

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2016-04576

**IN THE MATTER OF THE WILLS AND PROBATE
ACT CHAPTER 9:03**

AND

**IN THE MATTER OF THE ADMINISTRATION OF ESTATES
ACT CHAPTER 9:01**

AND

**IN THE MATTER OF THE ESTATE OF ELDON SPRINGER, DECEASED
(Late of L.P. 51 James Hinds Trace, Piarco Old Road, Red Hill, D'Abadie)**

BETWEEN

**CYNTHIA WALCOTT
(Sole Executrix of The Estate of Eldon Springer, Deceased)**

Claimant

AND

GLORIA JULIEN

Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: Friday 23 July 2021

Appearances:

Ms. Safiya Charles instructed by Mr. Beresford Charles for the Claimant

Mrs. Melanie A. Abdulah-Devenish for the Defendant

JUDGMENT

I. Introduction

[1] Cynthia Walcott, the Claimant herein, is the common-law spouse of the Deceased, Eldon Springer. The Deceased died on 4 May 2015. In a Will dated 4 March 2015 (hereinafter “*the March Will*”), the Deceased named the Claimant as his Executrix and proceeded to make provisions for the Claimant and his nephew, Collie Springer. On 22 July 2015, the Claimant, through her attorney-at-law, applied to the High Court for a Grant of Probate of the Will dated 4 March 2015. However, by Notice dated 22 July 2015, a Caveat was filed on behalf of the Defendant in the estate of the Deceased. The Claimant filed a Warning to the Caveat on 10 August 2015. Subsequently, the Defendant filed an Appearance on 26 August 2015 representing to the Court that the Caveator (the Defendant) was still objecting to the issuing of the Grant and that she was named Executrix in a purported Will of the Deceased alleged to be made on 18 April 2015.

[2] Consequently, on 21 December 2016 the Claimant filed a Fixed Date Claim supported by her Statement of Case seeking the following relief:

1. An Order that the Court pronounce for the force and validity of the Will and Testament of the Deceased dated the 4th day of March, 2015 and the said Will be propounded in solemn form as the last valid Will and Testament of the Deceased.
2. A declaration that the purported last Will and Testament dated the 18th day of April 2015 (“the purported will”) of Eldon Springer, late of LP 51 James Hinds Trace, Piarco Old Road, Red Hill, D’Abadie, deceased who died on the 4th day of May 2015 is null, void and of no effect.
3. A declaration that the Deceased lacked the testamentary capacity to make the purported will and/or lacked knowledge and/or approval of the contents of the purported will and/or the purported will was procured by undue influence.

4. A declaration that the Deceased did not know, approved¹ (*sic*) of and/or understood² (*sic*) the contents of the purported will and/or the execution of the purported will was procured by the undue influence of the Defendant and/or other persons procured by her over the Deceased.
5. In the alternative, a declaration that pursuant to the Administration of Estates Act Chap. 9:01 a cohabitational relationship existed between the Claimant and the Deceased for a period of more than five (5) years immediately preceding the death and that the quantum of the Claimant's share in the estate of the Deceased is one half (1/2) thereof pursuant to sections 25(1) and 25(3) of the said Act.
6. Costs.
7. Such further and/or other relief as the Honourable Court may deem fit.

[3] The Defendant, Gloria Julien, is the Deceased's sister. The Defendant filed a Defence and Counterclaim on 3 February 2017. The Defendant claimed that the Deceased was of sound mind and made his last Will and Testament revoking all previous Wills on 18 April 2015 (hereinafter "*the April Will*"). In the *April Will*, the Deceased named the Defendant herein as his executrix and proceeded to make provisions for the Claimant, the Defendant, his step-son, Keino Walcott, his twin brother, Elton Springer, his niece, Tricia Ann Rogers and his nephew Collins Springer. The Defendant averred that the Claimant exerted undue influence and coercion over the Deceased by isolating him from his friends and relatives as his condition worsened. In her Counterclaim, the Defendant sought the following relief:

1. An Order that the Court pronounce for the force and validity of the last Will and Testament of the Deceased dated 18th April 2015 and the said Will be propounded in solemn form as the last valid Will and Testament of the Deceased Eldon Springer.

¹ Grammar – should be: *did not approve*

² Grammar – should be: *did not understand*

2. A declaration that the purported last Will and Testament dated 4th March 2015 of Eldon Springer, late of Ali Jhan Trace Piarco Old Road, Red Hill, D'Abadie, deceased who died on the 4th day of May 2015, is null, void and of no effect.
3. A declaration that the Deceased did not know of and/or approve of and/or understand the contents of his purported last Will and Testament dated 4th March 2015 which was procured with the undue influence of the Claimant.
4. Costs.
5. Such further and/or other relief as the Honourable Court may deem fit.

[4] The First hearing of the Fixed Date Claim (FDC) came up on 2 March 2017 whereupon the Claimant was granted permission to file a Reply and Defence to Counterclaim on or before the 31 March 2017 and a case management conference (CMC) was fixed for 23 May 2017. The Reply and Defence to Counterclaim was actually filed on the 29 March 2017. At the CMC on 23 May 2017, the Court queried whether the Claimant would be able to establish the relief at 5 in the FDC seeking a declaration of cohabitational relationship on the basis that a claim for a share in the estate of the deceased under the section 25 of the Administration of Estates Act is only applicable in cases where the deceased has died intestate. In the case at bar, both the Claimant and the Defendant have advanced the case that the Deceased died leaving a Will. Time was allowed for parties to consider the Court's observation and concern.

[5] The matter was next convened for a further CMC on 18 July 2017. The Claimant's attorney agreed with the observation of the Court and sought leave to amend the Claim. Permission was granted to the Claimant to amend the FDC and Statement of Case to remove the relief sought for a declaration of cohabitational relationship stated as relief 5 on the Claim as well as to delete the reference to the Succession Act in the intitulation of the Claim. The Court also gave full directions for the progress of the matter to trial.

[6] Amended FDC with Amended Statement of Case was filed on 24 July 2017 seeking the same relief as those stated on the original FDC absent the relief for a declaration of cohabitational relationship. The matter came up for trial on 25 and 26 April 2018. Closing addresses were included in written submissions filed and exchanged on 29 June 2018. No reply submissions were file by either party.

II. Factual Matrix

The Claimant's Case

[7] The Claimant claims as the Executrix of the Estate of Eldon Springer. The Claimant and the Deceased resided together at LP 51 James Hinds Trace, Piarco Old Road, Red Hill, D'Abadie in a cohabitational relationship for a period of approximately 17 years prior to the date of his death on 4 May 2015. Prior to his death, the Deceased was diagnosed with colon cancer in or about 2012.

[8] The Claimant would take the Deceased to the Sangre Grande Health Clinic twice per month. On 5 February 2015, the Deceased requested the Claimant to contact an attorney-at-law to have a will prepared. The Deceased repeated this request on 27 February 2015 and the Claimant contacted an attorney-at-law, Mr. Beresford Charles, who visited their home and obtained instructions from the Deceased for the preparation of his Will.

[9] On 4 March 2015, Mr. Charles returned to the home of the Deceased and the Claimant for the due execution of the said Will by the Deceased. The said Will was read over to the Deceased in the presence of the Claimant and Mr. Charles. The Deceased approved the contents of the said Will. The witnesses, Bertie Andrews and Victor Andrews, arrived thereafter. The Deceased then executed the said Will in the presence of the witnesses who then signed the said Will in the presence of each other and in the presence of the Deceased.

[10] In the *March Will*, the Deceased bequeathed the following to the Claimant:
(i) his house at LP 51 James Hinds Trace, Piarco Old Road, Red Hill, D'Abadie;

(ii) all that parcel of land particularly described in Deed of Conveyance 20231 of 1998; (iii) all his monies in Scotiabank and Eastern Credit Union; and (iv) his motor vehicle PDB 3998. The Deceased also bequeathed all his monies in RBC Royal Bank to his nephew Collie Springer.

[11] In the month of April 2015, the health of the Deceased began to deteriorate drastically as he started speaking in a slurred manner and took longer to formulate his sentences. He had lost his appetite and began drinking food in liquid form. He hardly moved apart from going to the bathroom. From that time, the Deceased began spending the majority of the day lying in bed.

[12] On 16 April 2015, the Deceased was lying bed when the Defendant, his twin brother, Elton Springer, Lisa Rogers and Arthur Roberts visited the Deceased. The Defendant stated that she was taking the Deceased to a doctor. The Deceased complained and requested that the Claimant should accompany him. However, the Defendant objected and ordered Elton Springer to remove the Deceased from his bed. The Deceased resisted but Elton Springer overpowered him and placed him in the Arthur Roberts' vehicle. The Deceased, however, was not returned to his home on 16 April 2015. Arthur Roberts told the Claimant that the Deceased was in a safe place. The Claimant filed a missing person report at the Maloney Police Station on 17 April 2015.

[13] According to the Claimant, the Deceased was taken to another attorney-at-law two days after he was forcefully taken from his home by the Defendant. Therefore, the existence of a will in the above circumstances raises suspicion over the authenticity of the purported April Will. Accordingly, the Claimant averred that the execution of the April Will was procured by the undue influence of the Defendant over the Deceased.

The Defendant's Case

[14] On 15 April 2015, the Deceased's best friend, Arthur Roberts, visited the Defendant and told her that the Deceased wanted her to take him to the doctor and

see about some other things for him. The following day, 16 April 2015, the Defendant, Elton Springer and Lisa Springer visited the Deceased at his home to take him to the doctor. The Defendant and Elton Springer dressed the Deceased and Arthur Roberts put the Deceased in his vehicle. They all when to the doctor's office in Arima. The Defendant took the Deceased to the St. Thomas Emergency Medical Clinic where a doctor spoke with the Deceased in the presence of the Defendant. The Doctor examined the Deceased and determined that the Deceased was stable, of sound mind and was capable of making his own judgments. According to the Defendant, the Deceased refused to return to the house he shared with the Claimant upon his return from the Doctor's office.

[15] The Defendant alleged that the Deceased was of sound mind when he made the Will dated 18 April 2015. The Defendant averred that the Deceased listened whilst the contents of the April Will was read to him; that he approved the contents of the Will and affixed his thumb print to his last Will and Testament in the presence of two witnesses who then placed their signatures in the presence of each other and the Deceased.

[16] The Defendant pleaded that she had no influence undue or otherwise over the Deceased. The Deceased's decision to change his Will came after he found out that the Claimant had lied to him when she told him that one of the witnesses from his previous Will died and that he had to make a new Will.

[17] The Defendant denied that the Deceased's speech was slurred since he spoke normal to PC Bissoon who interviewed him on 18 April 2015 after the Claimant reported that the Deceased's whereabouts was unknown to her. The Defendant claimed that while the Deceased spent the majority of time in his bed in the latter days of his illness, he was able to move about if he wanted and usually did so when his friends were allowed to visit him.

III. Issues

[18] Having considered the pleadings, evidence and submissions, I am of the view that the sole issue to be determined is *whether the Court should pronounce in favour of the force and validity of either the Will dated 4 March 2015 or the Will dated 18 April 2015.*

[19] In arriving at its decision, the following sub-issues arise for determination:

1. *Has the Defendant, as the party propounding the Will dated 18 April 2015, discharged the onus of proving that the said Will had been executed as required by law?*
2. *Did the Deceased have the requisite testamentary capacity and knowledge and did he approve of the contents of the Will dated 18 April 2015?*
3. *Was the execution of the Will dated 18 April 2015 obtained by undue influence over the Deceased?*
4. *Has the Claimant, as the party propounding the Will dated 4 March 2015, discharged the onus of proving that the said Will had been executed as required by law?*
5. *Did the Deceased have the requisite testamentary capacity and knowledge and did he approve of the contents of the Will dated 4 March 2015?*
6. *Was the execution of the Will dated 4 March 2015 obtained by undue influence over the Deceased?*

IV. Law

[20] The legal requirements for the validity of a Will are set out both in statute and in common law. **Section 42 of the Wills and Probate Act Chap. 9:03** requires a will to be made in writing and signed at the foot or end of the document by the testator. The execution of the will must be witnessed by two persons who must sign at its foot in the presence of each other at the same time and in the presence of the testator.

[21] Stollmeyer J (as he then was) in **Doreen Fernandes v Monica Ramjohn Nadeau et al**³ on the issue of testamentary capacity; knowledge and approval stated as follows:

“The requirements for testamentary capacity and for knowledge and approval are separate (see Hoff v. Atherton paragraphs 33 and 62). Testamentary capacity, which the Claimant must show in this case, requires the capacity to understand (in the sense of the ability to do so) certain important matters relating to a will namely: the nature of the act and its effects, and the extent of the property being disposed of. The testator must also be able to comprehend and appreciate the claims to which he might give effect. (Hoff v. Atherton paragraphs 33 and 34, referring to Banks v. Goodfellow (1870) LR 5QB 549 at 565).

"If there is evidence of actual understanding then that proves the requisite capacity. If not, then a court must look at all the evidence to see what inferences can properly be drawn as to capacity. Such evidence may relate to the execution of the will but it may also relate to prior or subsequent events. It would be absurd for the law to insist in every case on proof of actual understanding at the time of execution"

Knowledge and approval requires proof of actual knowledge and approval of the contents of the will (Hoff v. Atherton paragraph 33). This is a further and a separate test (Hoff v. Atherton at paragraph 27). There will be cases in which a testator will not be found to have testamentary capacity in the absence of an explanation to him of the requirements for testamentary capacity, or at least the requirement that he comprehend and appreciate the claims to which he might give effect.

"Further, it may well be [per Chadwick JA at paragraph 64 of Hoff v. Atherton] that where there is evidence of a failing mind - - and, a fortiori where evidence of a failing mind is coupled with the facts

³ CV2006-00305

that the beneficiary has been concerned in the instructions for the will - - the court will require more than proof that the testator knew the contents of the document which he signed. If the court is to be satisfied that a testator did know and approve the contents of his will - - that is to say, that he did understand what he was doing and its effect - - it may require evidence that the effect of the document was explained, that the testator did know the extent of his property and that he did comprehend and appreciate the claims on his bounty to which he ought to give effect. But that is not because the court has doubts as to the testator's capacity to make a will. It is because the court accepts that the testator was able to understand what he was doing and its effect at the time he signed the document, but needs to be satisfied that he did, in fact, know and approve the contents - - in the wider sense to which I have referred."

[22] Stollmeyer J (as he then was) in **Marilyn Lucky v Maureen Elizabeth Thomas-Vailloo**⁴ on the burden of proof stated as follows:

*"The onus of approving that a will being propounded was executed as required by law lies upon the party propounding it. The onus is a shifting one. It is for the person propounding the will to establish a prima facie case by proving due execution. If the will is not irrational, and was not drawn by the person propounding it and benefiting under it, the onus is discharged unless or until, by cross-examination of the witnesses, or by pleading and evidence, the issue of testamentary capacity or want of knowledge and approval is raised. The onus on these points is then again upon the person propounding. As to other allegations, the onus is, generally speaking, on the party making them. See **Tristram & Coote's Probate Practice 28th Ed. para. 33.06***

...

⁴ H.C.A. No 1396 of 1996

The burden of proving the affirmative allegations impeaching the will where the fault does not lie with the testator e.g. undue influence or fraud, is upon the party making them. This applies notwithstanding that the party propounding the will still has the burden of satisfying the Court as to due execution, for this remains an essential matter whatever other issues may be raised in the suit.”

[23] **Williams on Wills**⁵ 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 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 LR 1P&D 481:

‘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.’

[24] The authors on **Williams on Wills** continued 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.

⁵ 9th Edition

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 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 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...”

[25] Madam Justice M. Mohammed in **Nandlal and another v Nandlal**⁶ described the test of undue influence in probate matters as follows:

“The test of undue influence in probate is different from the equitable presumption since there is no presumption of undue influence in testamentary matters⁷. Undue influence, in order to render a will void, must be an influence which can justifiably 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 mean⁸. Not all

⁶ CV2018-04694

⁷ Per Lord Cranworth in *Boyse v Rossborough* (1857) 6 HL Cas 2, 48 at 51

⁸ Privy Council decision in *Craig v Lamoureaux* (1920) AC 349 at 357

*influence is undue influence. Even very strong persuasion and 'heavy family pressures' are not, of themselves, sufficient*⁹.

[26] Stollmeyer J in **Lucky v Thomas-Vailloo** (*supra*) further summarized the principles that dictate how the Court is to approach a will and any challenge to a will at page 16 of the decision as follows:

- “1. The onus of proving a will as having been executed as required by law is on the party propounding it;*
- 2. There is a presumption of due execution if the will is, ex facie, duly executed;*
- 3. The force of the presumption varies depending upon the circumstances. The presumption might be very strong if the document is entirely regular in form, but where it is irregular or unusual in form, the maxim omnia praesumuntur rite esse acta cannot apply with the same force, as for example, would be the case where the attestation clause is incomplete;*
- 4. The party seeking to propound a will must establish a prima facie case by proving due execution;*
- 5. If a will is not irregular or irrational, or not drawn by a person propounding the will and benefitting under it, then this onus will have been discharged;*
- 6. If either by the cross-examination of witnesses, or the pleadings and the evidence, the issues of either testamentary capacity or want of knowledge and approval are raised, then the onus on these issues shifts again to the party propounding the will;*
- 7. Even if the party propounding the will leads evidence as to due execution, there is still the question of whether the vigilance and*

⁹ Munby QC in *Governor & Company of the Bank of Scotland v Bennett* [1997] 1 FLR 801 at pages 822E-826 F

suspicious of the court are aroused. If so, then the burden once again reverts to the party seeking to propound;

8. The onus as to other allegations such as undue influence, fraud, or forgery, generally lies on the party making the allegation.”

V. Analysis

[27] In summary, the testator must have had testamentary capacity at the time he made the Will. He must have known and approved of the contents of the Will at the time he made it. The Will must *not* have been prepared or executed in suspicious circumstances. In appropriate cases, a medical certificate should be obtained. The burden is on the party propounding the will to show the testator knew and approved of the contents of the Will. The court must carefully examine the circumstances relating to the preparation and signing of the will.

[28] There are two Wills before the Court. However, both Wills cannot exist simultaneously. **Section 50 of the Wills and Probate Act, Chap 9:03** provides for the revocation of a will in a prescribed manner. **Section 50 of the Wills and Probate Act** reads as follows:

“50. Save as in section 48 provided, no Will or any part thereof shall be revoked otherwise than by another Will executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same and executed in the manner in which a Will is required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator or by some person in his presence and by his direction, with the intention of revoking the same.”

[29] Accordingly, **section 50 of the Wills and Probate Act** provides that a will can be revoked by a later will once duly executed as required by law. However, there must be an intention to revoke the previous will – *animus revocandi*. This intention may be expressed or implied. An express revocation arises where a later will contains a **revocation clause** – a clause which is usually at the beginning of

a will stating that the testator revokes all former wills. In the later *April Will*, a revocation clause is included in the following terms:

“I HEREBY REVOKE ALL former Wills and testamentary dispositions heretofore made by me and declare this to be my Last Will and Testament.”

[30] By the inclusion of this revocation clause in his Will, there is a presumption that the Deceased intended to revoke his earlier *March Will*. However, this presumption is rebuttable by evidence of contrary intention. Nonetheless, there was no evidence of a contrary intention before the Court to rebut this presumption.

[31] Nevertheless, the *April Will* would have to be validly executed in order to revoke the *March Will*. Therefore, if this Court declares the *April Will* to be validly executed that would be the end of this matter. The *March Will* and all other earlier testamentary dispositions would be revoked. If the *April Will* is not valid, then the validity of the *March Will* must be examined to determine whether the Court should propound that Will or allow the laws of intestacy to apply.

Issue 1: Has the Defendant, as the party propounding the Will dated 18 April 2015, discharged the onus of proving that the said Will had been executed as required by law?

[32] The Defendant is the proponent of the second Will dated 18 April 2015, therefore, she has the burden to prove that it was lawfully executed. The evidence of the execution of the April Will came from the Defendant, Lisa Springer and Arthur Roberts. The Defendant’s evidence is that she contacted an attorney-at-law, Ms. Ann Marie Phillip, who visited her sister’s home with an assistant, to take the Deceased’s instructions to prepare a Will for him. Ms. Phillip left and returned with the assistant. The Will was executed by the Deceased in the presence of Arthur Roberts and Ms. Phillip’s assistant.

[33] Arthur Roberts' evidence is that Ms. Phillip and her assistant visited the Deceased at Ms. Springer's home. Ms. Phillip spoke to the Deceased. She and her assistant left and returned with a typed up will. Ms. Phillip read over the Will to the Deceased in his presence. The Deceased then executed the Will in his presence and in the presence of Ms. Phillip and Ms. Phillip's assistant, Ms. Naomi Martinez-Cust, by affixing his right thumb print to the document. He (Arthur) and the assistant (Naomi) then signed their names to the bottom of the Will in the presence of each other and the Deceased. According to Ms. Springer, a lawyer with her assistant came to her home on 18 April 2015. They left and returned with a document which she knew was a Will. The Deceased executed the Will using his thumbprint in front of the lawyer's assistant and Arthur Roberts.

[34] An examination of the April Will shows it *ex facie* to be duly executed. The Deceased's thumbprint is affixed at the foot of it. The attestation clause is in the usual and regular form. The signatures of the two attesting witnesses follow the mark of the testator. The April Will is not on its face irrational or irregular.

[35] However, the Deceased affixing his thumbprint to the *April Will* some forty-four days after signing the *March Will* raises suspicion in the Court's mind. This suspicion, however, has been dispelled by evidence adduced in support of the Defendant's case. The Deceased gave instructions for a Power of Attorney to be executed in favour of Arthur Roberts. By Power of Attorney registered as DE201501026673 and dated 20 April 2015, the Deceased appointed Arthur Roberts to be his lawful attorney. The Deceased also affixed his right thumbprint to this document just two days later. The Court notes that the Claimant has not challenged this Power of Attorney before the Court. Nevertheless, a testator's thumbprint constitutes a valid signature under the **section 42 Wills and Probate Act**: [See **In the Estate of Finn**¹⁰]. Nevertheless, there is no specific pleading by the Claimant challenging the deceased's right thumbprint as a valid signature on the Will.

¹⁰ [1935] 105 L.J.P. 36

[36] Having regard to the above, the Court finds that the Defendant has discharged her burden of proving that the *April Will* was duly executed as required by law.

Issue 2: Did the Deceased have the requisite testamentary capacity and knowledge and approval of the contents of the Will dated 18 April 2015?

[37] The Claimant set out a plea of undue influence in her Amended Statement of Case but not as to lack of testamentary capacity and want of knowledge and approval as it relates to the April Will. In that regard, the Court did not find it proper to construe the existing plea in the Claimant's Amended Statement of Case to include one of lack of testamentary capacity and knowledge and approval. Consequently, any submission that is so included that I should determine such an issue must fail as such pleas must be specifically pleaded and proved and of which particulars must be provided.

[38] In any event, there is no evidence before the Court which shows that the Deceased lacked the requisite testamentary capacity and knowledge and approval of the contents of the *April Will*.

Issue 3: Was the execution of the Will dated 18 April 2015 obtained by undue influence of the Defendant?

[39] As stated above, the onus of proving allegations such as undue influence, generally lies on the party making the allegation. Therefore, the Claimant has to prove that the Defendant exerted undue influence over the Deceased in executing the April Will. The Claimant set out the particulars of undue influence in her Amended Statement of Case as follows: (a) the Deceased was frail and did not have the mental capacity at the time the purported will was made to understand and/or approve its contents; (b) the purported will was made two days after the Defendant forcefully removed the Deceased from his home with the Claimant; (c) the Defendant forcefully removed the Deceased from his home; (d) the Defendant never informed the Claimant of the whereabouts of the Deceased after removing

the Deceased from the home of the Claimant; and (e) the Deceased died unknown to the Claimant who was only informed of his passing after his death.

[40] With respect to the mental capacity of the Deceased and understanding and approving the contents of the Will, this assumes testamentary capacity and is different from undue influence. Knowing and approving of the contents of the Will means that the dispositions made reflect the free intentions of the deceased. See **Moonan v Moonan (1963) 7 WIR 420**. As it relates to undue influence in probate matters, the essence of undue influence is coercion – coercion inducing the making of the dispositions by the Will under challenge: **Moonan**.

[41] The evidence led by the Claimant was that on 16 April 2015, the Defendant, Elton Springer, Lisa Springer and Arthur Roberts visited their home. The Defendant indicated to her that she was taking the Deceased to the doctor. However, the Deceased did not want to go and he resisted all efforts to persuade him to leave the home to go to a doctor. However, the Deceased changed his mind when his twin brother, Elton Springer expressed annoyance. The Deceased requested that she (the Claimant) accompany the Deceased but the Defendant objected. Arthur Roberts carried the Deceased to his vehicle and they all left the home. The Deceased was not returned to their home on 16 April 2015. As a result, the Claimant visited the Maloney Police Station on 17 April 2015 and filed a missing person report.

[42] That was the extent of the Claimant's evidence as it related to undue influence over the Deceased. The Court is of the view that the Claimant has not led any evidence for the Court to be satisfied on a balance of probabilities that the Defendant exerted undue influence over the Deceased in executing the April Will.

[43] Moreover, on 18 April 2015, PC Sunil Bissoon visited the house where the Deceased was staying because of the report made by the Claimant; that he was taken out of the house against his will. PC Bissoon interviewed the Deceased and

told him of the report made. He stated that the Deceased told him that he did not want to see the Claimant and that he was not returning home. The Deceased repeated this to PC Bissoon when PC Bissoon told him that the Claimant had requested to speak to him. Thus, it can be safely concluded that the Deceased was not being held against his will by the Defendant.

[44] In that regard, the Court is of the view that the Defendant did not exert undue influence over the Deceased in executing the *April Will*.

[45] Having regard to the above, the Court finds that *April Will* is valid on its face and was duly executed as required by law. That being said, the Will dated 18 April 2015 is the last Will and Testament of the Deceased and revokes all other testamentary instruments of the Deceased including the Will dated 4 March 2015. However, for the sake of completeness, I will still consider whether the Will dated 4 March 2015 was duly executed.

Issue 4: Has the Claimant, as the party propounding the Will dated 4 March 2015, discharged the onus of proving that the said Will had been executed as required by law?

[46] The evidence about the execution of the March Will comes from the Claimant and Bertie Andrews. The Claimant's evidence was that she contacted Mr. Beresford Charles, an attorney-at-law, on 27 February 2015 who spoke to the Deceased and made arrangements to meet with the Deceased at their home. Sometime after, Mr. Beresford Charles visited the home and obtained instructions from the Deceased for the preparation of the Will. Mr. Charles returned on 4 March 2015 to execute the Will. According to the Claimant, the Deceased read the will in her presence and in the presence of Mr. Charles and approved the contents of the Will. Mr. Charles read the Will to Bertie Andrews whereas Victor Andrews read the will himself. Thereafter, the Deceased signed the Will in the presence of Bertie Andrews, Victor Andrews, Mr. Charles and the Claimant. Bertie Andrews and Victor Andrews then signed the Will in the presence of each other and in the presence of the Deceased.

[47] Bertie Andrew's evidence was that on 4 March 2015, he and his brother, Victor Andrews, visited the home of the Deceased. Mr. Andrews stated that when he arrived at the Deceased's home on 4 March 2015, he met the Deceased in the drawing room with Mr. Charles and the Claimant. Mr. Charles read the contents of the Will to Mr. Andrews. When Victor Andrews arrived at the home, he was given the Will to read for himself. Thereafter, the Deceased signed the Will in the presence of Mr. Andrews and his brother, Victor. Mr. Andrews and his brother, Victor, then signed as witnesses to the Will in the presence of the Deceased and in the presence of each other.

[48] An examination of the March Will shows it *ex facie* to be duly executed. It is signed at the foot of it. The attestation clause is in the usual and regular form. The signatures of the two attesting witnesses follow that of the testator. The March Will is not on its face irrational or irregular. The presumption of due execution therefore arises and has not, in my view, been rebutted by the *viva voce* evidence at trial.

[49] Having regard to the above, the Court finds that the Claimant has discharged her burden in proving that the March Will was duly executed as required by law.

Issue 5: Did the Deceased have the requisite testamentary capacity and knowledge and approval of the contents of the Will dated 4 March 2015?

[50] The Court wishes to highlight that the issue of lack of testamentary capacity on the part of the Deceased has not been pleaded as it relates to the March Will. In that regard, the Court did not find it proper to construe the existing pleas in the Defendant's Defence and Counterclaim to include one of lack of testamentary capacity. Consequently, any submission that is so included that I should determine such an issue must fail.

[51] Nevertheless, it is essential to the validity of a Will that the testator should know and approve of its contents. A duly executed will, rational on the face of it, is presumed in the absence of evidence to the contrary, to be that of a person of competent understanding. See *Symes v Green (1859) 1 Sw & Tr 401*. There is a presumption that a testator's execution of a Will is sufficient evidence of his knowledge and approval of its contents unless suspicion attaches to the document. See *Guardhouse v Blackburn (1866) LR1 P&D 109*.

[52] Where there is no question of fraud, the reading over of the Will to or by a capable testator, as a rule, is conclusive evidence of knowledge and approval of its contents, although, the firmness of this rule was questioned in *Fulton v Andrews (1875) LR 7HL 448*. If the manner in which the Will is read over is called into question, the presumption may be rebutted, but only by the clearest evidence. See *Gregson v Taylor [1917] P 256*.

[53] The Claimant's evidence is that on 5 February 2015, the Deceased requested that she get an attorney-at-law since he wanted to make a will. This request was repeated on 27 February 2015. The Claimant contacted Mr. Beresford Charles who spoke to the Deceased and visited their home to take instructions. Mr. Charles returned to their home on 4 March 2015 to have the will executed. At paragraph 5 of the Claimant's Amended Statement of Case, the Claimant pleaded that *March Will* was read over to the Deceased in her presence and in the presence of his attorney-at-law. The Deceased, thereafter, approved the contents of the said Will. However, at paragraph 8 of the Claimant's witness statement, she stated that the Deceased read the will in her presence and the attorney-at-law's and that he approved the contents of the will. In cross-examination, the Claimant maintained that the Deceased read the Will himself.

[54] Bertie Andrews' evidence is that on 4 March 2015, the Deceased told him that he wanted him to sign something but the Deceased did not tell him that it was a will. When he arrived at the Deceased's home, he was sitting in the drawing room with

Mr. Charles and the Claimant. The Deceased told him that he wanted him to witness his will. The Deceased asked Mr. Charles to read the will for Mr. Andrews. When Mr. Andrews' brother, Victor arrived, he was given the will to read. However, before the Deceased signed the will, Mr. Andrews asked him "is this what you want?" and the Deceased said "yes". However, in cross-examination of Bertie Andrews, he indicated that the attorney-at-law read the will for both he and the Deceased.

[55] It is the Defendant's case that the Deceased could not read or write properly but was able to sign his name. However, the Court took judicial notice of the fact that the Deceased had a driver's permit which was in the Claimant's possession. In order for the Deceased to obtain a driver's permit in this country, he must be able to read and write. In that regard, the Court does not accept that the Deceased could not read.

[56] Furthermore, the Deceased's physical and mental condition at the time of the *March Will* was not challenged in cross-examination and having regard to circumstances above, I am satisfied that the Deceased knew of, understood and approved the contents of the *March Will* at that time. Moreover, I have come to the conclusion that vigilance and jealousy do not excite the suspicions of the Court in all the circumstances.

[57] Having regard to the above, the Court is of the view that the Claimant has discharged her burden of proving that the Deceased knew of, understood and approved of the contents of the *March Will*.

Issue 6: Was the execution of the Will dated 4 March 2015 obtained by undue influence of the Defendant?

[58] The Defendant did not lead any evidence in support of her plea of undue influence. The burden of proving undue influence lies on the party alleging it, in this case, the Defendant, unless there is some presumption of undue influence on the part of the Claimant to be ascertained from all the circumstances.

[59] The Defendant pleaded that the Claimant exerted undue influence over the Deceased when she lied to him and told him that one of his witnesses to his previous will had died and that he had to make another will. The Defendant further pleaded that the Claimant exerted undue influence and coercion over the Deceased by isolating him from his friends and relatives as his condition worsened.

[60] The only evidence before me is from the Defendant who stated that the Deceased told her he had to make another will because one of the witnesses to the 2002 Will had died. She asked the Deceased if he wanted her to find out from the lawyer and he said yes. The Defendant saw Mr. Albert Edwards who prepared the 2002 Will and she learned that the witness to the 2002 Will was still alive. The Defendant stated that the Deceased was shocked to hear this and assured her that he would fix up his business. This was the extent of the Defendant's evidence as it related to undue influence over the Deceased at the time of the execution of the March Will. This evidence, in my view, does not give rise to any presumption of undue influence on the Claimant's part. In this regard, the plea of undue influence raised by the Defendant therefore fails.

[61] Having regard to the above, the Will dated 4 March 2015 is also valid on its face and was duly executed as required by law. However, both Wills cannot exist simultaneously. The Will dated 18 April 2015, therefore, revokes the Will dated 4 March 2015. In those circumstances, the Court will pronounce in favour of the force and validity of the Will dated 18 April 2015.

Issue of Costs: Entitlement

[62] On the question of costs, the general rule on the award of costs is that the Court must order the unsuccessful party to pay the costs of the successful party: **Part 66.6(1) of the CPR**. However, the Court is of the view that both the Claimant and the Defendant are partially successful on the Claim and the Counterclaim. Both parties were successful in establishing that the respective Wills sought to be propounded in solemn form of law were indeed validly executed. The both Wills

were found to be duly executed as required by law. Both the Claimant and the Defendant raised the issue of undue influence over the Deceased when he executed both Wills. However, they were unsuccessful in proving this issue. Nonetheless, the Will dated 18 April 2015 is considered to be the Last Will and Testament of the Deceased since it included an express revocation clause which would have effectively revoked the Will dated 4 March 2015. I have found that both parties were justified in interrogating the evidence surrounding the perceived suspicious circumstances under which the respective Wills were executed by the Deceased.

[63] In all of the above circumstances, applying the “*issue-based*” approach as recommended by Lord Woolf M.R. in **A.E.I. Rediffusion Music Ltd v Phonographic Performance Ltd [1999] 1 W.L.R. 1507, CA** instead of the “*winner-takes-all*” approach, and taking into account the factors set out in Part 66.6(4)(5) and (6) CPR 1998, I am of the firm view that there is sound basis and justification for departing from this general principle that costs follow the event. I am therefore of the opinion that the justice of the case, in terms of the issue of entitlement of costs, will be met by an order that each party bear its own costs of the Claim and Counterclaim, each having equally won and lost on the issues before the Court: [**Cantour Gaming Ltd v Game Account Global Ltd [2007] EWHC 1914 (Ch)** applied].

VI. Disposition

[64] Given the reasoning, analyses and findings above, the order of the Court is as follows:

ORDER:

- 1. The Claimant’s Amended Fixed Date Claim Form and Amended Statement of Case filed on 24 July 2017 be and are hereby dismissed.**

- 2. The Court hereby declares that the last Will and Testament of Eldon Springer is the Will executed on 18 April 2015.**

- 3. It is hereby ordered that the last Will and Testament of the Deceased dated 18 April 2015 be propounded in solemn form of law and admitted to probate as the last valid Will and Testament of the Deceased, Eldon Springer.**

- 4. Each party shall bear her own costs of the Claim and the Counterclaim.**

Robin N. Mohammed
Judge