

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2019-01163

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

AND

IN THE MATTER OF THE ESTATE OF ANTHONY MITCHELL

OTHERWISE ANTHONY CURTIS MITCHELL (DECEASED)

BETWEEN

CARLOTA BUX

ALVIN MITCHELL

OTHERWISE ALVIN SERVATIUS MITCHELL

Claimants

AND

SHIVON MITCHELL

Defendant

Before the Honourable Madame Justice Margaret Y Mohammed

Date of Delivery 23 November 2021

APPEARANCES

Mr Robert Boodoosingh Attorney at law for the Claimants

Ms Zenobia Campbell- James and Ms Keisha Peters instructed by Ms Avian

Joseph Attorneys at law for the Defendant

JUDGMENT

INTRODUCTION

1. Anthony Mitchell, deceased (“the Deceased”) was the father of the Defendant, one of the half-brothers of the First Claimant and a nephew of the Second Claimant. He departed this life after a brief illness on 9 March 2018, leaving a Will dated 2 March 2018 (“the Will”) in which the Claimants are the main beneficiaries. They have instituted the instant action for the Court to pronounce in favour of the Will.

THE CLAIMANTS’ CASE

2. The Claimants instituted the instant action as a result of steps taken by the Defendant. In the Will, the Deceased made the following bequests:

“Property situate LP No. 59 Maraj Trace, Cantaro Village, Santa Cruz to my Trustees and to any such of my siblings as determined by my Trustees sole discretion for their absolute use and benefit as joint tenants.

Nissan Cube vehicle PDN 1282 and all my monies standing at Scotia Bank and Agricola credit union to my Trustees to be divided amongst my daughter, Shivon Mitchell, my uncle Alvin Mitchell and any such of my siblings that survive me, in the absolute discretion that my Trustees think proper.

The residue of my property to my daughter, Shivon Mitchell, any such of my siblings that my Trustees think proper and to my Trustees to be divided amongst themselves at the discretion of my Trustees.”

3. On learning of the contents of the Will, the Defendant caused to be filed an application for a Grant of Letters of Administration of the estate of

the Deceased (“the Defendant’s Estate Application”) on 3 July 2018. The Claimants filed a caveat, dated 11 September 2018, to the Defendant’s Estate Application. The Defendant responded with a Warning, dated 17 October 2018. The Claimants then filed the instant action whereby they claim that they are the sister and uncle of the Deceased and also the joint executors and trustees of the Will and that the Defendant is the “estranged daughter” of the Deceased.

4. The orders the Claimants have sought are that:
 - (a) The Court pronounce in favour of the Will as being the Last Will and Testament of the Deceased.
 - (b) The Defendant be compelled to withdraw the Defendant’s Estate Application.
 - (c) The Will be admitted to probate in solemn form.
 - (d) Costs.
 - (e) Such further and/or other relief as the Court deems fit in the circumstances of the case.

THE DEFENCE

5. The Defendant’s position is that she is the lawful daughter of the Deceased and his only issue; she was never estranged from the Deceased; she was actively involved in the Deceased’s life and in his daily care during his brief illness; the contents of the Will and the circumstances surrounding the execution of the Will aroused suspicion; and during the Deceased last days and immediately on his passing, the Claimants did everything possible to minimize her role and to take away her rightful inheritance.

6. The Defendant also asserted that after the Deceased's passing, the Claimants purposefully excluded the Defendant from the Deceased's funeral arrangements and the First Claimant appended her signature to all the documentation associated with the Deceased's burial. The Defendant asserted that when she made inquiries about the Will, the First Claimant informed her that the Will had been made for her and the Second Claimant. She also asserted that when the Will was read, the First Claimant informed her that the Defendant had not made any provisions in the Will for her and deliberately tried to mislead her as to the Deceased's assets.
7. The Defendant then prepared an inventory of the Deceased's assets and began making checks at the various financial institutions to ascertain the full extent of the Deceased's estate. She stated that upon visiting the Unit Trust Corporation ("the UTC"), she was informed by a representative that the Second Claimant had already exercised his rights to the Deceased's account and withdrawn the sum of \$105,663.84. Thereafter, she became aware that the Claimants had continued to withdraw funds from the Deceased's Scotia Bank Account ("the Scotia Bank Account"), had been visiting other financial institutions in an attempt to secretly dispose of the Deceased's assets and had made arrangements to deprive her of the benefit of the Deceased's motor vehicle and home.
8. The Defendant has made a counterclaim for the following orders:
 - (a) A declaration that the Will was not duly executed under the Wills and Probate Act¹.
 - (b) A declaration that at the time of the preparation of the Will, the Deceased did not know and approve of its contents.

¹ Chapter 9:03

- (c) A declaration that at the time of the execution of the Will, the Deceased was not of sound mind, memory or understanding.
- (d) An injunction prohibiting the Claimants from disposing and or converting the assets of the Deceased, pending the determination of this matter.
- (e) An Order that the Court pronounce against the force and validity of the Will.
- (f) An Order compelling the Claimants to withdraw the caveat entered on 11 September 2018 and renewed 13 March 2019, in the Defendant's Estate Application, or, in the alternative that the said caveats be cleared off the Caveat Book at the Office of the Registrar, Probate Registry.
- (g) A declaration that the Deceased died intestate.
- (h) A declaration that the Defendant is the next of kin of the Deceased and has the right of priority to anyone to apply for the Grant of Letters of Administration in the Estate of the Deceased.
- (i) An Order that the Claimants do account for all monies that were withdrawn from the Scotia Bank Account and Unit Trust Corporation Account of the Deceased, for the period October 2017 to May 2019.
- (j) An Order that the Claimants allow the Defendant to have undisturbed and exclusive occupation of the home of the Deceased at 59 Maraj Trace, Upper Santa Cruz ("the Santa Cruz property"), pending the final determination of this matter.

(k) Cost and any further relief that the Court may deem fit.

THE ISSUES

9. The issues to be determined from the pleadings are:
 - (a) Did the Deceased know and approve of the contents of the Will?
 - (b) Were there suspicious circumstances surrounding the execution of the Will?
 - (c) Was the Will executed in accordance with the law?

THE WITNESSES

10. At the trial, the Claimants gave evidence in support of their case and they called Ms Kelly- Ann Thorpe (“Ms Thorpe”), the Attorney at law who prepared the Will. They also relied on the evidence of Mr Ronald Gibbs (“Mr Gibbs”) and Mr Vincent Mitchell (“Mr Mitchell”). The Defendant gave evidence on her behalf and her only witness was Mr Jason Worrell (“Mr Worrell”). Mr Sorzano a representative from the UTC also gave evidence in response to a witness summons on the particulars concerning the Deceased’s Unit Trust Account.

DID THE DECEASED KNOW AND APPROVE OF THE CONTENTS OF THE WILL?

11. The Defendant pleaded that the Deceased did not know and approve of the contents of the Will, as: (a) he failed to account for all his assets; (b) he was due to retire in November 2018, approximately 10 months before his untimely passing, after 41 years as an employee of the Ministry of Works but he did not make any specific bequests of his terminal benefits; (c) there were inconsistencies in the powers given to the executors and trustees for the dispositions of his assets to named

beneficiaries vis-à-vis the sole discretion of the said executors and trustees; (d) the Deceased did not know the capacity and or functions of the two persons he had presumably named as joint executors and trustees; (e) the attestation clause was irregular as it did not state that through infirmity the Deceased was incapable of signing and signified his consent by affixing his right thumb print; and (f) the “X” made on the Will was not made by him.

12. Testamentary capacity was described by Cockburn LJ in **Banks v Goodfellow**² as:

“It is essential to the exercise of such a power that a testator shall understand the nature of the 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 exercise of his natural faculties; that no insane delusion shall influence his will on disposing of his property, and bring about a disposal of it which would not have been made otherwise... It must be borne in mind that the absolute and uncontrolled power of testamentary disposition conceded by the law is founded on the assumption that a rational will is a better disposition than any that can be made by the law itself. If, therefore, though mental disease may exist, it presents itself in such a degree and form as not to interfere with the capacity to make a rational disposal of property, why, it may be asked, should it be held to take away the right? It cannot be the object of the legislator to aggravate an affliction in itself so great by the

² (1890) LR 5 QB 549 at 565

deprivation of a right, the value of which is universally felt and acknowledged.”

13. The party who bears the burden of proving testamentary capacity is the party seeking to propound the Will. This was addressed by Wooding CJ in **Moonan v Moonan**³ who stated that:

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

14. The duty of persons propounding a Will was described in **Halsbury’s Laws of England**⁴ as:

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

³ (1963) 7 WIR 420 at 422 and 423

⁴ 5th ed Vol 103 at paragraph 902

15. The burden was on the Claimants to prove that the Deceased knew and approved the contents of the Will when he executed it.

16. Ms Thorpe stated in her witness statement that on 1 March 2018 she visited the Deceased at his home to take instructions to prepare the Will. She was greeted by the Deceased's mother who took her into the Deceased's bedroom where she was introduced to the Deceased. There was also one (1) other person whom she did not recall. Everyone then left the bedroom and she asked the Deceased if he was aware of the reason for her visit; if he wanted to make the Will; his full name and occupation and what were his assets. She then explained to the Deceased that he needed to appoint someone as the executor of the Will. According to Ms Thorpe, she wrote all the instructions she received from the Deceased on a sheet of paper ("the Questionnaire") which the Deceased signed. Thereafter, she left the bedroom and went into the kitchen area where she took a scanned copy of the Deceased's national identification card and his driver's permit.

17. Ms Thorpe also stated that she returned to the Deceased's home on 2 March 2018 with her law clerk, Ms Mirlin Howard-Brereton ("Ms Brereton"). They proceeded into the bedroom where the Deceased was laying down. The Deceased sat up on his bed propped up by a pillow and she introduced him to her law clerk. She indicated to the Deceased that she visited to have the Will executed. While she was reading the Will over to the Deceased he received a phone call. When she had finished reading the Will to the Deceased she allowed him to affix a thumbprint to execute the Will. She assisted the Deceased in inking his right thumb using a stamp pad which she had brought. She then showed the Deceased where to place the print on the Will, which he did in the presence of herself and her law clerk. After the Deceased affixed his thumbprint she and the law clerk affixed their signatures in the space allotted at the bottom of the Will and then they left the bedroom.

18. Ms Thorpe was cross-examined on: (a) the physical and mental condition of the Deceased; (b) the instructions from the Deceased; (c) the contents of the Will; and the execution of the Will.
19. In cross-examination Ms Thorpe stated that she had been asked by the Deceased's mother, Ms Forteau, to visit the Deceased who was ill and take instructions from him to prepare the Will. At that time, she did not inquire how ill the Deceased was, but while visiting the Deceased she recognized that he was ill, as he had been lying down on the bed and after her first visit she was informed by his mother about the extent of his illness.
20. Ms Thorpe admitted that although she had known the Deceased was ill, she had not asked anyone (including the Deceased) about the nature of his illness before taking instructions from him. She explained that prior to taking instructions from the Deceased, she had a general conversation with him and based on that conversation, she did not think that she needed to consult with a medical doctor to advise her or be present while she took instructions from the Deceased or before he signed the Will. She stated that she was aware that the Deceased was on medication, because she had observed that he had medication in the bedroom. Ms Thorpe admitted that she did not ask the Deceased for any information concerning his medication. She also did not ask the Deceased's mother about the medication that the Deceased was taking. Ms Thorpe testified that though she had believed that the Deceased was severely ill, she still did not think it was necessary to consult with a medical doctor about the Deceased's condition and his capacity to give proper instructions or sign the Will as she had observed that his speech was clear, his sentences were coherent, he was able to prop himself up on the bed on his own and his eyesight appeared focus. She also testified that she did not think about the Deceased's health on the following day when the Deceased executed the Will.

21. With respect to the instructions for the Will, Ms Thorpe confirmed that the Questionnaire is a general form that consists of a letter sized, typewritten sheet with her handwriting on it and a second page with handwritten notes. In the Questionnaire, it identified the Deceased as her client and his address the Santa Cruz property and the Defendant as the Deceased's child. The Questionnaire also identified the Claimants as the proposed executors of the Will. She stated that although the "Guardians and Pecuniary Legacies" section on the Questionnaire had identified the First Claimant and the Defendant as the beneficiaries of the Santa Cruz property she had not received any further instructions on how that interest would be held.

22. Ms Thorpe confirmed that on the Questionnaire, the Deceased's signature was on the second page which also had the Deceased's financial information. She admitted that she had not written the Deceased's full instructions down, but insisted that it had been captured in the Will. She also testified that the Deceased had instructed her that the monies from his Scotiabank Life Insurance were to be given to his executors, who would share it amongst themselves and the Defendant and if they saw fit they could share it with his siblings as well. The Scotiabank Account and Unit Trust Account were supposed to go to the Defendant; the Agricola Account had been initially listed as being intended for the Claimants and the Defendant, but the Deceased had instructed her to change the beneficiaries to the Claimants. She accepted that although she had made the change on the Questionnaire for the Unit Trust Account, she had not asked the Deceased to initial the change. She agreed that based on her notes, there was no evidence that the Deceased had changed his mind with respect to his initial instructions of the Unit Trust Account being intended for the Claimants and the Defendant.

23. Ms Thorpe also admitted in cross-examination that she did not have any beneficiary listed in the Questionnaire for the Deceased's motor vehicle, PDN 1282 ("the motor vehicle"). She confirmed that she did not have written instructions for all of the Deceased's assets, but maintained that the Will had been drafted based on the written and verbal instructions that she had received from the Deceased.
24. On the contents of the Will, Ms Thorpe stated that the Deceased intended to create a trust and had indicated that the trustees/ executors would know the objectives of the trust. After reviewing the Will, Ms Thorpe stated that she had listed the Claimants as the trustees in the Will because of the verbal instructions that she had received from the Deceased about creating a trust. According to Ms Thorpe, the Deceased had stated repeatedly that the Claimants knew what to do with his property and she interpreted that to mean that he wanted to create a trust, so she advised him on the implications of creating a trust. She explained that she did not take written instructions in relation to the trust because the Deceased had repeated his instructions several times. She explained further that the main objective of the trust was that both Claimants, who the Deceased stated were aware of his intentions would give the Deceased's property to the persons identified in the Will.
25. Ms Thorpe maintained that the Deceased had instructed to her make specific bequests for the Defendant and that was reflected in the Will, as it had been indicated in paragraph 4 of the Will that he was leaving his monies in the Scotiabank Account, the Agricola Account and the motor vehicle for the Defendant. It had also been indicated in paragraph 5 of the Will that the Deceased was leaving any residue for the Defendant and although it was not included in the Will, the Unit Trust Account was intended for the Defendant as it already had her name on it.
26. In relation to the Unit Trust Account, Ms Thorpe admitted that the Deceased had given her written instructions that the Defendant should

receive the benefit of these units, yet there was no such bequest in the Will. She also admitted that she had not mentioned receiving those instruction in her witness statement.

27. Ms Thorpe admitted in cross-examination that although paragraph 5 of the Will had given the Defendant a share in the Deceased's estate, it could not be quantified objectively. She maintained that the Deceased had indicated to her repeatedly that the Claimants would know what to do in relation to the disbursements of his assets. She disagreed that based on an ordinary interpretation of paragraphs 4 and 5 of the Will, the Defendant would not receive anything from the executors and trustees. She stated that the discretion of the trustees mentioned in paragraph 4 of the Will was only in relation to the Deceased's siblings and not the Defendant, as it was always the Deceased's intention that the Defendant would receive a share of his estate, but the size of the share was to be determined by the trustees.
28. Ms Thorpe also admitted in cross-examination that the Claimants, as the executors and trustees named in the Will, have an extremely wide discretion to dispose of the Deceased's property and stated that she had advised the Deceased of such. She agreed that paragraphs 4 and 5 of the Will gave the trustees a wide discretion, particularly as it related to which of the Deceased's siblings would be included in the disbursement of his assets. She stated that at the time she was taking instructions from the Deceased, she thought it would have been appropriate to recognize the names of these siblings, but the Deceased had several siblings and she did not think it was prudent to recognise them. She admitted that the Deceased had not given her any instructions in relation to making a bequest to his mother.
29. Ms Thorpe stated further that the extremely wide discretion given to the Claimants as executors and trustees in the Will was not unusual, especially if the Deceased had a conversation with the executors without

her knowledge. She stated that as the Attorney at law taking the Deceased's instructions, she had discussed with him her concerns about the wide discretion he was giving to his executors and she gave him legal advice in respect of same, but he persisted in giving her these instructions. She also agreed that although the Will had appointed trustees, no formal trust had been created and there were no formal written objectives in the Will.

30. In relation to paragraph 6 of the Will, Ms Thorpe explained that she always included this paragraph in the Wills that she prepared, because of her personal preference. She explained that if the Deceased had named a trustee who did it as a profession, the trustee would be allowed to charge for administering the Will, however, in the instant case the Deceased had not done so.
31. Ms Thorpe denied that the Santa Cruz property was intended for the Claimants exclusively. She stated that it was intended for the Claimants and all the Deceased's siblings, however, the Claimants had the discretion to exclude any of the siblings they chose to. She agreed that the only guarantee that the Will gave was that the Claimants would be joint tenants and there was no certainty about who else would receive a share in the Santa Cruz property. She also agreed that this was contrary to her written instructions that indicated that the First Claimant and the Defendant were to receive the Santa Cruz property.
32. Ms Thorpe testified that even though she had given the Deceased certain advice in relation to his verbal instructions, she was not concerned at any point in time that the nature of the bequests that she was being asked to make may be void for uncertainty. She was also not concerned that the manner in which she took the Deceased's instructions and represented it in writing could potentially lead to litigation.

33. Ms Thorpe stated that she was aware that the proper jurat for the attestation of a Will of a literate person, must state that the testator had read the Will. She explained that she had not included this jurat in the Will, because she had read the Will to the Deceased. She stated that she was also aware that it was the law that the Deceased must read his Will if he is capable, but in this case she had gone through the Will with the Deceased and though she could not recall why this had been done, she admitted that he had not read over the Will on his own. She further explained that an "X" had been placed beside the jurat that she included in the Will, so that the Deceased would know where to place his signature and he had signed using his thumbprint.
34. Ms Thorpe stated that although she had taken instructions from the Deceased the day before the Will was executed and he had signed these instructions, she believed that it was prudent to have him execute the Will using his thumbprint. She explained that even though the Deceased's signature on the previous day had been legible, it appeared slightly different from the signature on his national identification card and as such she thought it was best to have the Deceased execute the Will on the following day using his thumbprint.
35. Ms Thorpe agreed in cross-examination that the attestation had been disrupted by the certificate of execution in the middle of the execution, attestation and witnessing. She also agreed that the law stated that a witness must attest immediately below the signature of the Deceased. She stated that upon the execution of the Will, she kept it with her because the Deceased had indicated to her that he did not want it disclosed until after he died.
36. Ms Thorpe also agreed in cross-examination that the Will appeared to be doubly executed because of the use of the thumbprint, as well as with the mark capital "X". She explained that the Deceased could read, but she did not actually offer him the Will to read, instead she read it to him,

and according to the certificate of execution, “he thoroughly understood same to my satisfaction before affixing his thumbprint.” However, Ms Thorpe admitted that she did not ask the Deceased if he were able to sign his Will.

37. Both the First and Second Claimants stated in their respective witness statements that the Deceased was diabetic and he was diagnosed with cancer about three weeks before he died. The Claimants also stated that they had no input in the making of the Will.
38. The First Claimant was cross-examined on the Deceased’s condition prior to the execution of the Will; the contents of the Will and the Deceased’s relationship with the Defendant.
39. In cross-examination, the First Claimant testified that in the last few days of the Deceased’s life he was physically unable to do anything for himself but this was after he had executed the Will. She stated that the Deceased did not have a good relationship with the Defendant, but he had accepted her as his daughter and they had taken photographs together. She agreed that the Defendant was the Deceased’s only child and that in the event that he had died without leaving a Will his entire estate would go to her as his next of kin.
40. With respect to the contents of the Will, the First Claimant stated that she was aware that the Will contained instructions for her to carry out. However, she denied that the Deceased had spoken to her and the Second Claimant about what they were supposed to do with his assets in their capacity as trustees of his estate, or that she had received any oral instructions from the Deceased on how to carry out his wishes as set out in the Will.
41. The Second Claimant denied in cross-examination that the Deceased had spoken to him about creating a trust or how he wished for the Claimants

to administer his estate. He testified that he was aware that the Deceased had left the majority of his estate to the Claimants and his siblings, the latter of which was to be decided by the Claimants. He agreed that the Unit Trust Account was not in the Will. He accepted that the Deceased had instructed the Attorney at law that the funds in the Unit Trust Account were for the benefit of the Defendant, but stated that he had claimed those funds as he was listed on the account as the beneficiary. He explained that after the Deceased's funeral, he received a copy of the Will and became aware that he and the First Claimant were the trustees in the Will. They visited the Deceased's work place and the other places where he held his various accounts to make enquiries about the assets of the Deceased and the intended beneficiaries.

42. Mr Sorzano testified that the Unit Trust Account was created on 13 December 2000; that the Second Claimant was named as its beneficiary from inception; and that the funds from the Unit Trust Account, which amounted to \$105,663.84 had been released to the Second Claimant around June 2018.
43. Mr Mitchell testified in cross-examination that he accompanied the Deceased to the St Clair Medical Hospital on three occasions where the Deceased received treatment for an ailment caused by diabetes. He accepted that he was unable to state whether or not the Defendant took the Deceased to the Port of Spain General Hospital ("POSGH"), the Infirmary at St James or the Hospital at Mt Hope. Yet he stated that the Defendant was not regularly involved in the Deceased's life and she did not attend to him.
44. Mr Gibbs' evidence in his witness statement was that the Deceased was his cousin and that he visited him almost every day before he died and that the Defendant did not visit the Deceased regularly. In cross-examination he testified that he understood that under the Will the Claimants were named as the main beneficiaries and that the Defendant

would only benefit if the Claimants agreed to give her anything from the Deceased's estate.

45. The Defendant stated in her witness statement that although her parents did not live together the Deceased visited her and her mother very often. She also visited the Deceased after school and would spend time with him at his home and the home of the Deceased's mother's during school holidays. The Deceased frequently brought items of clothing for the Defendant and after her mother's passing in 2007, when the Defendant began living with the Deceased's mother, he contributed \$500.00 each fortnight to assist with her care.
46. The Defendant described the relationship that she shared with the Deceased as a good father-daughter relationship and stated that they frequently spent time together and were actively involved in each other's life. In fact, when the Defendant was pregnant in 2011, the Deceased had been overjoyed by the news and after she gave birth he asked her for a copy of her child's birth certificate so that he could open a savings account on the child's behalf. She stated that the Deceased often told her that in the event of his passing, all of his possessions were supposed to be for the benefit of her and her child.
47. The Defendant stated further that the Deceased was diabetic and in about 2013/2014 when he lost one of his toes, she used to visit him to clean and dress the injury until he was able to resume work at the Ministry of Agriculture. Shortly thereafter, the Deceased became very ill and he was hospitalized at the POSGH in January 2018 where he was diagnosed with Stage 4 pancreatic cancer. The Defendant stated that during the Deceased's stay at the POSGH she and the Deceased's mother visited him daily to ensure that he was comfortable and well taken care of. The Deceased was later discharged from the POSGH on 26 January 2018 and he opted stay at his mother's home, where the Defendant visited him daily and assisted the Deceased's mother with his care.

48. The Defendant stated that the Deceased was too weak for chemotherapy sessions and had only been able to visit the Cancer Treatment Centre at the St James Infirmary for treatment on two occasions. On the first occasion, the Deceased was taken by the Defendant and the Claimants and on the second occasion he had to be taken to the emergency room by the Defendant and the First Claimant. Thereafter, the Deceased's health continued to deteriorate and he had to be placed on very strong medication to lessen his pain. The Deceased was in such a weakened state that he could not sit up for any extended periods of time, he could barely walk or do anything for himself and he had to rely on both the Defendant and his mother to take care of him. In the latter part of the Deceased's life, he was often disoriented and forgetful. The Defendant stated that the Claimants upon recognizing the Deceased's rapidly deteriorating condition, began visiting him more frequently. During one of these visits, the First Claimant who already had the Deceased's bank card and pin, seized control of his house keys and wallet which contained his driver's licence and national identification card.
49. According to the Defendant, on 1 March 2018 she visited the Deceased at his mother's home and was introduced to an Attorney at law who attempted to take instructions from the Deceased in relation to the preparation of the Will. She asserted that the Attorney at law entered the Deceased's bedroom alone and emerged approximately fifteen (15) minutes later, to obtain particulars from her and the Claimants and to also notify them that she was unable to get much information from the Deceased. Nevertheless, the said Attorney at law visited the Deceased again on 2 March 2018, with her secretary and executed the Will which she gave to the First Claimant.
50. The Defendant was cross-examined on her relationship with the Deceased and when she became aware of the Will. She testified that she

shared a close relationship with the Deceased as she visited him very often, she accompanied him when he visited the POSGH during late 2017 to early 2018; and he spent two weeks in the POSGH before he was released around 26 December 2017. She admitted that she could not take care of the Deceased in his final days as she was working and that she was only given 1 week's leave after his death as bereavement leave.

51. According to the Defendant, she only became aware of the Will after the funeral of the Deceased and that after obtaining a copy she sought and obtained legal advice from her Attorney at law.
52. Mr Worrell's evidence was that he is a Nursing Assistant employed by the North West Regional Health Authority. His duties are mainly administrative and he performed clinical duties. He has no qualification in psychiatry or psychology but he was surprised to learn that the Deceased had signed the Will, given his physical and mental condition at the time.
53. Mr Worrell also testified that he shared a close relationship with the Deceased's mother who was like a second mother to him. He had known the Deceased for about forty (40) years since they grew up in the same community. He also knew the Defendant as the daughter of the Deceased and he met her when he visited the home of the Deceased's mother. After the Deceased became ill he visited the Deceased's mother at least once a week to assist the Deceased's mother with his care and when the Deceased's illness worsened he visited at least 2 to 3 times a week. He showed her how to feed the Deceased using a syringe and to tidy up the Deceased in bed as the Deceased could barely hold himself up or raise his hand. He also took the Deceased and his two sisters to a pre-arranged clinic appointment at the POSGH and the Deceased was subsequently prescribed morphine to be administered whenever necessary for pain. When he visited he observed that the Deceased spent most of his days sleeping.

54. In my opinion, the Claimants failed to discharge the burden of proving that the Deceased knew and approved the contents of the Will for the following reasons.
55. First, Ms Thorpe was unable to satisfy the Court that she had made sufficient enquiries and taken steps to satisfy herself that the Deceased's illness did not affect his testamentary capacity.
56. The role of an Attorney in the preparation of a will was discussed in the judgment of **Bernadette Sonia Sobers et al v Sharon Fraser Benjamin**⁵, where the court recited what has been described by solicitors in the preparation of Wills as the "Golden Rule". At paragraph 32 the Court stated:

"In Key and Anor v Key and Ors [2010] EWHC 408 (Ch) an 89-year old farm owner made a will one week after the death of his wife of 65 years. He left the bulk of his estate to be divided between his two daughters. They did not live or work on the farm and had no connection with it. This was in sharp contrast with a previous will that left his assets in favour of his wife for life and remainder to be divided equally between his two sons. The sons worked on the farm with their father. The will was challenged on the basis of a lack of testamentary capacity and want of knowledge and approval. Briggs J (as he then was) referred to 'the golden rule':

7. "The substance of the Golden Rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous

⁵ CV 2014-02731 unreported dated 1 April 2019

record of his examination and findings: see *Kenward v Adams* (1975) Times 29th November 1975; *Re Simpson* (1977) 121 SJ 224, in both cases *per* Templeman J, subsequently approved in *Buckenhan v Dickinson* [2000] WTLR 1083, *Hoff v Atherton* [2005] WTLR 99, *Cattermole v Prisk* [2006] 1 FLR 697, and in *Scammell v Farmer* [2008] EWHC 1100 (Ch.) at paras 117 to 123.

8. Compliance with the Golden Rule does not, of course operate as a touchstone of a will nor does noncompliance demonstrate its invalidity. Its purpose, as has repeatedly been emphasized, is to assist in the avoidance of disputes or at least in the minimization of their scope. As the expert evidence in this present case confirms, persons with failing or impaired mental faculties may for perfectly understandable reasons, seek to conceal what they regard as their embarrassing shortcomings from persons with whom they deal, so that a friend or professional person such as a solicitor may fail to detect a defect in mental capacity which would be or become apparent to a trained and experienced medical examiner, to whom a proper description of the legal test for testamentary capacity had first been provided.”

57. The law therefore places a duty on an Attorney who prepares a Will, not to just put into legal jargon the wishes of the testator, but to take measures to satisfy himself that the testator has the requisite testamentary capacity and that his instructions are that of a free,

independent mind. The duty is more important when the testator is ill and where the circumstances raise suspicion.

58. I accept that there was no medical evidence on the nature and extent of the Deceased's illness at the time he executed the Will. However, Ms Thorpe's admitted that she knew that the Deceased was ill prior to her visiting him to take his instructions and that when she visited him she observed that he was ill and in bed. Ms Thorpe's observation was consistent with the evidence of the Claimants and the Defendant that at least 3 weeks prior to the death of the Deceased he was diagnosed with cancer. In my opinion, once Ms Thorpe was aware that the Deceased was ill to the extent that he was in bed, she had a duty prior to taking instructions from him, and in this case a greater duty based on her observations of the Deceased, to make further enquiries of the nature and extent of the Deceased's illness to satisfy herself that the Deceased was competent to give instructions to make and execute the Will as this was outside of her expertise. Ms Thorpe's failure to do so raised doubt on the Deceased's ability to know and approve the contents of the Will. Further, there was no evidence that Ms Thorpe requested a medical report certifying the fitness of the Deceased to sign the Will. Her explanation for the Deceased executing the Will by thumbprint instead of by signature was hollow given that the day before he had signed the Questionnaire. It seemed to me that it was more probable that Ms Thorpe knew that the Deceased was so ill on the day she took his instructions, that she took her stamp pad with her on the following day to have the Deceased execute the Will by thumbprint. In any event, her admission in cross-examination that the Deceased executed the Will by thumbprint and not signature as he appeared to be weak, supported the Defendant's assertion that the Deceased was so ill that he did not know and appreciate what he was doing when he executed the Will.

59. Second, there was no evidence that the Will was witnessed by a medical practitioner which would have assisted in proving that the Deceased knew what he was doing when he signed the Will. In **Re Simpson, Schaniel v Simpson**⁶ the Court found that where a testator is elderly and infirm, his Will should be witnessed and approved by a medical practitioner.
60. Third, the contents of the Will did not represent the Deceased's instructions to Ms Thorpe. The strength of the Claimants' case on the validity of the Will in a large part depended on the credibility of Ms Thorpe's evidence. I have found that Ms Thorpe's evidence was lacking in credibility in several material aspects.
61. According to the Questionnaire the assets which Ms Thorpe recorded from the Deceased were the property, the Unit Trust Account, the Agricola Account, the Scotiabank Account and the motor vehicle. These assets save and except the Unit Trust Account were set out as the Deceased's assets in the Will. However, notably absent in the Questionnaire was any information and or instructions from the Deceased about the creation of a trust, and the objects of the trust.
62. Therefore, when the contents of the Questionnaire were compared to the Will there were material deviations from the Deceased's instructions as set out in the Questionnaire, which clearly demonstrates that the Will did not reflect the intention of the Deceased. In particular, in the Questionnaire the specific legacies for the Santa Cruz property were the First Claimant and the Defendant. However, the Will stated that the Santa Cruz property was given to the Claimants and such of the Deceased's siblings to be determined by the sole discretion of the Claimants, his trustees. Further, the Defendant's name was listed in the Questionnaire beside the Unit Trust Account. However, there was no

⁶ (1977) 121 Sol Jo 224

specific mention of the Unit Trust Account being given to the Defendant and if it formed part of the residuary estate, this was given to both the Defendant, the siblings of the Deceased and the Trustees, to be divided at the discretion of the Trustees. Notably, the Second Claimant admitted in cross-examination that he had later become aware through the Deceased's Attorney at law that the Unit Trust Account was to be given to the Defendant, which was consistent with the Questionnaire and not the Will.

63. In the Questionnaire there was no specific instructions for the motor vehicle. However, in the Will, this was to be divided amongst the Defendant, the Second Claimant and any of the siblings of the Deceased which survived him in the absolute discretion of the Trustees. Further, the Questionnaire stated that the monies in the Agricola Account was for the First Claimant and Defendant. Yet the Will stated that it was to be divided in the same manner as the motor vehicle. Again, in the Questionnaire there was no specific instructions for the Scotiabank account. However, in the Will, this was to be divided amongst the Defendant, the Second Claimant and any of the siblings of the Deceased which survived him in the absolute discretion of the Trustees.
64. Ms Thorpe's explanation in cross-examination for these material deviations in the Will from the instructions in the Questionnaire were absolutely lacking in credibility and hollow. She testified that she received both oral and written instructions from the Deceased about the Unit Trust account. However, she did not mention in her witness statement that the Deceased had given her any oral instructions. It appeared to me that Ms Thorpe was attempting to change her evidence to cover the deficiencies in the Will.
65. Ms Thorpe also testified that she did not receive any written instructions, but she received oral instructions about the creation of a trust. Again, Ms Thorpe did not state in her witness statement that she received oral

instruction to create a trust. In my opinion, Ms Thorpe's evidence about the oral instructions to create a trust in the Will was an outright fabrication as she admitted that no formal trust was created. Further, her evidence that the Deceased had told her that the Claimants knew what he wanted as his trustees was undermined by the evidence of both Claimants who denied in cross-examination that the Deceased had given them any such instructions. It was more probable that there was no instructions from the Deceased to Ms Thorpe about the creation of any trust as set out in the Will.

66. Fourth, the manner in which the Will was executed was irregular. In cross-examination, Ms Thorpe agreed that the Will has an attestation clause and a certificate of execution from her as a witness. She agreed that her certificate of execution which was after the Deceased's signature was in an inappropriate location as it had disrupted the execution clause. Notably, Ms Thorpe gave no evidence in her witness statement about the certificate of execution. In my opinion, Ms Thorpe's explanation about the manner of the execution of the Will and the certificate of execution was lacking in credibility. Her explanation was that she thought that it was prudent for the Deceased to execute the Will by thumbprint as his signature on the Questionnaire, which she obtained the previous day was slightly different from his national identification card. She also testified that although the Deceased could read she did not offer the Will to the Deceased to read but instead she read it to him. In my opinion, this was not a reasonable explanation as there was no evidence from Ms Thorpe that she asked the Deceased if he wanted to read the Will or how he wanted to execute the Will. In the absence of such evidence it is reasonable for me to conclude that those enquiries were not made of the Deceased.
67. In any event, Ms Thorpe was still unable to account for the Deceased's execution of the Will both by thumbprint and mark. In my opinion, the

failure by Ms Thorpe to account for this irregularity clearly demonstrated that the Deceased did not understand the nature and importance of what he was doing when he executed the Will.

WERE THERE SUSPICIOUS CIRCUMSTANCES SURROUNDING THE EXECUTION OF THE WILL?

68. It was not in dispute that suspicious circumstances are a subset of lack of knowledge and approval. In **Fuller v Strum**⁷ Gibson LJ described the presence of suspicious circumstances in the context of want of knowledge and approval as:

“What is involved is simply the satisfaction of the test of knowledge and approval, but the court insists that, given that suspicion, it must be the more clearly shown that the deceased knew and approved the contents of the will so that the suspicion is dispelled. Suspicion may be aroused in varying degrees, depending on the circumstances, and what is needed to dispel the suspicion will vary accordingly. In the ordinary probate case knowledge and approval are established by the propounder of the will proving the testamentary capacity of the deceased and the due execution of the will, from which the court will infer that knowledge and approval. But in a case where the circumstances are such as to arouse the suspicion of the court the propounder must prove affirmatively that knowledge and approval so as to satisfy the court that the will represents the wishes of the deceased. All the relevant circumstances will be scrutinised by the court which will be 'vigilant and jealous' in examining the evidence in support of the will (Barry v Butlin (1838) 2 Moo PC 480 at 483, 12 ER 1089 at 1090 per Parke B).”

⁷ [2002] 2 All ER 87 at para 33 p 97

69. Simmonds J. noted in **Wintle v Nye**⁸, that:

“[t]he degree of suspicion will vary with the circumstances of the case. It may be slight and easily dispelled. It may, on the other hand, be so grave that it can hardly be removed.”

70. The onus was on the Claimants who sought to rely on the validity of the Will to remove any suspicion in relation to it.

71. In my opinion, the following matters aroused suspicion concerning the validity of the Will which the Claimants failed to remove.

72. First, the contents of the Will were a marked deviation from the instructions in the Questionnaire.

73. Second, there was no reasonable explanation to account for the Deceased executing the Will by thumbprint and not signature, in circumstances where on the previous day he signed the Questionnaire. In my opinion, if the Deceased could have signed the Questionnaire the day before the execution of the Will he ought to have executed it by signature and not by thumbprint. The execution by thumbprint raises a sufficient degree of suspicion.

74. Third, there was also no reasonable explanation to account for the Deceased executing the Will using both a thumbprint and his mark.

75. Fourth, the font of the certificate of execution on the Will is different in appearance from that used in the body of the Will. Ms Thorpe’s evidence was that she prepared the Will after she obtained instructions from the Deceased and then she returned to the Deceased on the following day with her law clerk for the execution of the Will. She also testified that after the Will was executed she kept the original. In my opinion, if Ms

⁸ [1959] 1 All E.R. 552

Thorpe knew that the Deceased was executing the Will by thumbprint, she would have prepared the certificate of execution using the same font and spacing as that used in the rest of the Will. The difference in appearance of both the font and spacing used for the certificate of execution and her evidence that she kept the Will raises suspicion of whether the said certificate of execution was in the Will when it was executed.

76. Fifth, the failure by Ms Thorpe to consider and obtain a medical evaluation of the Deceased's condition to give proper instructions to prepare and execute the Will is also of concern, as Ms Thorpe admitted that she knew prior to taking instructions from the Deceased that he was ill.

WAS THE WILL EXECUTED IN ACCORDANCE WITH THE LAW?

77. The Defendant pleaded that the Will was not executed in accordance with the provisions of the Wills and Probate Act, as there was no part of the Will which stated that it was read over to the Deceased who then appeared to thoroughly understand same and to approve its contents; and the "X" made on the Will was not made by the Deceased and cannot be relied on to show due execution.
78. Section 42 of the Wills and Probate Act provides that the following requirements must be fulfilled for a Will to be valid namely:
 - (a) The will must be in writing; and
 - (b) Made by a person of the age of 21 years or more;
 - (c) The will must be either signed at the foot or end by the testator or by some other person in his presence and by his direction;

- (d) Such signature must be made or acknowledged by the testator in the presence of two or more witnesses of either sex competent to attest a will according to the law of England, present at the same time; and
- (e) Such witnesses must attest and subscribe the will in the presence of the testator and of each other but no form of attestation shall be necessary.

79. **Halsbury's Law of England**⁹ states that there is a presumption of due execution where the Will is regular on the face of it, with an attestation clause and the signature of the testator and witnesses in the proper places.
80. In my opinion, the Claimants failed to prove that the Will was duly executed in accordance with the provisions of the Wills and Probate Act as the certificate of execution signed by Ms Thorpe after the Deceased's signature, but before the signature of the witnesses is irregular.
81. Further, the wording of the attestation clause where the Deceased executed by his mark was inappropriate in law. According to **Williams on Wills**, an attestation clause will vary, depending on whether the purported testator is suffering from an impediment at the time that the Will was executed by him. In circumstances where the testator signs with his mark, an example of an appropriate attestation clause would read as follows:

“ SIGNED by the said [testator] with his mark as his last will (the same having been previously read over to him by [[name] OR me the undersigned [name]] when he seemed thoroughly to understand the same) in the presence of us present at the same time who at his request in his presence and in the

⁹ 5th ed Vol 103 at paragraph 898

presence of each other have signed our names below as witnesses.”¹⁰

82. Finally, there was no evidence from the other witness Ms Howard Brereton that she executed the Will in the presence of the Deceased and Ms Thorpe.

COSTS

83. It was submitted on behalf of the Claimants that the Court will have to decide whether the costs of the actions should be paid personally or out of the estate of the Deceased. The Defendant’s position was that the Claimants should pay the Defendant’s costs.
84. The award of costs is within the discretion of the Court. The general rule is that the unsuccessful party must pay the costs of the successful party, but the Court can exercise its discretion to deviate from the general rule having regard to the factors set out in Rule 66.6 (4), (5) and (6) of the Civil Proceedings Rules 1998 as Amended (“CPR”).
85. The Defendant as the successful party is entitled to be awarded her costs. The issue is whether the said costs is to be recovered from the Claimants personally or from the estate of the Deceased. The substance of the orders sought in this matter turned on the validity of the Will and the instant action arose after the Claimants caused a caveat to be filed against the Defendant’s Estate Application. Having examined the Will, the Claimants are both executors, trustees and the main beneficiaries under the Will. However, the Claimants did not institute the instant action seeking that the Will be admitted to probate in solemn form in their capacity as executors of the estate of the Deceased. The action which the Claimants instituted was intituled in their personal capacity.

¹⁰ 10th edition (October 2008), Forms and Precedents, Vol 2, Part B22 - Form B22.5

For these reasons, I am of the view that the Claimants are to pay the costs personally.

86. I now turn to the basis of quantification of the said costs. This was not a claim for a monetary sum. In this regard Rule 67.5(2)(c) CPR applies. I therefore quantify the costs in the sum of \$14,000.00 for the claim and \$14,000.00 as costs for the counterclaim, which amounts to a total of \$28,000.00.

ORDER

87. The Claimants' claim is dismissed.
88. Judgment for the Defendant on the counterclaim.
89. It is declared that the Will dated 2 March 2018 was not duly executed under the Wills and Probate Act Chapter 9:08.
90. It is declared that at the time of the preparation of the Will dated 2 March 2018, Anthony Mitchell, deceased did not know and approve of its contents.
91. It is declared that Anthony Mitchell, deceased died intestate.
92. It is declared that the Defendant is the next of kin of Anthony Mitchell, deceased and has the right of priority to anyone to apply for the Grant of Letters of Administration in the Estate of Anthony Mitchell, deceased.
93. The Claimants caveat(s) lodged in the Defendant's non-contentious probate application, Estate Application number Est 2080 of 2018 for a Grant for Letters of Administration are struck out.
94. The Claimants do account for all monies that were withdrawn from the Scotia Bank account of Anthony Mitchell, Deceased, for the period October 2017 to May 2019.

95. The said account is to be taken by the Registrar at a date and time to be fixed by the Registrar.
96. The Claimants to personally pay the Defendant's costs of the action in the sum of \$14,000.00 pursuant to Rule 67.5(2)(c) CPR for the claim and \$14,000.00 as costs for the counterclaim making a total of \$28,000.00.
97. Liberty to apply.

/S/ Margaret Y. Mohammed
Judge