

34. Based on the Claimant's evidence she still maintained contact with the Deceased even after the Claimant got ill. While the Claimant's visits to the Deceased decreased during the period 2013 until the Deceased passed away, her explanation which was that she was ill with breast cancer, was reasonable. Therefore the Claimant still shared a close relationship with the Deceased, although her visits decreased due to illness.

35. The evidence of Mr. Raymond Carvalho was that he met the Deceased while she attended the Marabella congregation of Jehovah's Witnesses of which he said she was a devoted

member. He sometimes visited the Deceased at her home. He said that he was aware that the Deceased had sustained a fall in 2012 and she was not capable of moving around as she had a hip injury and she feared falling again. He testified that the Deceased gave him a copy of the 1972 Will after her fall in 2012 for him to keep.

36. In my opinion Mr. Carvalho has nothing to benefit from the outcome of this matter since he is not a beneficiary under neither Will. He has no interest to serve save and except to honour the Deceased's wishes whom he said he knew as a member of the same church. I accept that as late as in 2012 he was given a copy of the 1972 Will to keep by the Deceased. Based on Mr. Carvalho's independent evidence, there was no reasonable explanation to exclude the Claimant from the 2014 Will. There was also no reasonable explanation why the Deceased who gave a copy of the 1972 Will to Mr. Carvalho in 2012, would have totally disinherit her only child and sole next of kin and give her entire estate to a complete stranger less than two years thereafter. In my opinion, and on the face of it, there is nothing to demonstrate that the Deceased was estranged from the Claimant and she had no reason to exclude the Claimant from the 2014 Will.

37. Jennifer Lumkin's evidence was that she knew and met the Deceased from attending church together. She first met the Deceased when the latter was 80 years old and in good health. Over the years they became close and she began taking the Deceased on various outings, to church and to visit friends. Ms. Lumkin said that she began caring for the Deceased regularly at times visiting at least three times per day at various hours, at least five times per week after the Deceased fell at the San Fernando bus terminal on Christmas Eve 2012, and was then unable to move around as she did before. She bought groceries, she cooked, cleaned, watered plants at the home of the Deceased as she became her caretaker based on the close friendship and bond she had developed with her over the years. The Deceased appointed her as her official health care agent under a Power of Attorney for Health Care sometime in 2014. The Deceased also requested that she and her husband oversee and execute her funeral arrangements and expenses. Ms. Lumkin stated that the Deceased would often mention the Claimant's name. She even professed her love for the Claimant the day before she died.

38. Ms. Lumkin's witness statement was admitted in evidence since she was unable to attend the trial due to treatment for a terminal illness. I did not have the benefit of assessing the credibility of Ms. Lumkin's evidence in cross examination. As such I am confined to attaching limited weight to Ms. Lumkin's evidence save and except where it is corroborated by evidence from the other witnesses.

Poor health of the Deceased

39. There was no medical evidence on the physical and mental condition of the Deceased at the time of the execution of the 2014 Will. The Court was left to decide this question of fact from the conflicting evidence of the witnesses who had direct interaction with the Deceased in the period leading up to the execution of the 2014 Will.

40. The Claimant's evidence was that during her telephone conversations with the Deceased, her mother often babbled words and she could not understand what she was saying. She said she first noticed this in a telephone conversation with her mother around mid-May 2014. At the time the 2014 Will was made she said her mother was unable to speak to her over the telephone. In my opinion not much weight can be attached to the Claimant's evidence on the Deceased's physical and mental condition since she was not physically in the Deceased's presence, she relied on information told to her by Jennifer Lumkin and she could not say with certainty that the person she heard making sounds on the telephone was the Deceased.

41. Ms. Lumkin's evidence was that after the Deceased sustained the fall in 2012, she was never able to fully regain mobility and she also began to show signs of being forgetful and confused. She acknowledged that as the Deceased's health deteriorated, the Claimant was not visiting Trinidad as often as she did before. According to Ms. Lumkin, the Deceased's health condition became worse in June 2014. Her mental condition also became worse as she described that the Deceased at that time appeared to be "in and out of it". Two weeks before she died the Deceased appeared disoriented. Ms. Lumkin stated that with respect to the 2014 Will, she recalled that during this time period that the Deceased never left the

house to do anything as she was bedridden and wearing pampers. She also stated her mental health had deteriorated since around June 2014.

42. In my opinion Ms. Lumkin was in a position to make an assessment of the Deceased's overall physical condition but not her mental health since she was not a trained health care professional in this field. In any event, based on Ms. Lumkin's evidence, the Deceased was in good mental health in June 2014 since the Deceased executed a Power of Attorney in favour of Ms. Lumkin to look after certain affairs for the Deceased. I accept Ms. Lumkin's evidence on the lack of mobility of the Deceased after she fell in 2012 since this was corroborated by the evidence of Mr. Carvalho and Dr. Sylvester.

43. Mr. Carvalho's evidence was that he was aware that the Deceased had sustained a fall in 2012 and she was not capable of moving around as she had a hip injury and she feared falling again. In cross examination, he testified that the Deceased was bedridden from the fall and she remained in this condition up until her death in 2014. He also said that when he visited her, she was in bed and she was totally bedridden from June 2013. Under cross examination he says he never saw the Deceased move from the bed and she was cared for by Ms. Jennifer Lumkin. Mr. Carvalho testified that on his visits to the Deceased, he observed that her physical and mental health were deteriorating and that she was becoming weaker and forgetful.

44. In my opinion, Mr. Carvalho could not speak of the Deceased's mental ability when she executed the 2014 Will. His evidence was limited to the Deceased's poor physical health.

45. Dr. Sylvester did not give evidence as a medical expert, but as a lay person who was a member of the same congregation as the Deceased and who also visited her. According to Dr. Sylvester he knew the Deceased for the past seventeen (17) years prior to her death as they were both members of the Marabella Congregation of Jehovah's Witness. During the last five (5) years of her life he assisted in her medical care and he visited her monthly to conduct a general checkup. He accepted in cross examination that the medical care he gave to the Deceased was mostly in the form of medical advice when he was requested to do so, and he would see to it that it was followed up. He admitted that he had given the Deceased

a prescription and that the interaction with the Deceased was on a purely voluntary basis as there was no monetary consideration, and as a member of the congregation she came to him and he would issue a prescription if it is something that had to be formally prescribed. His advice seemed to be informal as it was frequently when they met at church and he did not take notes or records. He conceded that he was not the only person who gave the Deceased advice as she consulted other persons on any other health issues. He conceded also that he did not know her primarily as a medical practitioner.

46. According to Dr. Sylvester, some months prior to her death, he observed that the Deceased began to suffer from general weakness, had an unsteady gait when attempting to walk and became slower in her activities. Three (3) months before her death she became too weak to get out of her own bed on her own. She also became very forgetful and would often repeat statement she made. In the immediate weeks prior to her death she was unable to recognize persons. However, he recognizes that it is not unusual or uncommon for persons as old as the Deceased was, to exhibit such features.

47. According to Dr Sylvester, in the six week period prior to the death of the Deceased, the deterioration of her condition became more obvious. Forgetfulness and babbling were more consistent. Notwithstanding this observation, when asked whether he did anything as a medical practitioner or as a friend in terms of what he observed of that condition in that last six weeks of her life, his response was that he teamed up with other members of the congregation to ensure that there was more vigilance with respect to her situation. He also ensured that people would arrange to visit more frequently to take care of her needs. He denied that his evidence of the deterioration and alleged deterioration of the Deceased was a complete fabrication for the purpose of supporting the Claimant's claim for the Marabella property.

48. Based on Dr. Sylvester's observations, the Deceased became physically frail in the three month period leading up to her death. He could not testify on her mental condition but it was his observations as a regular visitor that the Deceased became forgetful and she spoke incoherently. In my opinion, at best, Dr. Sylvester's evidence corroborated the evidence of

Mr. Carvalho and Ms. Lumkin on the Deceased's frail physical condition and her forgetfulness in the three months prior to her death.

49. The Defendant's evidence was that she knew the Deceased since 2011.They initially met on the Tarouba bus and began meeting more frequently thereafter, more so on the same Tarouba bus where they would sit together almost every day. The Defendant stated that she assisted the Deceased on a daily basis from 2011 to 2014. However later in her evidence in chief she said that the Deceased did not require assistance until mid-2014. In cross examination she said that the Deceased appointed her as the former's caregiver in 2011. She also said that she cared for the Deceased from August 2011 until the Deceased died. According to the Defendant she visited the Deceased daily. In cross examination the Defendant in response to the claim that she was able to visit the Deceased by means of an unlocked door, acknowledged that the door was left unlocked but said it was because Ms. Lumkin and other members of the church who visited, used to leave later than her and by that time the Deceased was already in bed so when they left they simply pulled in the door as it had to be locked from inside.

50. At her visits to the Deceased she said she cooked and cleaned for the Deceased without pay. During this time she was unemployed. She said that Ms. Lumkin was the only member of the Deceased's church who did anything for the Deceased. Apart from Ms. Lumkin, a person named Rachel also started to assist the Deceased in May 2014. In cross examination the Defendant acknowledged that the door was left unlocked because Ms. Lumkin and other members of the church who visited used to leave later than her and by that time the Deceased was already in bed so when they left they simply pulled in the door as it had to be locked from inside.

51. According to the Defendant, the Deceased only started wearing "pampers" 7-10 days before she died because it became too difficult for her to walk to the bathroom. She stated that she did not see any indication that the Deceased was having any mental problems like forgetting or signs of dementia or anything else associated with old age. Instead, she said she was surprised that that Deceased had a sharp mind. The Defendant noted that the Deceased did not mention that any doctor was treating her. She was not present when the

Deceased passed away but she was informed of her death. She stated that she was not involved in the funeral arrangements for the Deceased, as the Deceased had told her some time ago that she had made arrangements with the Church to take care of her funeral. Ironically this was the same church members who the Defendant testified the Deceased warned her about trusting them.

52. Counsel for the Claimant put to her that she ingratiated herself in the Deceased's life as she said did not require a caregiver. The Defendant gave no definite answer but responded that she met the Deceased when the latter was 95 years old and they became friends because the Deceased wanted to adopt her daughter.

53. In my opinion the Defendant was not a witness of truth on the Deceased's physical ability. Her evidence was inconsistent on whether the Deceased required assistance due to her physical fragility and incapacity. In my opinion if the Deceased was as well as the Defendant represented, there would have been no need for the Defendant to act as the Deceased's care taker, cooking and cleaning for the Deceased on a daily basis as she did. There would also have been no need for the Defendant to take food to the Deceased. There would have been no need for the person named Rachel and Ms. Lumkin to assist the Deceased. There also would have been no need for the members of the church who visited the Deceased to even close the door upon leaving from their visit with her since the Deceased would have been able to close the door. In my opinion, the Defendant's own evidence demonstrated that the Deceased was physically incapable of looking after herself.

54. Mr. Ilead Lwiseh evidence was that sometime in 2011, the Defendant, his wife told him of the relationship she had formed with the Deceased. His wife visited the Deceased often and cooked for her. In cross examination, he said that he volunteered to paint her wall which he also said only occurred one time after he power washed the yard. He visited her almost every Sunday since he wanted to see where his wife and his children were visiting on such a regular basis. On their visits, they would take lunch to the Deceased and they would all eat together. His wife cooked and he would organized the drink and ice cream which he says the Deceased liked. At their visits they had conversations with the Deceased while his children played in the yard. He said that the last time he saw the Deceased was the Sunday

before she died. He said she was frail looking and wore pampers. To him, she did not appear to have a problem remembering anything and she remembered him and they chatted as usual. He stated that during his observation and conversation with her he did not see or notice anything which made him think that her mind was failing or that she was having problems or difficulty understanding what was going on around her or unable to help herself mentally or even physically. On all occasions, except for his last visit to the Deceased, she would come out of her bedroom and talk to him.

55. I have attached little weight to Mr. Lwiseh's evidence since he too was not a witness of truth since it was clear that his purpose in giving evidence was to support his wife, the Defendant's story. He was not an independent witness and his evidence was self-serving.

56. Mr. Gaskin's evidence was that after learning from the Defendant that the Deceased had fallen and injured herself, he began visiting her on average once a month, sometimes alone and sometimes in the company of his wife. Prior to him visiting her, he telephoned her land line to inform her of his impending visit. He last visited her around the third week of June 2014. At that visit she opened the door for him and they sat down outside and chatted for a while. At that visit he said she was still able to move around, walk and see, and was she well within her senses. He said that although she was able to take care of herself, she required someone to cook and the Defendant assisted with this. He admitted that on one visit sometime in late 2013 or early 2014 he noticed a few people there who he was told were from the church.

57. According to Mr. Gaskin, until the last time he saw her in June 2014, she appeared to him to be fully in control of herself and what she was doing. Admittedly under cross examination, he says that even though he was of the view that she did not need a caregiver and was in good health taking care of herself up to June 2014, the Defendant nonetheless was still acting as a caregiver to her.

58. In my opinion Mr. Gaskin was also not a witness of truth. His evidence that the Deceased was able to care for herself was not plausible since he admitted that she needed assistance from the Defendant. In my opinion, if the Deceased needed the Defendant's assistance

after the fall in 2012, and he visited as often as he represented, he would have observed the Deceased's deterioration in health.

59. Ms. Brenda Modeste stated that she was a witness to the 2014 Will. She came to know the Deceased sometime in 2005. She visited the home of the Deceased on a few occasions. Other than that they kept in touch either via telephone or when they met up. She met the Deceased sometime in early 2014 in the mall. This is when the Deceased told her about the Defendant and told her that the Defendant used to cook for her and look after her. She did not know the Defendant. The first time she met the Defendant was when the latter came looking for her to sign an affidavit for the 2014 Will and she accompanied the Defendant to her lawyer's office. She was unable to recall the exact date or time when she was visited by the Defendant. However, she was able to recall with precise clarity, the date and time she went to the home of the Deceased to sign the 2014 Will. According to Ms. Modeste, it was the 12th August 2014 at around minutes to 2 in the afternoon. The Defendant was not there at the time as the Deceased had told her the Defendant left to pick up her kids. On the 12th August 2014, both she and another mutual friend of the Deceased Ms. Hazel Edwards, visited the Deceased. Ms. Edwards was already there by the time she got there. It was at this visit that the 2014 Will was executed and witnessed by both her and Ms. Edwards. She said that the Deceased looked a little weak but she seemed to be fine and she was still able to move about. She offered them ice cream and something to drink but that she went to the kitchen to get the glasses for the drink.

60. According to Ms. Modeste, the Deceased was able to sit up on the bed and move around. At some point during their visit she recalled the Deceased asking them to do something for her. The Deceased opened a drawer, which Ms. Modeste said she assisted her with opening, located on the foot of the bed and retrieving a bag containing paper. The "something" was to sign a document which after reading she recognized to be the 2014 Will. Under cross examination Ms. Modeste stated that the Deceased was aware of what she was asking her to sign, and the Deceased was very clear about what she was doing and what she wanted her to do. The Deceased signed first followed by Hazel and then her. Ms. Modeste said she had concerns as to whether she was doing the right thing but she proceeded as the Deceased

told her it was her thing and she could do what she wanted. The Deceased then placed the document back in the bag which she handed to her which she then placed back in the drawer and closed the drawer.

61. Her evidence under cross examination was that she met Ms. Hazel Edwards the day before who told her she was going to visit the Deceased. She then decided that she too should visit the Deceased as it was a long time since she last did so. She admitted that the Deceased had no knowledge that she would be visiting. Although she personally did not inform the Deceased of her impending visit to her home, she was certain that Hazel would have mentioned it to the Deceased so the Deceased was aware that she was coming. She said that the document she signed was on typed paper and that the Deceased had no computer or type writer in her house. She said she saw that the document was dated the 12th August 2014 but she did not know when the date was typed in and the only person the Deceased said visited her on that day was the Defendant.

62. I formed the opinion that Ms. Modeste was not a witness of truth for the following reasons. Firstly, the Deceased could not have met Ms. Modeste in the mall in 2014. Based on the evidence of all the other witnesses after the Deceased fell in 2012, persons visited the Deceased since she did not leave her home. Secondly, Ms. Modeste was not as close to the Deceased as she represented, since if she was as close, she would have visited her more often than a few occasions after 2005. Thirdly, the arrangement with Hazel, the other witness was a fabrication since if this was indeed so, such an important detail ought to have made its way into her witness statement. Fourthly, given the assistance which the Deceased required from the Defendant and Ms. Lumkin, it was not possible for the Deceased to sign the 2014 Will at the edge of the bed, sitting and pressing on the wooden part at the bottom of the bed. In my opinion, the only reasonable explanation that Ms. Lumkin, the Church members and the Defendant visited the Deceased so often in the three months prior to her death was because they all knew that the Deceased was physically incapacitated and they visited to assist her.

63. Fifthly, there was no evidence that any attorney at law had visited the Deceased in order for there to be an explanation as to how the 2014 Will came into the possession of the

Deceased. In my opinion, this raises sufficient suspicion on how the Deceased came into possession of the 2014 Will. Ms. Modeste said she had concerns but she proceeded. Based on the Deceased's physical limitations, it was clear that the Deceased did not leave the house to give instructions to have it prepared. Indeed, while there was a document which the Defendant said was the Deceased's instructions for the preparation of the said Will, there was no evidence of who prepared it. The undisputed evidence was that the visitors to the Deceased in the three month period before the execution of the 2014 Will were the members of the Church, Ms. Lumkin, the Defendant and the two witnesses on the day the 2014 Will was executed.

64. Based on the evidence of Mr. Carvalho, Dr. Sylvester and Ms. Lumkin, the 2014 Will was not brought by any member of the church since they were all taken by surprise when they found out about it. Ms. Modeste did not know who prepared it. The other witness to the Will did not give evidence and the Defendant who was the only other person present on a daily basis and on the morning the 2014 Will was executed, also did not know how the said document came into the possession of the Deceased. In my opinion, it was not possible for the Deceased to leave her home to obtain the 2014 Will but someone had to bring it to her.

65. On a balance of probabilities, I find that the Deceased was in a frail physical condition at the time when she executed the 2014 Will. The Deceased required assistance and care in meeting her daily needs. It would not have been possible for her to take out the 2014 Will from a drawer at the foot of her bed without assistance. It would have not been possible for her to sign it without assistance. In the absence of medical evidence on the Deceased's mental capacity, it is reasonable to assume that a person who is 98 years would have been forgetful. However I am unable to make any other finding on her mental capacity.

Secrecy

66. The Claimant's evidence was that she first found out about the 2014 Will in June 2015 when she instructed her attorney at law to apply for the Grant for Letters of Administration for the 1972 Will.

67. According to the Defendant's evidence in chief, a week before the Deceased passed, the Deceased gave her a bag containing documents which she asked her to carry home and go through when she had time. In the bag she discovered the 2014 Will for which she had applied for a Grant of Probate. The 2014 Will was accompanied by a letter dated 12th August 2014, certifying that the Deceased had made the 2014 Will. There was also another letter dated 23rd April 2014 which appointed the Defendant as the Deceased's agent to collect rent in the bag. She spoke to the Deceased about the 2014 Will. She said that the Deceased had always indicated that she wanted to leave the Marabella property for someone who had children so that the children could play in the yard. The Deceased had stated that she had been thinking of leaving the Marbella property for the Defendant and her children.

68. However the circumstances surrounding what occurred the day the Defendant was given the bag containing the 2014 Will was not entirely clear. Under cross examination, the Defendant stated that she was given the white plastic bag by the Deceased who told her not to open it. She said the bag was in a drawer which even she had difficulty in opening. But this was the same drawer Ms. Modeste said the Deceased was able to open with a bit of assistance from her. The Defendant said that she did not open the bag but she left shortly thereafter to pick up her children who were at school. However she recanted this version the second time around when Counsel indicated that this on the 12th August and as such school would have been closed. Instead she said she went to get the children from her sister's.

69. According to the Defendant, when she got home she simply placed the bag in a wardrobe and did not inform anyone, including her husband of the same. Three days later she opened the bag. She said it contained bills and a document but no mention of the letter appointing her as the Defendant's agent to collect rent which was also in the same bag. The document she said when she read it through, she realized that it was the 2014 Will which the Deceased had made. She said she knew nothing about it and as such she was shocked. Even after this she put the 2014 Will back in the bag and put the bag back in the wardrobe.

70. The Defendant stated that on the morning of the funeral for the Deceased she learnt from Ms. Lumkin that the Deceased had left a Will. She said Ms. Lumkin also asked her to return all things that the Deceased had given to her. Despite learning of the existence of a Will, the Defendant said she never told anyone that she too was in possession of the 2014 Will. In fact, her response to why she did not mention the 2014 Will to anyone, was that she would have told the Claimant about it but not Ms. Lumkin. However, even when the Claimant returned to Trinidad and took over the Marabella property, the Defendant still did not mention it to the Claimant. Indeed, the Defendant said the first time she saw the Claimant was in Court in this instant matter.

71. According to the Defendant, after the funeral she was met on the Marabella property by Eric Attale, the Claimant's brother in law whom she realized had assumed control of the Marabella property. It was put to her that if she believed that she was the owner of the Marabella property then she would have taken steps to gain possession of the same. She indicated that she did so by placing a lock on it which someone cut off.

72. In my opinion the Defendant's actions by not revealing to Ms. Lumkin on the day of the funeral that she was in possession of the 2014 Will was highly suspicious given that Ms. Lumkin told her that there was a Will which clearly was not the 2014 Will.

73. But the degree of suspicion does not end with the Defendant's evidence alone. The evidence of the Defendant's husband contradicted the Defendant's evidence in material aspects which undermined her credibility. He said that he knew that the 2014 Will gave the Marabella property to his wife which surprised him. He subsequently learnt that his wife made an application to get the Marabella property in her name, however he did not know the value of the Marabella property nor did his wife mention the value of it to him.

74. Mr. Lwiseh's evidence under cross examination was that one week prior to the passing of the Deceased, his wife told him that she had the 2014 Will from the Deceased. She told him that the Deceased had given her a bag with some papers to hold on to and among the papers there was the 2014 Will where she left the Marabella property for her and their children. He said he believed that his wife opened the bag and noticed the 2014 Will almost

immediately after she got it. He said he knows that his wife told him one time after opening the bag about what it contained and he was told about the 2014 Will one week before the Deceased passed away. This contradicted his wife's evidence that she opened the bag days after and was unsure as to when she made mention of it to her husband.

75. Mr. Gaskin's evidence was that he was not surprised when he learned from the Defendant that the Deceased made the 2014 Will where she was the main beneficiary. However he said that the Defendant did not tell him she got the 2014 Will but she told him that the Deceased gave her something to carry home which she opened when she got home.

76. In my opinion the Defendant's conduct upon receipt of the 2014 Will and after the Deceased died was highly suspicious. She was aware that Ms. Lumkin and the church members spoke about a Will and she nonetheless remained silent about the 2014 Will. She was also aware that the Deceased had a daughter, the Claimant and she took no action when the Claimant's brother-in-law took possession of the Marabella property. In my opinion, if the Defendant had confidence in the validity of the 2014 Will, she would have taken steps to remove the Claimant and her agents and to preserve the said property which she knew she was to inherit based on the 2014 Will.

77. Therefore the omission of the Claimant from the 2014 Will, the Deceased's poor health and the secrecy surrounding the 2014 Will before and after its execution, were sufficient circumstances to demonstrate the Deceased's lack of knowledge and approval of the contents of the 2014 Will.

Was the Deceased of sound mind, memory and understanding when she executed the 2014 Will?

78. The Claimant contended that the Deceased was not of sound mind, memory and understanding on the 12th August 2014 because the Defendant confirmed that the Deceased was capable of doing everything until the 11th August 2014 but the 2014 Will was executed on the 12th August 2014 and there was no medical evidence from the Defendant to prove that the Deceased understood what she was doing. Further, the 1972 Will made specific

provision for the Deceased's estranged husband and there was no such provision in the 2014 Will for the Claimant, who according to the Defendant, was estranged from the Deceased.

79. Cockburn LJ in **Banks v Goodfellow**[10] stated the following on testamentary capacity:

> "It is essential to the exercise of such power that a testator shall understand the nature of his act and its effects; shall understand the extent of the property of which he is disposing ; shall be able to comprehend and appreciate the claims to which he ought to give effect, and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right or prevent the natural exercise of his faculties that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it, which if his mind had been sound, would not have been made…As long as a testator knows that he wants to leave the assets in a specific proportion for reasons that are clear, rational and consistent then he might be considered capable."

80. Wooding CJ in **Moonan v Moonan**[11] stated that:

> "the onus of proving testamentary capacity was on the appellants who were propounding the will. If the matter is left in doubt then they fail to prove that the testator was capable of making a will. The resolution of the issue may be in one of three ways: either that the court is affirmatively satisfied that [the testator] was sound in mind, memory and understanding, or that the court is satisfied that he was not sound in any of these respects or that the court is left in doubt, with the result that the issue has to be resolved against the appellants who … were propounding the will."

81. **Halsbury's Laws of England**[12] describes the duty of persons propounding a will as:

[10] (1890) LR 5 QB 549 at 565
[11] (1963) 7 WIR 420 at 421 I
[12] 5th ed Vol 103 at paragraph 899

> "…However it is the duty of the executors or any other person setting up a will to show that it is an act of a competent testator, his testamentary capacity must be established and proved affirmatively. The issue of capacity is one of fact. The burden of proof of sanity is considerably increased when it appears that the testator had been subject to previous unsoundness of mind. The justice or injustice of the disposition may throw some light upon the question of the testator's capacity."

82. The burden was on the Defendant to prove that the Deceased was of sound mind, memory and understanding when she executed the 2014 Will. It is not necessary that the Deceased's mental powers are reduced below the ordinary standard. What is important is the Deceased had a sound disposing mind and memory at the time of the execution of the 2014 Will.

83. In **Re Simpson, Schaaniel v Simpson**[13] the Court found that where a testator is elderly and infirmed, his will should be witnessed and approved by a medical practitioner. There was no medical evidence placed before the Court by either side to establish the nature of the Deceased's mental health. There was also no evidence as to whether the Deceased was taking any medication which may have had an impact on the soundness of her mind when she executed the 2014 Will. In those circumstances it is very difficult to make a finding on whether or not the Deceased was of sound mind when she executed the 2014 Will.

84. However the burden lay with the Defendant to prove that the Deceased was of sound mind when she executed the 2014 Will. What is not in dispute from the evidence was that the Deceased was 98 years old at the time; her physical mobility was severely restricted; she depended on others to meet her needs; the 2014 Will is completely different from the 1972 Will since the Claimant is excluded; and there is no explanation in the 2014 Will as there is in the 1972 Will for excluding the Claimant.

85. In my opinion, based on the undisputed evidence, the Deceased was not of sound mind, memory and understanding when she executed the 2014 Will since there was no evidence to demonstrate that she understood that she was excluding the Claimant her sole next of

[13] (1977) 121 Sol Jo 224

kin. There was nothing stated in the 2014 Will to provide an explanation. It was not as if the Deceased was unaware that such a provision ought to have been made in the 2014 Will if she was disinheriting the Claimant since she made provision for her spouse in the 1972 Will where she left him five dollars with an explanation for doing so. The only evidence for excluding the Claimant from the 2014 Will came from the Defendant, her husband and Ms. Modeste all of whom I found not to be credible witnesses. In particular the Defendant and her husband's evidence was self-serving. In the absence of any credible explanation, I find that the 2014 Will was not rational. If there was an explanation in the 2014 Will for excluding the Claimant, then it would have demonstrated that the Deceased understood the claims which could have been made on her estate by the Claimant.

86. Therefore I cannot conclude that the Deceased had the requisite testamentary capacity at the time of the execution of the 2014 Will.

Was the 2014 Will obtained by fraud and or undue influence?

87. The particulars of fraud which was pleaded by the Claimant were:

"PARTICULARS OF FRAUD

21. a. That the Defendant who is named as the sole executor of the alleged Will obtained the said alleged Will by fraudulent means in that she knew at the time of the execution of the alleged Will that the Deceased was an elderly and sickly person. A true copy of the medical report of Dr. Rawle Sylvester dated March 23, 2006 is hereto annexed and marked **"G.A. 9".**

b. That the Deceased lacked the animus testandi or testamentary capacity to make the alleged Will, in that, six weeks prior to the Deceased's death she was not competent to conduct her affairs or transact any business because of her physical and mental condition.

c. That the Deceased at the time of the execution of the alleged Will was not of sound mind, memory and understanding so as to be able to understand the nature of the act and its effects or the extent of the property of which

she was disposing or to comprehend and appreciate the claims to which she ought to give effect.

d. The execution of the alleged Will was not done in the presence of a medical doctor and no medical report was issued to support the Deceased's state of mind.

e. That the Deceased at the time of the purported execution of the alleged Will neither knew or approved of the contents thereof.

88. The particulars of undue influence pleaded by the Claimant were:

"PARTICULARS OF UNDUE INFLUENCE

24. a. By the Defendant's pretended friendship with the Deceased and/or visits by the Defendant and her family to the Deceased's home the Defendant exerted control over the Deceased by showing a caring relationship with the intention of influencing the Deceased whose mental condition had deteriorated and was unable to part with her property and/or estate and the Defendant coerced the Deceased to devise to her the Deceased's property and/or estate even to the exclusion of the Jehovah Witness Church in which the Deceased was a devoted member.

25. The Claimant will rely on all the particulars as stated under Particulars of Fraud and/or Particulars of Suspicious Circumstances and/or Particulars of Lack of Testamentary Capacity to maintain the plea that the execution of the alleged Will was obtained by the undue influence of the Defendant.

89. **Williams on Wills**[14] at page 64 paragraph 5.9 stated the following on undue influence and fraud:

"Fraud and undue influence are really questions of knowledge and approval rather than of testamentary capacity since what has first to be proved is not the lack of

[14] 9th ed

capacity of the testator, but the acts of others whereby the testator has been induced to make dispositions which he did not really intend to make…A gift obtained by undue influence or fraud is liable to be set aside upon proof of the undue influence or fraud. Undue influence means coercion to make a will in particular terms. The principle has been stated by Sir JP Wilde in Hall v Hall[15]:

'Persuasion is not unlawful, but pressure of whatever character if exerted as to overpower the volition without convincing the judgment of the testator, will constitute undue influence, though no force is either used or threatened."

90. The authors on **Williams on Wills** continue at page 65 to state:

"The proof of motive and opportunity for the exercise of such influence is required but the existence of such coupled with the fact that the person who has such motive and opportunity has benefited by the will to the exclusion of others is not sufficient proof of undue influence. There must be positive proof of coercion overpowering the volition of the testator. The mere proof of the relationship of parent and child, husband and wife, doctor and patient, solicitor and client, confessor and penitent, guardian and ward or tutor and pupil does not raise a presumption of undue influence sufficient to vitiate a will and although coupled with, for example, the execution of the will in secrecy, such relationship will help the inference, yet there is never in the case of a will a presumption of undue influence. There is no presumption of undue influence, which must be proved by the person who sets up that allegation. The onus of proof resting upon a the party propounding a will where circumstances of suspicion are disclosed does not extend to the disproof of an allegation of undue influence or fraud, the burden of establishing which always rests on upon the parties setting it up. The person who affirms the validity of the will must show that there was no force or coercion depriving the testator of his judgment and free action and that what the testator did was what he desired to do…..much less influence will induce a person of weak mental capacity or in a weak state of health to do any act and in such cases the court will the more readily find undue influence…"

[15] LR 1P&D 481

91. The test of undue influence in probate is different from the equitable presumption since there is no presumption of undue influence in testamentary matters[16]. Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean[17]. Not all influence is undue influence. Even very strong persuasion and 'heavy family pressures' are not, of themselves, sufficient[18].

92. Therefore the onus was on the Claimant to prove that the Defendant used acts of coercion or her influence to induce the Deceased to execute the 2014 Will leaving her entire estate to the Defendant and her children.

93. On the issue of undue influence, Counsel for the Claimant argued that the Defendant formed a motive and saw an opportunity to benefit when she became aware that the Deceased was an old lady living in a home that she owned all alone. As such the Defendant deliberately befriended the Deceased and appointed herself the Deceased caregiver carrying food for her on a daily basis and cleaning the Deceased's home when there was no such need since Ms. Lumkin and the other members of the Church to which the Deceased belonged, were taking care of the Deceased. As such Counsel argued that the Defendant's friendship with the Deceased was pretended and the only reason she ensured her visits were daily was because the Defendant was grooming the Deceased to obtain her property as she saw an opportunity to do so.

94. With respect to the allegation of undue influence Counsel for the Defendant submitted that the nature of the undue influence actual or presumed was not pleaded. There is no authority which shows that a "pretended friendship" can ground a finding of undue influence. The second limb of paragraph 24a. which is *"exerted control over the Deceased … showing a caring relationship with the intention of influencing…"* appears to be a plea in actual undue influence. There was no cogent evidence on behalf of the Claimant to prove undue

[16] Per Lord Cranworth in Boyse v Rossborough (1857) 6 HL Cas 2, 48 at 51
[17] Privy Council decision in Craig v Lamoureaux 91920) AC 349 at 357
[18] Munby QC in Governor & Company of the Bank of Scotland v Bennett [1997] 1 FLR 801 at pages 822E-826 F

influence. The pleading of undue influence in the circumstances goes to credibility and it is also relevant to the issue of the appropriate award of costs.

95. On the issue of fraud, it was submitted on behalf of the Claimant that the 2014 Will was obtained by fraudulent means by the Defendant since based on the Defendant's evidence, in the week of the 11th August 2014 the Deceased had difficulty moving around and complained of being weak resulting in the Deceased remaining bedridden until her death on the 26th August, 2014. Therefore, the Defendant knew at the time of the execution of the 2014 Will, on the 12th August, 2014 (Tuesday), which is within the week of the 11th August, 2014 (Monday), that the Deceased was an elderly and sickly person. It was also submitted that the Defendant's demeanour in the witness box demonstrated that she has a strong personality as such she was capable of coercing the Deceased on the 12th August 2014 since this was when the Deceased's health was in decline.

96. Counsel for the Defendant submitted that there was no fraud on the part of the Defendant in obtaining the 2014 Will since the Deceased was strong willed and had strong views on what she wanted.

97. I was not satisfied that the Claimant had discharged the burden of proving that the Defendant coerced the Deceased into executing the 2014 Will. In my opinion cogent and compelling evidence is required to prove coercion and there was no such evidence adduced on behalf of the Claimant. While the Defendant was steadfast during her cross examination by Counsel for the Claimant, in my opinion, she did not display an attitude of being forceful or coercive and in any event in the absence of direct evidence from witnesses who saw any forceful behaviour by the Defendant in her interaction with the Deceased, it would be speculative for me to make such a finding. The evidence from Dr. Sylvester and Ms. Lumkin was that they saw the Defendant at the Deceased's house. But there was no evidence from that, that they observed the Defendant's interaction with the Deceased as being coercive. As such, I was not satisfied that the Claimant discharged the burden of proving fraud in procuring the 2014 Will.

98. However the procurement of the 2014 Will by undue influence is another story. In my opinion there was actual undue influence by the Defendant in procuring the 2014 Will. I have arrived at this position for the following reasons. Firstly, the Deceased was in poor physical health in the three month period prior to her death. She was therefore in a vulnerable position since she depended on other persons for her needs and the Defendant was a self-appointed caretaker who visited the Deceased every day without remuneration to take care of the said needs. On the day the 2014 Will was executed the Defendant admitted that she visited the Deceased that morning. There was no evidence and no explanation of how the Deceased, whose visitors were limited to the Defendant, Ms. Lumkin and members of the church came into possession of the 2014 Will which was a typed document, given that the Deceased did not leave her house and did not have a computer at her house. In my opinion it was highly plausible that the Defendant was the only person with the motive and the opportunity to have the 2014 Will prepared and she brought it to the Deceased's home.

99. Secondly, based on the Defendant's own evidence the Deceased's health took a turn for the worse around the 11th August 2014 which was the same week which the 2014 Will was executed by the Deceased. In my opinion, the Deceased who was already in a vulnerable position was then in a more frail physical state when she signed the 2014 Will.

100. Thirdly, the totality of the Defendant's evidence amounts to her befriending the Deceased after the former realized that the latter was very old, lived alone in her own house and with few persons to do things for her. In my opinion, there was no reasonable explanation to account for the Defendant who was unemployed, with limited financial means and with two young children to care for physically and financially to dedicate her time and effort on a daily basis for about at least two years visiting, cooking and cleaning for the Deceased save and except that she was befriending the Deceased in order to influence her into giving all her estate to the Defendant and her children. This was not a case where the Deceased had absolutely nobody to care for her. Based on the Defendant's evidence she was aware that Ms. Lumkin took care of the Deceased and in May 2014 a person named Rachel was assisting. She was also aware that other church members visited the Deceased to meet her needs. There was no evidence that the Deceased was lacking in food and medical supplies

and that was the reason the Defendant cooked for the Deceased on a daily basis. In any event the Defendant admitted that the members of the Church were against her visiting yet she still continued. The only explanation for the Defendant's resilience given that she acted with secrecy after the 2014 Will was given to her was because she had fostered a relationship with the Deceased.

101. Fourthly, there was no evidence that the Deceased was afforded any independent legal advice before she executed the 2014 Will and there was also a notable absence of any evidence indicating to whom the Deceased gave the instructions to prepare the 2014 Will. In my opinion the statement dated 12th August 2014 which the Defendant sought to rely on is of no value since there was no evidence as to whether the Deceased received independent legal advice before she signed the said statement.

Costs

102. On the 29th May 2017 the Court made an order fixing the costs budget in the sum of $40,000.00 and by consent for the Claimant to pay the sum of $30,000.00 as security for costs which was paid into Court before the deadline.

103. It was submitted on behalf of the Claimant that that the costs budget should be revised to take into account Counsel's and Instructing Attorney-at-Law refreshers fees for the second and third days of trial. Counsel for the Claimant submitted that the trial lasted for approximately 4 hours on the 7th day of June, 2018 and for approximately 1 and a half hours on the 8th day of June, 2018. Counsel's refreshers rate is $1900.00 per hour and Instructing Attorney-at-Law is $900.00 per hour.

104. On the other hand Counsel for the Defendant argued that cost remain within the discretion of the Court subject to certain special rules which have been applied to probate actions. There is no basis for the suggestion that the costs ought to be paid out of the estate. Having regard to the conduct of the case by the Claimant where there was no real claim of any substance with the Claimant wasting the Court's time with pleas which were unsupported by evidence. The order for costs must be made against the Claimant personally. The

litigation was also conducted in a hostile manner. Security for costs having been ordered and paid in the sum of $30,000.00 it is now necessary for the Court to make an order for payment to the Defendant's Attorney of that sum paid by way of security.

105. The Claimant has been successful in proving its claim against the Defendant. I have found no reason to depart from Part 66.6 (1) CPR which is the general rule that states:

> "If the court, including the Court of Appeal, decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party."

106. I therefore order that the Defendant pay the Claimant's costs of the claim and the counterclaim.

107. In determining the quantum, I considered that I had already set a costs budget on the 29th May 2017 in the sum of $40,000.00. Part 67.8 CPR sets out the provision for budgeted costs. as:

> "(1) A party may, however, apply to the court to set a costs budget for the proceedings.
>
> (2) An application for such a costs budget must be made at or before the first case management conference.
>
> (3) The application may be made by either or both parties but an order setting a costs budget may not be made by consent.
>
> (4) An application for a costs budget must be accompanied by-
>
> (a) a written consent from the client in accordance with rule 67.9;
>
> (b) a statement of the amount that the party seeking the order wishes to be set as the cost budget; and
>
> (c) a statement showing how such budget has been calculated and setting out in particular-
>
> (i) the hourly rate charged by the attorney-at-law (or other basis of charging)
>
> (ii) a breakdown of the costs incurred to date;

(iii) the fees for advocacy, advising or settling any document that are anticipated to be paid to any attorney-at-law other than the attorney-at-law on record;

(iv) the disbursements other than expert witness fees that are included in the budget;

(v) the anticipated amount of any expert fees and whether or not such fees are included in the budget;

(vi) a statement of the number of hours of preparation time (including attendances upon the party, any witnesses and on any other parties to the proceedings) that the attorney-at-law for the party making the application has already spent and anticipates will be required to bring the proceedings to trial; and

(vii) what procedural steps or applications are or are not included in the budget.

(5) A party may apply to vary the terms of an order made under this rule at any time prior to the commencement of the trial but no order may be made increasing the amount of the budgeted costs unless the court is satisfied that there has been a change in circumstances which became known after the order was made."

108. The purpose for the Court setting a costs budget at an early stage of the proceedings is for the parties who are involved in the litigation to be aware of the extent of liability and exposure in costs if unsuccessful at trial. While I was satisfied that the total sum in the costs budget was fair, reasonable and proportionate, I am still entitled to review it to determine if there were good reasons to depart from the costs budget upon conclusion of the trial and to determine if the costs budget was fair, reasonable and proportionate.

109. The trial took 2 ½ days. It could have been completed within 2 days but the Defendant's last witness was unable to get time off from work to attend before the last day. The written

submissions filed on the issues were comprehensive. The issues in the trial were not novel and the law was settled. The main issues with respect to the lack of testamentary capacity, whether the 2014 Will was executed in accordance with the law and the undue influence and fraud were primarily disputes of fact. In a large part all the documents referred to during the trial were agreed. There were four witness statements filed by each party and all save and except Ms Lumkin was subjected to extensive cross-examination. The claim would have required dedicated preparation by the Attorneys-at-law. At the time of the budgeted costs application, the Court contemplated that the trial would have lasted 2 days.

110. At the end of the trial I was persuaded to consider reviewing the sum to include the Counsel's refreshers rate is $1900.00 per hour at 1 ½ hours for the attendance on the 8th June, 2018. This sum is $ 2,850.00. No refresher is awarded for instructing attorney since refreshers is for Counsel only. Therefore the Defendant is to pay the Claimant the costs of the claim and counterclaim in the sum of $42,850.00.

Conclusion

111. The Defendant's case failed since she was unable to convince the Court that the 2014 Will was the last Will and Testament of the Deceased. The Defendant was unable to dispel the suspicious circumstances surrounding the making, procurement and contents of the 2014 Will. The omission of the Claimant from the 2014 Will, the Deceased's poor health and the secrecy surrounding the 2014 Will before and after its execution were sufficient circumstances to demonstrate that the Deceased's lack of knowledge and approval of the contents of the 2014 Will. I also concluded that the Deceased was not of sound mind, memory and understanding at the time the 2014 Will was made since she was in poor health and advanced age and there was no evidence that she received any independent legal advice prior to the execution of the 2014 Will.

112. While I am is of the opinion that there was no fraud on the part of the Defendant in relation to the 2014 Will, I have concluded that there was actual undue influence on the part of the Defendant.

113. The counterclaim of the Defendant is dismissed and I find in favour with the claim of the Claimant. As such, I have concluded that the 1972 Will is the Last Will and Testament of the Deceased.

Order

114. Judgment for the Claimant as follows:

(a) It is declared that the Will dated the 5th day of January, 1972 is the true and Last Will and Testament of the Deceased.

(b) The Court pronounces for the force and validity of the Will dated the 5th day of January, 1972 in solemn form of law.

(c) The alleged Will of the Deceased dated the 12th day of August, 2014 is false and of no effect.

(d) The Application No. L2482 of 2015 In the Estate of Annettelena Eltine Charles is set aside.

(e) The Claimant do proceed to apply for a Grant of Letters of Administration with Will Annexed in the Estate of Annettelena Eltine Charles.

115. The Defendant's counterclaim is dismissed.

116. The Defendant to pay the Claimant's costs for the claim and the counterclaim in the sum of $42,850.00.

117. The security for costs in the sum of $30,000.00 paid into court by the Claimant pursuant to the order dated the 29th May 2017 is to be paid out to the Claimant.

Margaret Y Mohammed
Judge