

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2016-02366

IN THE MATTER OF THE WILLS AND PROBATE ACT

AND

IN THE MATTER OF THE ESTATE OF THOMAS SANDY DECEASED

AND

**IN THE MATTER OF AN APPLICATION BY THE CLAIMANTS FOR A DECREE
PRONOUNCING AGAINST THE VALIDITY OF THE ALLEGED WILL OF THOMAS
SANDY DECEASED IN THE POSSESSION OF THE FIRST DEFENDANT**

BETWEEN

DOROTHY SANDY

First Claimant

SUZANNE SANDY

Second Claimant

TREVOR SANDY

Third Claimant

CARL SANDY

Fourth Claimant

AND

JOELLE CARMINO-BANNATYNE

First Defendant

EMMA CARMINO

Second Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: January 14, 2019

Appearances:

Claimants: Ms. D. Moore-Miggins

Defendants: Mr. P. Lamont instructed by Ms. M. Harper

Judgment

1. This claim is about the validity of the purported Last Will and Testament executed on June 26, 2015 by Thomas Sandy (“the deceased”) who died on February 6, 2016. The first claimant, Dorothy Sandy (“Dorothy”) is the former wife of the deceased. The second claimant (“Suzanne”), the third claimant (“Trevor”) and the fourth claimant (“Carl”) are the children of Dorothy and the deceased.
2. Dorothy and the deceased were married in the United Kingdom. They visited Trinidad in or around 1993 and purchased a leasehold interest in a parcel of land situate at 133E Cedar Hill Road, Claxton Bay (“the land”). In or around 1996, they constructed a dwelling house upon the land and a second dwelling house was constructed a few years later. The parcel of land and the houses will hereinafter be referred to as the property.
3. By deed of assignment dated July 5, 1996 and registered as 13871 of 1996 (“the 1996 deed”), Dorothy and the deceased as Lessees of the land assigned the property to themselves and to their children as joint tenants. In or around 2005, Dorothy and the deceased were divorced and she returned to the United Kingdom leaving the deceased to reside alone at the property.
4. By the purported will, the deceased appointed the first defendant, Joelle Carmino-Bannatyne (“Joelle”) as his executrix. He purported to bequeath his share in the property to the second defendant, Emma Carmino (“Emma”). He also purported to make further devises to other family members. Emma alleges that she is the lawful daughter of the deceased. However, she has not provided the court with any documentation to prove

that she is the daughter of the deceased. Also, she has never done a paternity test. Joelle is the daughter of Emma.

5. The claimants dispute the validity of the purported will on the following grounds;
 - i. The deceased was eighty-six years of age at the date of execution of the purported will and was blind, medicated and incapacitated. As such, it is the claim of the claimants that the deceased was neither of sound mind, memory and understanding nor did he have the mental competence to execute the purported will.
 - ii. The signature does not appear to be that of the deceased;
 - iii. The name of the deceased's grandson is "Luke Austin" not "Luke Sandy" and the deceased was very much aware of the name of his grandson at least up to two years prior to his death;
 - iv. There is nothing to show on the face of the purported will that the deceased was blind or visually impaired or had difficulty reading;
 - v. There is nothing to show on the face of the purported will that same was read over to the deceased and that he appeared to understand the contents thereof and approved same;
 - vi. There is nothing to show on the face of the purported will that the deceased was eighty-six years of age at the time and that he was seen by an appropriate medical professional who certified that he was mentally competent to make a purported will;
 - vii. There is nothing to show on the face of the purported will the place where it was executed; and
 - viii. The deceased was aware from the year 1996 (the date of the deed) and up to about two years before he allegedly executed the purported will that if he pre-deceased the claimants, he would

have no share in the property at the date of his death to bequeath to anyone.

6. Consequently by Claim Form filed on July 14, 2016 the claimants seek the following relief;

- i. A declaration that the purported will is null and void;
- ii. A declaration that the deceased did not have testamentary capacity to execute the purported will and/or that the purported will is invalid for want of knowledge and approval;
- iii. A declaration that the purported will was obtained by the undue influence of the defendants together and/or separately;
- iv. Alternatively, a declaration that the purported will did not comply with the Wills and Probate Act Chapter 9:03;
- v. A declaration that the claimants are by the doctrine of survivorship the lessees of the property and that the deceased's share was completely extinguished upon his death;
- vi. A declaration that the deceased died intestate in respect of the proceeds of his bank account and all his assets (save and except the property) and that those proceeds and assets are to be distributed in accordance with the rules of intestacy;
- vii. An injunction restraining the defendants whether by themselves and/or agents from entering and/or remaining on the property and/or purporting to act in a way in accordance with the purported will;
- viii. An order that the defendant do account for the assets of the deceased collected by her subsequent to the death of the deceased.

7. By Defence and Counterclaim filed on February 10, 2017 the defendants counterclaim for the court to pronounce for the force and validity of the purported will as it is their case that the deceased was alert, clear, logical, coherent and was possessed of the relevant mental capacity at the time of execution of the purported will. According to the defendants, by deed of conveyance dated March 14, 2013 and registered as DE201300874318D001 (“the 2013 deed”), the deceased conveyed his undivided one fifth share of the property to Emma and by that act severed the joint tenancy.

8. The defendants have however applied by way of their submissions to withdraw their counterclaim. No such withdrawal was sought prior to the close of the case for the defendants and the inclusion of same in submission is somewhat procedurally odd.

ISSUES

9. The issues to be determined by this court are as follows;
 - i. Whether the defendants can withdraw their counterclaim at this stage of the proceedings;
 - ii. Whether the defendants are the propounders of the purported will;
 - iii. Whether the purported will of the deceased was validly executed in accordance with the Wills and Probate Act, Chapter 9:03;
 - iv. Whether the deceased knew and approved of the contents of the purported will;
 - v. Whether the deceased possessed the testamentary capacity to execute the purported will;

- vi. Whether there were suspicious circumstances surrounding the preparation and execution of the purported will;
- vii. Whether the purported will was obtained by undue influence; and
- viii. Whether Deed dated March 14, 2013 and registered as DE201300874318 severed the joint tenancy between the claimants and the deceased in relation to the property.

Case for the claimants

- 10. The claimants called two witnesses, Suzanne Sandy (“Suzanne”) and Claude Horace Austin (“Claude”).
- 11. Suzanne is a Retirement Housing Manager. Suzanne, Trevor, Carl and Dorothy (hereinafter collectively referred to as “the claimants”) reside in the United Kingdom (“UK”). During cross-examination, Suzanne testified that the last time she visited Trinidad was in or about 2000. She further testified during cross-examination that she does not currently have friends or family residing in Trinidad. That most of her family in Trinidad have since died. As set out above, Dorothy is the former wife of the deceased.
- 12. In 2005, after she and the deceased were divorced, Dorothy returned to the UK leaving the deceased to reside at the property. During cross-examination, Suzanne testified that the deceased did not inform her that after his divorce with Dorothy he in fact sold the house in which they lived during the marriage. She further testified during cross-examination that she was unaware that after the divorce, the deceased took his portion of the property and built the other house. Moreover during cross-examination, she testified that she did not put any money towards building the house on the property and/or purchasing the land.

13. Suzanne testified that the deceased travelled to the UK about twice per year up to 2014. While the deceased was in the UK he would visit her and the other claimants, although his health was deteriorating each year. Suzanne and the other claimants always made time to see and interact with the deceased so long as they were aware of his visit. The deceased may have chosen to visit the UK without telling the claimants but Suzanne did not know him to do that.
14. Suzanne has always harboured a strong desire to retire to Trinidad and Tobago and to live peacefully on the property for the remainder of her life. As far as she is aware, Dorothy and her siblings have the same desire.
15. In 1998, one of the legs of the deceased was amputated due to poor blood circulation. He was also a diabetic and a heavy smoker. In 2012 the deceased's health deteriorated further in that his eye sight deteriorated to the point where he was almost blind.
16. Suzanne became aware of the aforementioned because when the deceased visited the UK in 2011, he stayed with her brother and she. According to Suzanne, the deceased was unable to read statements and other documents including the newspapers. She had to personally read various documents to the deceased. She testified that the deceased at times did not appear to comprehend what she was reading or saying to him. It was her testimony that his sight and his health had deteriorated considerably. Suzanne had to cook and perform all of the deceased's daily ablutions for him as he was unable to do same for himself. She testified that the deceased had to eventually hire domestic assistance as he was unable to attend to his needs because his mobility, strength, sight and memory were severely impaired.

17. In 2014, Suzanne and the other claimants received what purported to be a draft Deed of Gift¹ prepared by an Attorney-at-Law, Ms. Terese Lucio-Barrow on behalf of the deceased for their execution. This deed of gift as drafted would have conveyed the claimants' share in the property to the deceased. The claimants refused to execute the deed of gift. Suzanne testified that there was no prior discussion with her or with any of the other claimants about this proposed deed of gift. She further testified that it is not true that she and the other claimants were favourably disposed to giving their interest in the property to the deceased.
18. Sometime after Dorothy and the deceased got divorced, Suzanne became aware that the deceased was being cared for by the defendants. According to Suzanne, the defendants were both responsible for cooking the deceased's meals, bathing him, administering his medication, keeping the house clean and generally attending to the deceased's physical needs. Suzanne further testified that she has never met the defendants. That she only spoke to them on the phone on a couple of occasions.
19. According to Suzanne, Emma and her husband visited the UK in 2014. Whilst Emma was in the UK, she called Suzanne and told her that she and her siblings had to sign over their share of the property as the deceased's pension had stopped. Suzanne testified that before this Carl, Trevor and she had not heard of or even seen Emma, her husband and Joelle.
20. According to Suzanne, she tried on numerous occasions to have the deceased admitted to a care home in Trinidad however Emma did not allow it. She testified that when she told Emma that the deceased had money to go into a care home, Emma stated "*what's it got to do with you?*"

¹ A copy of this deed of gift was attached to Suzanne's witness statement at "B".

21. Suzanne testified that from 2014, the deceased was unable to leave his room or move around the house without the aid of one or both of the defendants. Suzanne was aware that the deceased came to rely on the defendants completely and that he was physically and mentally dependent on them for his everyday needs. During cross-examination, Suzanne testified that the deceased never informed her that he was unable to leave his room or that he came to rely upon the defendants completely.

22. As far as Suzanne was aware, there was no other relative of the deceased living close to him in Trinidad. The defendants practically lived at the property or spent extensive periods of time there. She testified that it was during this period of time that the deceased purported to make the will. During cross-examination, Suzanne testified that the deceased never informed her that the defendants practically lived at the property or that they spent extensive periods of time there.

23. Suzanne testified that the deceased did not make the purported will of his own free will because during the period of time the purported will was executed, the defendants exerted tremendous influence and/or pressure on the deceased to make the purported will contrary to his own wishes and desires. According to Suzanne, the following particulars show that the deceased never had any desire or wish to divest her and the other claimants of their share in the property;

- i. The deceased stated over the years that it was his intention for the claimants to inherit the property. This intention was evidenced by the 1996 deed.
- ii. After being divorced from Dorothy the deceased took no steps to divest her of her share in the property;

- iii. The deceased continued to visit the claimants up to the year 2014 when he became unable to;
- iv. It was not until 2014 when the deed of gift was received by the claimants, that the deceased appeared to want to obtain the property for himself alone. At this time, the defendants had entered into his life and his health and mental state had deteriorated to the point where he could not understand the full import and meaning of the purported deed of gift and the defendants influenced him to prepare same.

24. In 2014, Emma informed the claimants that she was the child of the deceased and that Joelle was his granddaughter. As this was the first time Suzanne was hearing of this, she challenged same and demanded that Emma take a paternity test. However, Emma never complied with Suzanne's demand. This of course resulted in conflict between the claimants and the defendants. On several occasions when Suzanne telephoned to speak with the deceased, either of the defendants would simply hang up the phone without allowing her to speak to the deceased.

25. Suzanne testified that as far as she is aware, the deceased died on February 6, 2016 without severing the joint tenancy or otherwise disposing of his share interest in the property. She further testified that the defendants are claiming that the deceased conveyed his undivided one fifth share of the property to Emma by the 2013 deed. However, according to her the deceased was not mentally capable of signing any will or deed or of making any decision affecting his property rights and interests or the disposition of his property. It was the testimony of Suzanne that the deceased was not certified as mentally capable of signing the deed. Consequently, it was her evidence that the deed was not a deed of the deceased and/or that he was pressured and/or influenced by the defendants to make the deed.

26. Suzanne was not aware that the deceased had died until she contacted the San Fernando General Hospital and a staff member so informed her. This was about two days after the deceased passed away. Further, the deceased was buried without the knowledge of the claimants. As such, Suzanne testified that neither she nor the other claimants were given the opportunity to attend his funeral or pay their last respects to the deceased. Although the defendants did not contact the claimants in the UK, they contacted the deceased's pension fund managers in England and later submitted documents claiming a refund of the funds allegedly spent on the deceased's funeral. Suzanne testified that the managers refused to pay the defendants' claims and sent the claims to her.²

27. Suzanne has seen a copy of the purported last will and testament of the deceased.³ In this purported will, the deceased named Joelle as the sole executrix. The deceased purported to bequeath his share in the property to Emma. Further, the deceased purported to make other devises to other family members and to his care giver.

28. According to Suzanne, neither Mr. Moore, the attorney-at-law who prepared the purported will, his legal clerk nor the deceased's domestic assistant possessed the requisite expertise to determine or assess the deceased's metal capacity to make a purported will or to sign a deed.

29. Suzanne is unaware of any joint accounts Emma held with the deceased at the HSB Bank.

30. **Claude**, a Construction Glazing Manager is Suzanne's partner. He resides in England. He knew the deceased for over twenty years prior to his death.

² A copy of the claims was annexed to Suzanne's witness statement at "C".

³ A copy of the purported will was annexed to Suzanne's witness statement at "D".

Claude testified that he observed that the deceased's health began to deteriorate after he lost his leg in 1998.

31. On the deceased's last visit to the UK in 2014, Claude went to collect him from where he was staying with Emma. Claude was shocked at how poorly the deceased looked. He testified that the deceased had lost a lot of weight and that his sight was more or less gone. That the deceased needed help to do almost everything. Claude had to carry him downstairs to his vehicle from the first floor apartment in London. Claude testified that as the defendant had lost so much weight, it was like carrying a small child.

32. According to Claude, the deceased was always a good conversationalist. However, he found that the deceased was getting confused, forgetful, rambling and struggling to hold a conversation. The deceased kept referring to when he worked for British Rail and when he lived in Crofton Park both of which occurred a very long time ago and had no connection to what he was speaking about. Claude testified that deceased's mental and physical health had deteriorated considerably and so did his eye sight.

33. When Claude returned the deceased to where he was staying with Emma, he (Claude) had to literally carry the deceased upstairs on his back. Before Claude left, Emma asked him to ask Suzanne and Dorothy to sign the deeds to the property. Claude told Emma that that was the personal business of Suzanne and her family and that he had no dealings with that.

34. During cross-examination, Claude testified that when he saw the deceased, he did not give him any material to read.

The case for the defendants

35. The defendants called four witnesses, Emma, Kenneth Peter Rush, Judy Bailey-Lewis and Mr. Anthony J. Moore.
36. Emma resides at No. 20 Sam Boucaud Gardens, Santa Cruz. She is a retired Accounts Clerk. She testified that she is the lawful daughter of the deceased. During cross-examination, Emma accepted that she does not have any documentation to show that she is the daughter of the deceased. She further testified during cross-examination that she has never done a paternity test. Emma's mother was never married to the deceased.
37. The deceased lived in Boissiere, Maraval. Emma testified that the deceased was also her friend and that they discussed all personal things. She cannot recall the deceased visiting her at her mother's home in Boissiere Village, Maraval. However, she recalls when the deceased left Trinidad in 1961 to reside in England she was about ten or eleven years of age at that time. She testified that she believes that the deceased married Dorothy in 1963 and that Dorothy was a Jamaican citizen.
38. According to Emma, when the deceased visited Trinidad, she saw him. When he and her aunt, Elena visited her, they brought for her gifts such as clothes, shoes and other personal effects.
39. Emma first met Dorothy at the property at Bryan's Gate, La Romaine when she came to Trinidad to live. However, she met Suzanne before when Suzanne first came to Trinidad on vacation. Emma testified that Suzanne was about ten or eleven years of age. During cross-examination, Emma testified that she met Suzanne again in 1989 or 1990 when the deceased had an operation on his leg and Suzanne visited him whilst he was in the hospital.

40. According to Emma, the deceased and Dorothy were separated in 2001. She testified that the deceased returned to Trinidad and that he eventually filed divorce proceedings against Dorothy in 2004. That when the deceased returned to Trinidad, he built his own home on the land which he owned jointly with the claimants. At that time the deceased had already suffered the loss of his left leg.
41. Emma became involved in the day to day care of the deceased. The major problem faced by the deceased was his failing eyesight. That he was walking around up to December, 2015 or January, 2016. She further testified that she engaged the services of geriatric care-givers to take care of the deceased during the period of October, 2013 to September, 2015. That at no time was the deceased cared for by her daughter, Joelle. Sally was the first Elderly Caregiver. Sally cooked and cleaned for the deceased. However, Sally's services came to an end when she discovered she had a terminal illness. Thereafter, Emma engaged the services of Judy Bailey-Lewis ("Judy") who served the deceased up to September, 2015.
42. Emma testified that she and Joelle did not live at the deceased's home. That one Gaitre Pulchan ("Gaitre") a caretaker, and her husband, Freddie Pulchan ("Freddie") occupied the annex to the deceased's house. Gaitre and Freddie looked in on the deceased. Emma testified that it was Gaitre who called the neighbour Kenneth Peter Rush ("Kenneth") for assistance when the deceased collapsed at his home. Neither Emma nor Joelle was there at the deceased's home at the time. Emma was advised by the deceased's doctor, Dr. Indira Singh to call an ambulance (which she did) to take the deceased to the hospital. The deceased remained in the hospital until his passing on February 6, 2016.

43. According to Emma, in March of 2013 the deceased asked her and her husband, Joseph Carmino (“Joseph”) to take him to the office of an Attorney-at-law, Mrs. Merlin Boyce (“Mrs. Boyce”). At Mrs. Boyce’s office the deceased executed the 2013 deed which conveyed his interest in the property to Emma.⁴ As such Emma testified that she knew that the deceased conveyed his interest in the property to her. After the 2013 deed was registered Emma received a certified copy. She testified that the deceased told her that he wanted to give her his share of the property, that the house on the land was hers and that she can do what she wanted with it. However, it was her testimony that she in no way influenced the deceased to execute the 2013 deed. She further testified that the deceased was lucid, had a sharp intellect and was in full control of his senses. During cross-examination, Emma testified that the deceased had a good memory. That she got a letter from a doctor in 2014 before she went to England stating that the deceased was of sound mind.

44. Emma testified that although the deceased had failing eye sight due to the onset of glaucoma and had lost his leg due to circulation in the 1990’s, those medical issues did not deter him from taking care of his personal business as he would have driven himself around to the grocery, market, to pay his bills at T&TEC and WASA and to do his banking affairs up to 2013. Emma and Joseph would when required take the deceased to the bank to attend to his affairs. She testified that she paid for his electricity, telephone and WASA bills. She also paid for his groceries and for the maintenance of the outdoor grounds on the property. Further, she paid for his medical bills out of monies he received as pension from the UK.

⁴ A Copy of this deed was annexed to Emma’s witness statement at “A”.

45. In September, 2015 Emma and her husband took the deceased to England for medical treatment of his eyes and to have his prosthetic leg checked. On that visit to London, the deceased asked Emma to accompany him to his bank where he asked that her name be added to his account as a joint holder. Emma testified that at this time the deceased had already added her name as a joint holder on his bank account at Republic Bank Limited. On their return from England, Emma continued to visit the deceased every weekend to ensure that his needs had been properly met, to take groceries to him, to take him out for lunch or dinner and to generally supervise and do whatever was needed to be done in the house for his comfort. Emma testified that as far as she can recall the claimants never came to visit the deceased. During cross-examination, Emma testified that the deceased was relying upon her for almost everything. That he placed a lot of trust in her. She visited the deceased mostly on weekends. She would stay the weekend and return to her home on the Sunday.

46. During cross-examination, Emma testified that she and Joseph went to England with the deceased on two occasions. That she and her husband paid for their trip to England. She further testified during cross-examination that the purpose of their first visit to England was to ask the claimants to sell to their share in the property to the defendants land from them so that they could sell same as the deceased was unable to afford to maintain the property. She denied that she insisted that the claimants execute a deed.

47. During cross-examination, Emma testified that the deceased had an examination conducted on his eyes in Trinidad. She accepted that she has not presented any documentation to the court to show the results of that examination. She further testified during cross-examination that the deceased did have vision problems but that it was not serious problems.

That the deceased could have seen during the years 2013 and 2014. It was in 2015 when he came back from England he began having problems with his eye sight. Counsel for the claimants then put to Emma that the deceased's problems with his eye sight started way back and that is why it was addressed in England in 2014 and she agreed.

48. During cross-examination, Emma testified that when she and the deceased went to England in 2014, Claude did in fact visit where they were staying to collect the deceased. She however denied that she asked Claude before he left to ask Suzanne to sign the deed for the property. She further denied that the deceased had lost a lot of weight, his sight had more or less gone and that he needed help doing almost everything. She agreed that where she was staying was an upstairs place. She testified that Joseph had to lift the deceased from downstairs to reach the place where they were staying because it was twelve flights of stairs and there was no elevator. She further testified that the deceased could have walked on his own but that his leg was sweating. She denied that the deceased could not climb the stairs because he was frail and weak.

49. During cross-examination, Emma testified that she never saw the deceased confused, being forgetful or rambling. She denied that the deceased struggled to hold a conversation.

50. Emma did not know anything about the deceased making a will. She was not at his home when he executed the purported will. During cross-examination, Emma testified that the deceased was not medicated at the time when the purported will was executed. She denied that she pressured the deceased into making the purported will.

51. **Judy** is a fifty-four year old Geriatric Nurse. She has been a Geriatric Nurse for eight years. A friend of Judy's told her that Emma was looking for someone to take care of the deceased. The friend gave Emma Judy's number and Emma called Judy on March 15, 2015. After Emma and Judy spoke they met on the same day at Marabella. Emma and Joseph took Judy to the property.
52. Judy met with the deceased and they spoke for a few hours. She testified that the deceased was jovial, alert, articulate and fully engaged in the conversation. She further testified that the deceased was able to move on his own on crotches and with the assistance of his prosthetic leg. The deceased, Emma and Judy then spoke of the duties that Judy would perform for the deceased. It was agreed that Judy would cook, clean and administer the deceased's medication when needed. During cross-examination, Judy testified that she administered hypertension medication to the deceased. That the deceased was blind and had hypertension. Judy was informed by Emma that the deceased was blind.
53. According to Judy, as the deceased wanted to maintain his independence, he was solely responsible for bathing, dressing, using the bathroom facilities and feeding himself. Judy began working on March 16, 2015.
54. Judy worked between the hours of 9:00am to 3:00pm Monday to Friday. As such, it was her testimony that the deceased cared fully for himself from 3:00pm to 9:00am the next morning. Judy testified that on weekends, Emma and Joseph would care for the deceased. During cross-examination, Judy testified that she worked three days a week.
55. During the week Judy prepared breakfast for the deceased after which the deceased would sit in the living room and watch television while she

cleaned the house and prepared his dinner. Over time the deceased would often talk with Judy about his life and time in England, his children and their families.

56. Judy testified that shortly after she began working she observed that the deceased received telephone calls that would leave him upset. It was unknown to Judy who was calling. She often heard the deceased screaming at the person on the other line. The deceased would be visibly upset after taking the phone call. Judy would often have to calm him down after such a phone call. She testified that the phone calls persisted from the time of her employment in March to September, 2015.

57. In June, 2015 Judy was at the deceased's home when a lawyer came with another person and the deceased's son-in-law. She was however not present during the meeting. The deceased, the lawyer, the person and the deceased's son-in-law remained in the living room and Judy went to deceased's bedroom which is located to the back of the house. During cross-examination, Judy testified that the lawyer came to the deceased's home on two occasions. She was only present on one occasion as on the other occasion she had a day off.

58. **Kenneth** is a fifty-eight year old retired police officer. He knows Emma. He also knew the deceased from 1999. At that time the deceased lived at Bryan's Gate. Kenneth visited the deceased at Bryan's Gate a few times. He remembered when the deceased started to prepare the site on the land. Kenneth was born and bred in Claxton Bay and generally knows the area and the families in that community in Cedar Hill. He lives one hundred feet away from the deceased's residence.

59. According to Kenneth, the deceased always kept a record of what was happening when he was constructing his house on the land. He testified that the deceased was always very lucid. That the deceased drove his own motor vehicle. Kenneth visited the deceased regularly and on his visits he and the deceased would have long conversations. Kenneth testified that the deceased spoke about Emma whom he said was his daughter. He further testified that Emma was the only child who visited the deceased and took care of his physical and medical needs. Moreover, Kenneth testified that in September, 2015 Emma accompanied the deceased to England for medical care related to his eyes and general health care.

60. On one occasion, after the deceased had built his house on the land, Kenneth observed the deceased driving with a female sitting in the back of his vehicle. This was the first time Kenneth saw the deceased's wife. He testified that the deceased's wife did not live in the house with the deceased.

61. Kenneth testified that the deceased did complain about his eyes but that as far as he knows the deceased was never blind. The deceased told Kenneth that he would be going to England for assessment and treatment. Kenneth further testified that the deceased's eye problem affected his movement in and out of his residence. That the deceased had a driver named Joe who would take him around. The deceased sold his vehicle to Joe. Kenneth never saw the deceased smoking. During cross-examination, Kenneth denied that the deceased had to be lifted around.

62. According to Kenneth, Emma did not live at the deceased's home. He testified that Emma and Joseph would visit the deceased and that they would sometimes stay a day or a weekend. During cross-examination, Kenneth testified that Emma was by the deceased very often. Emma and

Joseph would always stop and visit Kenneth when they were in Claxton Bay. On one occasion, when Kenneth shared communion with the deceased, Emma and Joseph were there.

63. Kenneth testified that in the later part of 2015, the deceased's health appeared to have deteriorated. According to Kenneth at that time, the deceased was like a "shut in". He further testified that the deceased had a caretaker named Judy, who came in daily to assist him. That he had another lady who lived in the annex to his house who would look in on him. When the deceased collapsed at his home, the caretaker, Gaitre who lived on the deceased's premises called Kenneth who in turn called the EHS service.

64. **Mr. Anthony J. Moore** ("Mr. Moore") is an Attorney-at-Law employed with M.K. Harper & Co. Attorneys-at-Law. On May 7, 2015 the deceased telephoned the offices of M.K. Harper & Co to request the services of Mr. Moore for the preparation of the purported will. Mr. Moore agreed to meet the deceased at 10:00 am on May 19, 2015 at the property.

65. Mr. Moore testified that on his arrival at the deceased's residence on May 19, 2015, he was met by the deceased, Judy and the deceased's tenant. Mr. Moore further testified that there was no evidence of the defendants or any other party at the deceased's home at that time or at any of his subsequent visits. At the meeting, Mr. Moore observed that the deceased was a senior gentleman in his 80's, he had just one leg and that he was moving around the house on crutches. He further observed that the deceased had a wheelchair but that he was not using it at the time.

66. The deceased informed Mr. Moore that he had an amputation due to complications with diabetes and that he needed glasses to read. According

to Mr. Moore, the deceased seemed to hear him well and so he took the opportunity to ask him questions about his estate and possessions, his family and who he wanted to give his possessions to. Mr. Moore testified that at the time the deceased was alert, clear, logical and coherent. That the deceased appeared to fully understand his instructions, who he was benefitting and who he was excluding. Mr. Moore further testified that based on their conversation and the answers to his questions, he concluded that the deceased possessed the necessary mental capacity to execute the purported will. After their conversation and the taking of instructions, the deceased suggested that Mr. Moore visit the next week to confirm the instructions and to determine whether there were any changes that he (the deceased) would like to be made.

67. During cross-examination, Mr. Moore testified that he did enquire from the deceased whether he was taking any medication. He further testified during cross-examination that he did not see a reason to advise that the deceased be medically examined before the execution of the purported will.

68. During cross-examination, Mr. Moore testified that on May 19, 2015 was the first time he met the deceased. That although he was not the attorney for Emma, he knew of her as he was the attorney for her son. Mr. Moore now knows Emma as he subsequently prepared three agreements for Emma.

69. Further during cross-examination, Mr. Moore testified that he got the names "Luke Sandy" and "Suzzanie" from the deceased. That the deceased wrote the names of the beneficiaries for him on a piece of paper.

70. On June 22, 2015 Mr. Moore met with the deceased again at his residence.

On this occasion Mr. Moore took the draft purported will he prepared to go through same with the deceased. He testified that the deceased was cordial and engaging and regrettably informed him that there was one change that he wished to be made. This change was to include a gift to his care-giver who supported him faithfully. Notwithstanding the need to redo the instrument to cater for the amendment, Mr. Moore used the opportunity to read and go over the contents of the draft purported will with the deceased. He testified that as the deceased was again clear, logical and coherent, he was of the view that the deceased possessed the mental competency to execute the purported will. During cross-examination, Mr. Moore testified that the deceased did have on his glasses when the purported will was being read.

71. According to Mr. Moore, at that visit the deceased asked him whether the purported will could be challenged as he was convinced that his former wife and daughter, Suzanne would do so as they were not happy with his relationship with Emma. The deceased told Mr. Moore the events surrounding his relationship with Emma's mother, that he had abandoned Emma when the relationship had ended and migrated to England and so he now wished to leave something for Emma. The deceased further told Mr. Moore that he had already passed the property to Emma but that he wanted to be doubly sure that she would get what he wanted her to have. Mr. Moore advised the deceased that what he had done already was sufficient to achieve his wish as the title to the property had already passed and that it was very unlikely to be successfully challenged and reversed. The deceased reiterated that he wanted to be doubly sure.

72. After Mr. Moore completed the review of the first draft, he prepared the second purported will with the deceased which included the gift to the

deceased's caregiver. Mr. Moore testified that the deceased was satisfied with the changes and so was ready to execute the purported will then and there. However, Mr. Moore had to return to his office to have the purported will settled and printed and so made arrangements with the deceased to return on June 26, 2015 to have the purported will executed.

73. On June 26, 2015 Mr. Moore returned to the deceased's residence. He was accompanied by one of the legal secretaries at M.K. Harper & Co, Patricia Beharry ("Patricia") and by Joseph. Patricia agreed to witness the execution of the purported will and Joseph was present in the event Mr. Moore needed assistance as Judy had the day off. Mr. Moore testified that he and the deceased went over everything, that the deceased was satisfied and that as he was ready to sign, he asked for pen. The deceased executed the purported will in the presence of Mr. Moore and Patricia. Thereafter, Mr. Moore put the purported will in a sealed envelope and handed it to the deceased who promised that he would put it somewhere safe.

74. During cross-examination, Mr. Moore agreed that he did not record on the purported will that the deceased had appeared to understand the contents of same. That he has seen wills wherein attorneys recorded on same that the contents of the will was read over to the testator and that the testator had appeared to understand same. He also saw wills wherein it was recorded that the attorney was satisfied by seeing a certificate from a doctor that the testator had the mental competence to execute a will. Mr. Moore testified that he did not advise that a medical doctor should examine the deceased before the purported will was executed because he (Mr. Moore) was satisfied with the deceased's competency.

75. Moreover, during cross-examination Mr. Moore testified that he recorded that the deceased appeared to understand what he had signed. No such record has been placed before this court.

76. Sometime around February 6, 2016 Joseph informed Mr. Moore that the deceased had passed away.

Issue 1 - *whether the defendants can withdraw their counterclaim at this stage of the proceedings*

The submissions of the defendants

77. The defendants submitted that their own counterclaim appeared to be insufficient as there was no clause repeating and relying on the Defence, so that the Defence was not included in their counterclaim. The defendants further submitted that they did not plead that the purported will was duly executed, that the deceased knew and approved of the contents of the purported will and that the deceased possessed testamentary capacity to execute the purported will. The defendants also did not produce the original or even a copy of the purported will itself in their counterclaim. However, a copy of the purported will was annexed to an affidavit of testamentary scripts.

78. Consequently, the defendants submitted that as neither of them is a proper propounder of the purported will, the only reasonable thing to do is to withdraw their counterclaim. The defendants further submitted that as they no longer seek to propound the purported will and seek no orders of their own, the relief sought by the claimants appear premature. Moreover, the defendants submitted that where the claimants seek

premature declarations and there is no true propounder of the purported will, the burden of proving what is alleged by the claimants lies upon them. In other words, it was the submission of the defendants that in this case, the legal and evidential burdens of proof do not shift as is otherwise usual in probate matters but lie at all times upon the claimants.

The submissions of the claimants

79. The claimants submitted that based on the existence of the counterclaim there was little doubt that Joelle was the propounder of the purported will of the deceased as she and Emma had on various occasions held out the purported will as being valid and authentic.
80. The claimants submitted that the defendants cannot on their own volition simply withdraw their counterclaim at this or at any stage of the proceedings without the leave of the court to so do. This leave has neither been sought nor obtained. The claimants further submitted that the time for withdrawing the counterclaim (with or without the court's leave) has long gone. That there were several junctures along the way to trial where that could have been done.
81. According to the defendants, at this stage the entire case as presented by them and even by the defendants will be radically effected by the after the fact withdrawal of the counterclaim. The claimants submitted that they would have been denied the opportunity to adjust their case to meet the defendants' new case without the counterclaim. The claimants further submitted that the defendants have purported to withdraw their counterclaim but have not addressed the issue of costs payable to the claimants who have filed a reply and defence to counterclaim.

82. Additionally, the claimants submitted that the withdrawal of the counterclaim in these circumstances is tantamount to an amendment of the Defence and Counterclaim which is governed by all the requirements set out in the CPR Rules 20.1(3)(5) and (6). According to the claimants, the defendants have neither addressed those requirements in their submissions nor can they do so now as the time for doing so has gone.

Findings

83. The court recognizes that a defendant may at any stage of the proceedings seek to discontinue his claim or counterclaim and that same can only be done with permission in the appropriate circumstances. This is one of those circumstances where leave is required.

84. The court is however of the considered view that it is disingenuous of the defendants at this stage to withdraw their counterclaim after having been party to a trial in which the issues were defined by not only the claim but also by the counterclaim. Not only is it disingenuous but it would be manifestly unfair to the claimants in that the case for the claimants was prepared and run on the basis of a defence to a counterclaim that is closely related to the claim. Despite the submission of the defendants that the defence formed no part of the counterclaim, one observes that the defence is contained within the same walls of the one document which includes the counterclaim. This of course by itself is no reason to deny permission to the defendants to withdraw but it forms an important part of context of all of the circumstances which the court must consider in making a determination as to whether to grant permission to withdraw.

85. The grounds upon which the defendants purport to rely to justify the withdrawal of the counterclaim as set out above are grounds that would have been evident to them at a much earlier stage of proceedings, certainly before trial during the case management process and even up to the date of trial. The defendants knew that they had in fact filed a copy of the purported will with the affidavit of testamentary scripts instead of the original, and that they had not repeated the averments in the defence as part of the counterclaim. These were all matters known to the defendants well in advance of the trial. Yet they chose to move forward and lead evidence of due execution. Those actions were clearly in keeping with paragraph 20(a) of the Counterclaim which sought the following relief;

“That the Honourable Court shall pronounce of the force and validity of the said will in solemn form of law”.

86. The attempted withdrawal of the counterclaim at this late stage of the proceedings after evidence has been led and submissions made appears in the court’s view therefore to be an attempt to employ a strategy that borders on abuse of the court’s process, in that the defendants are now attempting to have the burden of proof rest solely with the claimants although the case was tried on a different basis. A court ought not to permit such unfairness. Should this strategy have been employed earlier in the case, the court’s view may have been different as the real prejudice to the case for the claimants may have been avoidable at that stage.

87. In those circumstances the court will not permit the withdrawal of the counterclaim at this very late stage of proceedings.

ISSUE 2 - *whether the defendants are the propounders of the purported will*

The submissions of the claimants

88. The claimants submitted that the defendants' purported withdrawal of their counterclaim does not mean that they are no longer the propounders of the purported will. That the defendants remain the propounders of the purported will even if the court allows them to withdraw their counterclaim.

89. The claimants submitted that the defendants are the propounders of the purported will by virtue of the definition of the word propound. Some definitions of the term include the following;

- i. Blacks Law Dictionary⁵ - an executor or other person is said to propound a will or other testamentary paper when he takes proceedings for obtaining probate in solemn form. The term is also technically used in England to denote the allegations in the statement of claim in an action for probate by which the plaintiff alleges that the testator executed the will with proper formalities and that he was of sound mind at the time.
- ii. Duhaime's Law Dictionary – to propound a will means to take legal action as part of probate including a formal inspection of the will by the court.
- iii. Dictionary.com – 1) the term propound means to suggest or put forward for consideration and 2) (English law) to produce (a will or similar instrument) to the proper court or authority in order for its validity to be established.

⁵ Brain A. Garner, editor in chief (2014) Black's law dictionary, St. Paul, MN: Thomson Reuters

90. The claimants submitted that based on the foregoing definitions, it is clear that a party does not only propound a will by submitting it to probate and/or by the filing of a counterclaim as in this case. The claimants further submitted that a party also does so by statements made before a court of law contained in his or her statement of case or in the defence or witness statements or in evidence supporting the validity and/or authenticity of the purported will. According to the claimants, there are several paragraphs in the Defence and the witness statements of Mr. Moore and Emma which argue for the validity and authenticity of the purported will. The claimants submitted that as the defendants have not stated that those paragraphs have to be struck out as well, those paragraphs still stand before the court.

91. Moreover, the claimants submitted that the defendants' filing of the purported will before the court by way of their affidavit of scripts filed pursuant to the order of the court is also a very powerful statement made to a court supporting the validity of the purported will.

92. The claimants relied on the case of **Hugh Lee King v Leo Martinez and Veronica Lambert**⁶ wherein the defendants contested the validity and due execution of a will and the claimant pleaded to have the will in his possession which he did not as yet apply for probate of same. At paragraph 5, Justice Jones stated that *"It is accepted that the effect of this plea by the Defendants is that the Claimant is required to prove due execution of the Will in accordance with the Wills and Probate Act Chapter 8:02."*

93. Further, at paragraphs 8 and 9, Her Ladyship stated as follows;

⁶ CV2012-03303

“8. Part 72.5 of the Rules requires that, unless directed otherwise, the claimant and every defendant who has entered an appearance swear and file an affidavit of testamentary scripts. There has been no contrary direction made by me in these proceedings. Any testamentary script referred to therein must be lodged at the court within 14 days after the entry of an appearance by the defendant or, if no defendant enters an appearance and the court does not otherwise direct, before the first hearing. In this regard testamentary script includes a will. The effect of this rule is to bring before the Court the testamentary script sought to be propounded. Despite the plea in his statement of case that the original of the will is in his possession no affidavit of scripts has been filed by the Claimant nor has the original Will been lodged in Court in accordance with Part 72.5 of the Rules.

9. In my opinion the Claimant’s failure to comply with Part 72.5 of the Rules is fatal to his claim to have the Will probated. The effect of such a failure is that the Will is not before the Court. In my opinion the absence of the Will prevents the making of an order directing that the Registrar issue a grant of probate of it. Neither, unfortunately, can the Claimant seek an order for the probate of a copy of the Will since a copy of the Will has not been placed before me and in any event to do so would require evidence as to the unavailability of the original. There is no such evidence. The Claimant’s right to pursue all the other reliefs sought by this action hinges on his ability to propound the Will. In my opinion therefore the absence of the Will is fatal to the claim.”

94. As such, the claimants submitted that the aforementioned paragraphs appear to suggest that where a will has been put before the court in compliance with Part 72.5 of the CPR, it is enough to deem the party putting it forward as the propounders of the will. The claimants further

submitted that as Joelle filed an affidavit of testamentary scripts with an office copy of the purported will, the defendants have deemed themselves propounders of the purported will and that cannot be withdrawn.

95. Additionally, the claimants submitted that as the defendants have attempted at trial and before to satisfy every element of the requirements of due execution of the purported will as set out in the case of **Marilyn Lucky v Mauren Elizabeth Thomas-Vailloo**⁷, they are the propounders of the purported will.

96. According to the claimants, the defendants' attempt at this last stage to withdraw their counterclaim telegraphs to the court that they no longer stand behind the validity and due execution of the purported will. The claimants submitted that the defendants' attempt to withdraw their counterclaim also show that they are not prepared or are incapable of meeting the requirements as set out in **Marilyn Lucky** supra to establish the validity and due execution of the purported will. The claimants further submitted that the court is being asked to draw robust conclusions on this attempt by the defendants to resile at this stage from being propounders of the purported will.

97. The claimants submitted that assuming the court is minded to accept the defendants' new position that they are no longer propounders of the purported will, the effect of that would be to bring into focus the defendants' submission that the claim herein is premature not having been made by or against any party propounding the purported will. According to the claimants, the defendant have overlooked that they (the claimants) as close relatives of the deceased, have a basic right to approach the court at any time (whether or not a will has been submitted for probate or not)

⁷ H.C.A No. CV 1936 of 1996 at page 16, Stollmeyer J (as then was was)

to seek an order against the validity of the will. The claimants submitted that that is especially so when that purported will was procured by another party behind the back of those close relatives.

98. The claimants submitted that whether the defendants propound the purported will or do not propound the purported will, they must answer their case that the purported will is not valid or duly executed.

Findings

99. The court finds that the defendants are the propounders of the purported will. This is so not only because by their Counterclaim (a claim by itself) in which they have asked for the the court to pronounce in favour of the will but because throughout the trial of this matter, the defendants have sought to lead evidence to the prove the validity and authenticity of the purported will.

100. The court agrees with the submission of the claimants that the defendants' filing of the purported will before the court by way of the affidavit of scripts with an office copy of the purported will, filed pursuant to the order of the court was a very powerful statement made to a court supporting the validity of the purported will. That affidavit was filed by Joelle. It is to be noted that had it not been the case that the defendants were the propounders of the will, they may have chosen to do otherwise.

ISSUE 3 - whether the Purported will of the deceased was validly executed in accordance with the Wills and Probate Act, Chapter 9:03

Law

101. In order for a Will to be validly executed, it must be made in accordance with **Section 42 of the Wills and Probate Act Chap. 9:03** which provides as follows;

- i. The Will must be in writing and made by the deceased;
- ii. The Will must be signed at the foot or end of it by the deceased or by some other person in his presence and by his direction;
- iii. The signature must be made by the deceased or acknowledged by him in the presence of two or more witnesses;
- iv. The witnesses must be present at the time the deceased affixed his signature and they attested and signed the Will in the presence of the Deceased and of each other.

102. In **Marilyn Lucky** supra, Stollmeyer J (as he then was) summarized the applicable principles to due execution 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 1 See Tristram and Coote’s Probate Practice 30th Edition, page 813 paragraph 34.06 2 HCA 1398/ 1996, page 16 Page 15 of 22 or unusual in form, the maxim omnia praesemuntur 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 by 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 suspicions of the court are aroused. If so, then the burden once again reverts to the party seeking to propound; The onus as to other allegations such as undue influence, fraud, or forgery, generally lies on the party making the allegation.”*

Analysis and findings

103. The onus of proving that the purported will of the deceased was executed as required by law lay with the defendants. This onus was a shifting one. An examination of the purported will appeared to show ex facie that it was duly executed. It was signed at the foot, the attestation clause appeared to be in usual and regular form and the signatures of the two attesting witnesses followed that of the testator. Further, it was not drawn by the person propounding it and benefitting under it. Consequently, the purported Will was not on its face irrational or irregular therefore the maxim *omnia praesemuntur rite esse acta* would have applied, the onus on the defendant having been discharged.

104. It would be remiss of the court if it did not mention at this stage, the fact that the deceased was eight-five years of age and that there was

overwhelming evidence (which will be further discussed hereinafter) that the deceased was totally blind and/or almost totally blind. That the signature of the deceased was affixed in a slanted manner on the will which gave the impression to the court that he could not see where he was signing and/or corroborate the fact that the deceased's sight could have been impaired and/or that he was suffering from severely impaired vision.

105. However, due to the evidence of execution given by Mr. Moore who was one of the attesting witnesses to the will and also the attorney-at-law who prepared the will, the court is satisfied that on a balance of probabilities, that the purported will was signed by the deceased in the presence of the witnesses and each other in compliance with section 42 as the court is satisfied that whatever act of signing transpired, it was done by the deceased in the presence of the two witnesses.

106. The issue, however does not end there as the claimants have raised the issues of testamentary capacity, want of knowledge and approval, and undue influence. When the issues of either testamentary capacity or want of knowledge and approval are raised, the onus on those issues shifts again to the party propounding the will, the defendants. The onus as to undue influence lies on the party making the allegation, the claimants.

ISSUES 4 & 5 - *whether the deceased knew and approved of the contents of the purported will and whether the deceased possessed the testamentary capacity to execute the purported will*

Law

107. **Williams on Wills, 8th Edition, Volume 1, paragraph 5.1 page 51**

under the rubric “Knowledge and approval”, provides as follows;

“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.”

108. **Halsbury’s Laws of England, 4th Edition (Volume 17), paragraph 907** provides as follows;

“Whenever the 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. 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 weakness in the testator which, although it does not amount to incapacity, renders him liable to be made the instrument of those 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 misrepresentation; 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.”

109. In **Banks v Goodfellow**,⁸ Cockburn LJ stated the following in relation to 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.”

110. In **Doreen Fernandes v Monica Ramjohn Nadeau, Ian Ramjohn, Marilyn Ramjohn et al**,⁹ (a case relied upon by the claimants), Justice Stollmeyer, (as he then was), stated the following at page 15, 16 & 17;

“The requirements for testamentary capacity and for knowledge and approval are separate...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...If there is evidence of actual understanding then that proves the requisite capacity...Knowledge and approval requires proof of actual knowledge and approval of the contents

⁸ (1890) LR 5 QB 549 at 565

⁹ CV2006-00305

of the will... "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 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".

111. Further, in **Moonan v. Moonan**¹⁰ Wooding CJ stated as follows;

"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 that issue may be in one of three ways: either that the court is affirmatively satisfied that Joseph Moonan 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, as I said, were propounding the will."

¹⁰ (1963) 7 WIR 420 at 421 I

Analysis and findings

112. The defendants submitted that as the purported will appears to be duly executed and to be rational, the presumption of sanity arises. The defendants further submitted that there is also a presumption of knowledge and approval which arises from the testator's execution of the will, unless suspicion attaches to the document.

113. The claimants on the other hand submitted that at the time the will was executed, the deceased lacked the requisite testamentary capacity. They cite the fact that he was of advanced age, he was blind and was under medication. They further argued that while his long-term memory may have been good, the deceased's short-term memory was failing.

114. The court finds that there was no real evidence before it that the deceased's was suffering from a disorder of the mind at the time of the execution of the purported will. Suzanne testified that in or around 2012, the deceased's health began to deteriorate further and that he became more or less blind. That she knew of the aforementioned because when the deceased visited the UK in 2011, he stayed with her. She further testified that the deceased was unable to read documents, that she had to read to him slowly and that at times he did not appear to comprehend what she was reading or saying. It was her testimony that she had to perform all basic tasks like cooking and performing all the deceased's daily ablutions because the deceased's mobility, strength, sight and memory was severely impaired.

115. Suzanne went on further to state that in 2014, the deceased was unable to leave his room or move around the house without the aid of the defendants. That at this time, the deceased's mental health had

deteriorated to the point where he could not understand the full import and meaning of the purported deed of gift and that the defendants influenced him to execute same. During cross-examination, Suzanne testified that the deceased never informed her that he was unable to leave his room or that he came to rely upon the defendants completely. Further, during cross-examination, she testified that the last time she visited Trinidad was in or about 2000 and that she does not currently have friends or family residing in Trinidad. Most of her family in Trinidad died. As such, the court finds that Suzanne did not provide any insight as to how she came to the conclusion that the deceased's mental health had deteriorated to the point where he could not understand the full import and meaning of the purported deed of gift. Therefore the evidence on this issue from this witness is in the court's view unreliable.

116. Moreover, Suzanne testified that the deceased was not mentally capable of signing any will or making any decision affecting his property. Again, she laid no foundation as to how she arrived at that conclusion. She then made another bald assertion that the deceased was not of sound mind, memory and understanding nor did he have the mental competence to execute the purported will.

117. Claude, Suzanne's partner testified that he observed that the deceased's health began to deteriorate after he lost his leg in 1998. That on the deceased's last visit to the UK in 2014, he needed help to do almost everything. Claude had to carry him downstairs to his vehicle from the first floor apartment in London. Claude testified that as the defendant had lost so much weight, it was like carrying a small child.

118. According to Claude, the deceased was always a good conversationalist. However, he found that the deceased was getting

confused, forgetful, rambling and struggling to hold a conversation. The deceased kept referring to when he worked for British Rail and when he lived in Croton Park both of which occurred a very long time ago and had no connection to what he was speaking about. Claude testified that deceased's mental and physical health had deteriorated considerably and so did his eye sight.

119. Judy, the Geriatric Nurse hired to care for the deceased, testified that when she met with the deceased in March 2015, he was jovial, alert, articulate and fully engaged in the conversation. During cross-examination, Judy testified that she administered hypertension medication to the deceased. She further testified that the deceased was blind and that Emma informed her that the deceased was blind.

120. In light of what appeared to be the self-serving evidence of Claude and Suzanne and contrary to the inference which may have been drawn from their evidence, Judy was viewed by this court as an impartial and independent witness. The court formed this opinion although she was a beneficiary under the will because the bequest to her was not a major part of the deceased's property. As such, the court finds that she had no reason to tell untruths about the deceased's condition.

121. Further, she would have been one of the persons in 2015 to have spent a great deal of time with the deceased and the court notes that the information she provided treated with facts which occurred after the 2014 visit to the UK. So that her evidence lies in stark contrast with the evidence of Suzanne and Claude on this issue and is to be preferred. The court therefore accepted her evidence that the deceased was blind and that he was jovial, alert, and articulate and was able to be fully engaged in conversation.

122. Further evidence of the deceased's testamentary capacity came from Mr. Moore, the attorney at law who prepared the will and witnessed its execution. Mr. Moore, an attorney-at-law of twelve years standing, testified that at his meeting with the deceased, the deceased was alert, clear, logical and coherent. That the deceased appeared to fully understand his instructions, who he was benefitting and who was excluding. Mr. Moore further testified that based on their conversation and the answers to his questions, he concluded that the deceased possessed the necessary mental capacity to execute the purported will.

123. Consequently, the court finds that on a balance of probabilities, the deceased had the capacity to understand that he had executed a will. However, the evidence that the effect of the will was explained to the deceased and that he approved of the contents of the purported will was severely lacking. This is compounded by the fact of that the deceased was at the time suffering from severe optical impairment.

124. Stollmeyer J set out in ***Doreen Fernandes*** supra that *"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"*.

125. Nowhere in Mr. Moore's witness statement, did he state that the deceased understood or appeared to understand what he was doing and its effect or that the deceased knew the extent of his property or that he comprehended and appreciated the claims on his bounty to which he ought to give effect. In his witness statement, Mr. Moore simply testified that he went over everything with the deceased, that the deceased was satisfied and that as he was ready to sign, he asked for pen.

126. The court agrees with the submission of the claimants that Mr. Moore's evidence that he went over everything and that the deceased was satisfied, was extremely loose and vague. A court of law requires much more by way of proof. As such, the court is not satisfied that the evidence of Mr. Moore of the process he employed was that which was required in law and falls way short of the requirements set out above by Stollmeyer J. Any attempt to introduce the evidence by the witness in cross examination was in the court's view an attempt to plug a very serious *faus pas* in the witness' evidence and such evidence was therefore unreliable.

127. Further, although the deceased was blind and/or almost blind when the will was executed, the purported will did not contain a clause attesting to the fact that it was read over to the deceased. In the case of **Daisy George v Lisa Natasha Estrada**,¹¹ Rajkumar J, (as he then was) declined to admit an alleged will to probate. His Lordship found *inter alia* that the lack of an attestation clause confirming that the will was read over to the illiterate deceased excited suspicion and weighed against the probability that the testator had testamentary capacity or knew and approved the contents thereof.

¹¹ CV2008-3140

128. Moreover, Mr. Moore failed to give evidence that the deceased was visually impaired or blind at the time the will was prepared and executed. He, however during cross-examination testified that the deceased wore glasses while the will was being read. The court finds that the fact that Mr. Moore did not give evidence as to the deceased's eyesight at the time the purported will was prepared and executed was highly suspicious to say the least and most unsatisfactory in facing of overwhelming evidence of the severe impairment of the vision of the deceased.

129. In **Butterworth's Wills Probate and Administration Service**, Division G, Contentious Matters: Narrative, Chapter 2, Disputes over the will under the rubric "When knowledge and approval must be proved", the following is provided at paragraph [2.28];

"...it is possible to identify three main situations in which the court will require affirmative proof that the testator knew and approved the contents of the testamentary document:

- (1) where the document was executed in suspicious circumstances;*
 - (2) where the testator suffered from a physical disability that weakens the presumption that he read and understood the document (eg blindness);*
- or*
- (3) where the testator was of reduced mental capacity."*

130. Consequently, the court finds that the presumption of knowledge and approval which arises from the deceased execution of the will was rebutted as there was suspicion attached to the purported will. The court therefore finds that it has not been proven that the deceased possessed

the requisite high degree of understanding of the effects of the purported will,¹² or knew and approved of the full contents and effect of same.

ISSUE 6 - *whether there were suspicious circumstances surrounding the preparation and execution of the purported will*

131. In **Lalla v Lalla**,¹³ Mendonca JA held as follows at paragraph 59;

“Where there are circumstances which excite the suspicion of the Court, the Court ought not to pronounce in favour of the Will unless the suspicion is removed so that the Court is satisfied that the Will propounded does express the true Will of the deceased (see Barry v Butlin 2 Moo P. C. 480).”

132. In **Lalla v Lalla**, His Lordship further explained that the circumstances, which have been held to excite suspicion, include the intrinsic terms and the circumstances of the preparation and execution of the will and regard must be had to the circumstances primarily existing at the time when the will was executed, although subsequent events could be relevant.¹⁴

133. The claimants submitted that in this case, the undermentioned factors are some of the circumstances that are sufficient to excite the suspicion of the court;

- i. The virtual refusal of Mr. Moore and Emma to admit a crucial factor of the case, that is, that the deceased was blind (or extremely visually impaired) when the purported will was prepared.

¹² See the case of Simpson and Others v Simpson and Another [1992] 1FLR 601 at 613 per Morritt J for the degree of understanding required.

¹³ Civ App No. 102 of 2003

¹⁴ See paragraph 60

According to the claimants, blindness and/or visual impairment of a testator requires that the preparer of a will takes extra precaution to ensure that the testator at least knows and approves the contents of the case. The claimants submitted that in this case, the purported will showed no appreciation of this important factor hence the reason that those two witnesses for the defendants were intent on denying that the deceased was blind.

- ii. The repeated denials by Emma that the deceased was blind and on medication only to have her own witness, Judy, the caregiver confirm both sets of facts. Judy testified that it was Emma who told her so. The claimants submitted that one of those witnesses would have been untruthful to the court and that they suspect that it was not the caregiver, Judy.
- iii. The use of the Attorney connected to the defendants' family for the preparation of the purported will, rather than the Attorney for the deceased.
- iv. The presence of Emma's husband at the execution of the purported will and the attempt to disguise the reason for his presence as due to the non-attendance of the geriatric nurse, Judy at work on that day.
- v. The conflicting evidence given by Judy during cross-examination that she was not at work on the day the purported will was executed when in her witness statement she testified that she was at work on the day that the purported Will was executed.¹⁵

¹⁵ At paragraph 8 of her witness statement she testified that *"I was at the Deceased's home, when the Lawyer came back with another person and the Deceased's son in law. This was in or about June, 2015."*

- vi. The lack of expert medical evidence attesting to the mental capacity of the deceased and to his visual condition.¹⁶ The claimants submitted that the practice in such a case is for the report from this expert to be referred to in the attestation clause of the Will and annexed thereto.
- vii. The lack of an attestation cause expressly stating that the purported will was read over to the deceased (and by whom), with words such as, *“him being 85 years of age and blind, and/or visually impaired but him being certified as having the mental capacity to make a Will by Dr. ** in his report dated *** annexed hereto, and he appeared to understand what was read to him by expressly saying so to me ...”* or a similar formulation.¹⁷
- viii. Emma’s concerted attempt to distance herself from the execution of the purported will, although her husband was present at the time of the execution of the purported will for a spurious reason.

The use of the defendants’ family attorney

- 134. The fact that Mr. Moore prior to the preparation and execution of the purported will acted on behalf of Emma’s son by itself did not arouse the suspicion of the court. However, what did excite the court’s suspicion

¹⁶ See Marilyn Lucky v. Maureen Elizabeth Thomas-Vaillo H.C.A. No. CV 1396 of 1996, per Stollmeyer J, (as he then was) at p.15,

¹⁷ See the case of Daisy George v Lisa Natasha Estrada CV2008-3140, wherein Rajkumar J, (as he then was) declined to admit an alleged Will to probate as His Lordship found inter alia that the lack of an attestation clause confirming that the will was read over to the illiterate deceased excited suspicion and weighed against the probability that the testator had testamentary capacity or knew and approved the contents thereof.

was the fact that Emma in her witness statement attempted to distance herself from the preparation and execution of the will claiming that she knew nothing about the deceased making a will when the attorney who was preparing the will was her son's attorney and her husband was present at the time the purported will was executed. Clearly, Emma was trying to hide something from the court when she testified in her witness statement that she knew nothing about the deceased making a will and was attempting to place distance between she and the will.

Absence of medical examination

135. In the case of **Marilyn Lucky v. Maureen Elizabeth Thomas-Vaillo**,¹⁸ Justice Stollmeyer (at page 15) stressed the need for the presence of a medical practitioner when an elderly or infirm testator makes a will. His Lordship stated as follows;

“Where a testator is elderly and infirm his will should be witnessed and approved by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and who records his examination and findings – Re Simpson, Schaniel v Simpson 1977 121 Sol Jo 224”

136. Further, in the case of **Euline Hackett v Roger Ransome**,¹⁹ Justice Devindra Rampersad had the following to say at paragraph 50;

“...This court recognized then and recognizes now that a testator who is being treated with medication may very well be unable to have the proper frame of mind to appreciate the consequences and effects of the document placed before him/her for signature in such a state.”

¹⁸ H.C.A. No. CV 1396 of 1996

¹⁹ CV 2011-00455

137. Although the evidence showed that the deceased was in his eighty's, blind and under medication, Mr. Moore testified that he did not advise that the deceased be medically examined prior to the making or executing of the purported will. Although, on the totality of the evidence, it was sufficiently established that the deceased did understand what he was doing, and further, that there was no evidence of any mental illness or unsoundness of mind in the deceased, for an attorney of twelve years' experience having prepared over one hundred and forty wills, Mr. Moore's approach to the preparation and execution of the purported will excited the suspicion of the court since as an experienced attorney, he should have demonstrated a better appreciation for the fact that the deceased was elderly, blind and on medication. Mr. Moore's explanation as to why he did not advise that a medical examination be done was that he was satisfied after speaking with the deceased that the deceased possessed the necessary mental capacity to execute the purported will.

138. As a matter of guidance to practitioners this court would recommend that in all cases where the testator is over the age of eighty that the attorney who is entrusted with the responsibility to take instructions, prepare and take execution of a last will and testament ensure that a mental evaluation is performed on the testator by a qualified practitioner to ensure that the testator is vested with the necessary animus. In so doing, the practitioner not only establishes that fact but he also protects himself from unjustified allegations which may arise long after the testator has passed. This practice has been of benefit to many a lawyer over the years. It may not be the law but it is certainly the prudent thing to do.

The absence of the written instructions

139. Mr. Moore in his witness statement testified that he took instructions from the deceased for the purported will. During cross-examination, Mr. Moore accepted that those instructions were not before the court. Further during cross-examination, Mr. Moore testified that the deceased while giving instructions for the purported will, wrote on a piece of paper the names of the beneficiaries. This piece of paper was also not before the court. The court finds that it was highly suspicious that Mr. Moore failed to provide to the court the instructions he obtained from the deceased. Mr. Moore did not provide any explanation as to why those instructions were not placed before the court.

The visual impairment or blindness of the deceased

140. It was clear on the evidence that the deceased was either blind or almost blind. Emma's evidence that the deceased's problems with his eyes were not serious was contradicted by her own witness, Judy, who testified that the deceased was blind in 2015 and that Emma had informed her of such. Further, Mr. Moore failed to give evidence that deceased was visually impaired. In his witness statement, he simply stated that the deceased required glasses to read and during cross-examination, he testified that the deceased was wearing his glasses whilst the will was being read.

141. Emma and Mr. Moore's attempt to down play the problems the deceased had with his eyes was another matter which clearly aroused the suspicion of the court.

No attestation clause

142. Although the deceased was blind and/or almost blind when the will was executed, the purported will did not contain a clause attesting to the fact that it was read over to the deceased. This is another matter which raises suspicion.

The presence of Emma's husband at the time

143. The claimants submitted that great significance should be attached by the court to the inconsistency between the evidence provided by Mr. Moore, and Judy to ascertain the purpose for Emma's husband, Joseph being present on the day in which the purported will was executed.

144. Mr. Moore in his witness statement asserted that on the day in which the purported will was finalized and executed, Joseph was present in the event that assistance was needed by the deceased as Judy had the day off. The claimants submitted that Mr. Moore seemed to suggest that the only reason for Joseph being present was to give assistance to the deceased because of the caregiver's absence.

145. According to the claimants, Judy contradicted Mr. Moore's evidence when she asserted that she was at the deceased's home when the *"lawyer came back with another person and the deceased's son in law"*. She further went on to state that she was not present at the meeting but that *"they remained in the living room"* while she went to the deceased bedroom to the back of the house. The claimants submitted that this is a material contradiction in which various inferences can be drawn not only as to the purpose for which Joseph was present but more so the reason it was claimed that the caregiver was not there on that day.

146. Although Judy's evidence was that she was present on the day that Mr. Moore came back with another person and Joseph suggests that she did not have the day off on the day the purported will was executed, the court finds that this does not excite the suspicion of the court since it was probable that as Judy went to the bedroom of the deceased, Mr. Moore was of the opinion that she was not present.

147. In closing on this issue therefore the court finds that circumstances of suspicion surrounding the execution of the purported will have not been dispelled. As such, the court is not satisfied that the purported will expressed the true will of the deceased. Consequently, the court will not pronounce in favour of the purported will.

ISSUE 7 - *whether the purported will was obtained by the undue influence*

Law

148. **Williams on Wills**²⁰ provided 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

²⁰ 9th Edition, pages 64 & 65

influence means coercion to make a will in particular terms... '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...

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..."

The submissions of the defendants

149. The defendants submitted that as there is no propounder of the purported will, the burden of proving undue influence is upon the claimants as they are seeking the declarations in relation to same. The defendants further submitted that where there is a presumption and/or evidence of capacity, due execution, and of knowledge and approval, the burden shifts to the claimants who must prove that the defendants exercised undue influence upon the deceased.

150. According to the defendants, Suzanne testified that from 2014, the deceased was unable to leave his room or move around the house without the aid of one or both of the defendants. The defendants submitted that that evidence of the claimants was contested by the evidence of Kenneth, Emma and Judy. That Suzanne further testified that the deceased was physically and mentally dependent upon the defendants, who she says practically lived on the property. That evidence was also contrary to the evidence led by the defendants' witnesses.

151. According to the defendants, the aforementioned allegations seem to be made to lay a foundation for a plea of undue influence. The defendants submitted that those allegations were however hearsay statements, inaccurate, and insufficient to raise that plea since Suzanne could not be aware of matters taking place in Trinidad, as she was fully occupied with life in the UK, and she last came to Trinidad in or about the year 2000. Furthermore, she testified during cross-examination that she has no friends or family living in Claxon Bay and that the deceased did not inform her of such and so her source of information is unknown. As such, the defendants submitted that no weight should be given to those and similar statements.

152. The defendants submitted that the evidence of Emma, Judy and Kenneth showed that the defendants did not live in the house, and usually visited on weekends to check on the deceased. The defendants further submitted that the deceased had his own support system apart from the defendants and that militated against the claim of undue influence. That the plea of undue influence seemed to be raised as a last resort and was also raised in the alternative.

The submissions of the claimants

153. The claimants submitted that on the totality of the facts in this case the court may well find that the defendants exerted undue influence on the deceased to make the purported will. The claimants argued that if the deceased did indeed execute the purported will, he did so under the undue influence of the defendants together and/or separately.

154. The claimants relied on the case of **Royal Bank of Scotland v Etridge**²¹ wherein Lord Nicholls at paragraphs 6 & 7 page 457 stated as follows;

"Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused. In everyday life people constantly seek to influence the decisions of others. They seek to persuade those with whom they are dealing to enter into transactions, whether great or small. The law has set limits to the means properly employable for this purpose. "The law will investigate the manner in which the intention to enter into the transaction was secured...If the intention was produced by an

²¹ (No.2) [2001] UKHL 44, [2001] 4 All ER 449

unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or 'undue' influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion."

155. The claimants further relied on the case of ***Brown v Stephenson***²² wherein the relevant principles surrounding undue influence was helpfully explained. It was stated that there has to be “*a relationship (of which there are numerous types) where trust, confidence, reliance, dependence or vulnerability applies to one side, and ascendancy, control, or domination applies to the other. There needs to be a transaction which calls for explanation. These give rise to an inference of undue influence.*”

156. The claimants submitted that in several ways the entire transaction surrounding the procuring of the will in the instant case falls under the parameters set out by the learned Judge above. That there was nothing objective placed before the court showing how “the intention to enter into the transaction of making a will was secured” as stated in ***Royal Bank of Scotland*** supra. The claimants further submitted that the Attorney who happens to be the family attorney of the main beneficiaries did not put any written instructions from the deceased before the court. That that was a very elementary step to be taken. The beneficiaries themselves did not provide anything. Also the piece of paper the deceased wrote on was not put before the court by Mr. Moore or the defendants.

²² [2013] EWHC 2531 (Ch)

157. The claimants submitted that the defendants did occupy a position of trust, control and ascendancy with the deceased as the deceased clearly relied on them for providing his basic comforts and they were performing several services for him such as hiring his caregiver, doing chores for him, taking him to the doctor, preparing his meals, doing his banking etcetera.

158. As such, the claimants submitted that the defendants and their Attorney were likely the ones who crafted the Will. The claimants further submitted that if that was not the case, then why was the piece of paper with the names and the deceased's instructions to the attorney for the preparation of the will not put before the court, his grandson's surname incorrect and Emma's husband present at the execution. According to the claimants, those were the very factors to which the learned Judge referred in the Brown Case, as likely to give rise to undue influence. Consequently, the claimants submitted that the court is asked to make that finding or at least to declare its disquiet with the entire transaction.

Findings

159. The deceased at the time the purported will was executed was eighty-five years of age, blind or almost blind and under medication. It is clear from the evidence that the deceased was dependent on others for obtaining food or groceries or medication.

160. Emma testified that she engaged the services of geriatric caregivers to take care of the deceased during the period of October, 2013 to September, 2015. She further testified that up to 2013, the deceased took care of his personal business as he would have driven himself around to the grocery, market, to pay his bills at T&TEC and WASA and to do his

banking affairs. That Joseph and she would when required take the deceased to the bank to attend to his affairs. Moreover, she testified that she paid for his electricity, telephone and WASA bills. She also paid for his groceries and for the maintenance of the outdoor grounds on the property. Additionally she paid for his medical bills out of monies he received as pension from the UK. In March, 2013 the deceased asked Joseph and Emma to take him to the office of an Attorney-at-law, Mrs. Boyce. At Mrs. Boyce's office the deceased executed the 2013 deed which conveyed his interest in the property to Emma.

161. During cross-examination, Emma testified that she and Joseph went to England with the deceased on two occasions. Emma further testified that during their 2015 trip to England, the deceased asked her to accompany him to his bank where he asked that her name be added to his account as a joint holder. At that time the deceased had already put her name as a joint holder on his bank account at Republic Bank Limited. Moreover, during cross-examination, Emma testified that the deceased was relying upon her for almost everything. That he placed a lot of trust in her. She visited the deceased mostly on weekends. She would stay the weekend and return to her home on the Sunday.

162. As such, on the evidence it is clear that a relationship of ascendancy existed between Emma and the deceased as the deceased was dependent on Emma for transport, hiring his caretakers, taking him to the doctor etcetera. The deceased's financial resources had also been entrusted to Emma. Consequently, the court finds that Emma was in a relationship of ascendancy over the deceased at the time of preparation and execution of the purported will.

163. However, whether there was evidence that Emma abused that relationship is another issue. In that regard, the court finds that the abovementioned suspicious circumstances surrounding the preparation and execution of the purported will is evidence that Emma abused her relationship of ascendancy over the deceased. Those suspicions have not been quelled by any explanation or testimony of the defendants. As such, the court finds that on a balance of probabilities, it more likely than not that Emma unduly influenced the deceased in the execution of the purported will. Consequently, the court finds the purported will is not a valid will of the deceased.

Issue 8 - *whether Deed dated March 14, 2013 and registered as DE201300874318 severed the joint tenancy between the claimants and the deceased in relation to the property.*

Law

164. In the case of **Williams v Hensman**²³, Page Wood VC highlighted the following three circumstances in which a joint tenancy can be severed;

"A joint tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the jus accrescendi. Each one is at liberty to dispose of his own interest in such a manner as to survivorship. Secondly a

²³ [1861] 70 ER 862 at 867

joint tenancy may be severed by mutual agreement. And in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common."

Findings

165. The claimants have sought a declaration that the property should go to them by the doctrine of survivorship. However, that relief sought by the claimants ignored the existence of Deed dated March 14, 2013 and registered as DE201300874318 wherein the deceased describing himself as a Retired Engineer, conveyed his undivided one fifth share in the property to himself and Emma as joint tenants. By that deed, the deceased severed the joint tenancy he held with the claimants in relation to the property. Consequently, the claimants are not entitled to the declaration sought neither are they entitled to an injunction to restrain the defendants from entering and/or remaining on the property because the joint tenancy was severed within the lifetime of the deceased and the court so finds.

Disposition

166. The court will therefore make the following order;
- i. It is declared that the purported last will and testament of THOMAS SANDY, deceased ("the deceased") dated June 26, 2015 is not a valid Will and Testament of the deceased and is null and void;
 - ii. The counterclaim is dismissed;

- iii. The defendants shall pay to the claimants the prescribed costs of the claim; in the sum of \$14,000.00 and
- iv. The defendants shall pay to the claimants the prescribed costs of the counterclaim in the sum of \$14,000.00.

Ricky Rahim

Judge