

**IN THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)**

CLAIM No. DOMHCV2018/0220

BETWEEN:

**RADCLIFF PRINCE as Personal Representative of the estate of
The Testator, Testator, testate**

Claimant

- and -

BRENDALEE THOMAS

Defendant

APPEARANCES:

Ms Rose-Anne Charles, Counsel for the Claimant

Mr Gildon Richards, Counsel for the Defendant

2024: September 30

October 1

2025: March 13

JUDGMENT

Trespass to Land, Validity of Will

- [1] **JAWARA-ALAMI, J.:** this is a claim brought by the Claimant through a Fixed Date Claim Form filed on 24th October 2018, against the Defendant seeking for (i) Possession of premises known as a Lot in Marigot in the parish of St. Andrew containing 6,842.5 square feet belonging to the estate of The Testator and registered at Book of Titles L5 folio 33; (ii) An injunction to restrain the Defendant whether by herself or by her servants or agents or otherwise howsoever from entering or crossing the said property; (iii) An order that the Defendant deliver to the Claimant or the office of his solicitor, Rose-Anne Charles,

certificate of title No.97 of 1983 in respect of the said property registered in the name of The Testator at Book of Titles L5 folio 33, within 3 days of making of the order; (iv) Damages for trespass; (v) Mesne profits calculated at the daily rate of \$20.00 from the date of filing of this claim until possession is delivered up; (vi) Costs; and (vii) Such further relief that the Court deems just¹.

BACKGROUND

- [2] Central to this claim are two figures; the Claimant who is the son and executor of The Testator; the Defendant, Brendalee Prince/ Samuel/Thomas, who is the granddaughter of the Testator.

- [3] The Testator, died testate on 16th September 2017 and on 31st August 2017 he executed a will in which he named the Claimant as his sole executor and beneficiary of all his properties including the one at Marigot containing 6 842.5 sq. The Claimant obtained a grant of probate on 31st August 2018 marked as Exhibit 'R.P.1' with the will attached recorded at Book of Probates 'NX2' folio 260-21. This will revoked a previous will made by him in 1996.

- [4] The Claimant claims that there was conflict between his father, the Defendant and her children and that although she lived with his father as a child, she lived separately from him preceding his death and that the Defendant moved into The Testator's house on the exact date that The Testator died. The claimant also claims that together with his son, they took his father to the hospital when he was very ill and stayed to care for him but did not see the Defendant visit his father or care for him at the hospital. He further claims that his father was in his right senses throughout the time that he was at the hospital. It was only during his last visit on the day that he died that The Testator could not talk clearly. Prior to that The Testator was able to recognize people and had all his senses. He would converse with him and other visitors.

- [5] About two years prior to his death, he claims that his father told him that he wanted to change his will and that he could not leave Brendalee and her children among his children to cause trouble. He testified that he was asked to accompany him to the lawyer's office to which he expressed reluctance to get involved and he responded, 'do not bother'. He testifies that whilst his father was hospitalised in 2017, he said to him again in the presence of his sister Eleanora that "the biggest man does make a mistake" and asked to see his lawyer. He went with his sisters Verdian and Elenora to the office of Alick Lawrence and informed the staff that The Testator wanted to see the lawyer. Mr. Lawrence was not

¹ Paragraphs 1 - 7 of the Fixed Date Claim Form

available at the time, so the Claimant was referred to Rose-Anne Charles who dealt with the matter.

- [6] The Claimant further claim that prior to the Testator's death, the Defendant refused to allow the Claimant access to the Testator's belongings including his personal documents, despite The Testator's indication to her that he wished the Claimant and the Claimant's older sister to have access to his belongings. The Claimant alleges that the Defendant has the certificate of title No. 97 of 1983, L5 folio 33 in her possession and refuses to give it to the Claimant, and the Defendant has also on numerous occasions, by herself and through her agents, threatened violence against the Claimant. The Claimant further alleges that following his father's death, he requested that the Defendant vacate the premises so that he could have vacant possession of the same, via letters through his solicitor in October 2017 and again in August 2018 but the Defendant has refused to vacate the premises². Accordingly, this claim was filed seeking the reliefs stated at paragraph [1].

DEFENCE AND COUNTERCLAIM

- [7] The Defendant filed a Defence and Counterclaim on 7th December 2018 in which she disputed the validity of the will which the Claimant asserted that he was the sole executor and sole beneficiary of the estate of The Testator and the grant of probate to the Claimant. The Defendant's dispute to the Claimant's allegations is premised on the basis that the Testator executed a will in 1996 in which the Claimant was not named as the executor and the state of the Claimant's relationship with the Testator even just before his death and knowing the intention and decision of the Testator at that time. She claims that she resided on the property at Arrow Park and continues to do so and she is not a beneficiary named in the will pursuant to which the Claimant obtained probate. In addition, she states that she had a very close relationship with the Testator whom she lived with from her childhood at the age of 9 years and bore her first child while still resident in the Testator's house. The Defendant also claims that the Testator relied on her for support as he grew older and she took care of him while he was ill and went to the garden with him when he was well, helped him to carry produce from the garden to the house and sometimes sold the produce on the Testator's instructions and returned the money to him.
- [8] The Defendant further claim that the Testator gave her the certificate of title in respect of a portion of land at Arrow Park, Marigot containing 6,842.5 square feet of land which he owned as a gift in June 2007. That in or about 7th November 2017, just after the Testator

² Paragraphs 4 and 5 of the Statement of Claim

passing, she was informed by letter from Counsel for the Claimant that the Testator had executed another will dated 31st August 2017 leaving all his real and personal property to the Claimant. The Defendant claims that this 2017 will was not made “consciously, voluntarily and without undue influence or pressure” as she does not believe that the Testator would have disentitled all of his other beneficiaries named in the earlier will. She claims that she has very good reasons to believe that this will, if made by the Testator, was made under duress or pressure or under influence by the Claimant and her aunt Verdan while he was not in “a sound, or sufficiently sound, mental, and or emotional and or psychological state of mind to be aware or fully aware of what he was doing and or the effect of what he purportedly did”. The Defendant, who asserts that the will executed by the Testator in February 1996 is his true last will and testament, seeks a revocation of the probate and the will of August 2017 granted to the Claimant.

[9] The Defendant’s counterclaim is in the following terms:

- (1) A **declaration or determination** that the Will dated the 31st day of August 2017, probated on 21st day of August 2018, recorded in Book of Probates “NX2” Folios 260-261 purportedly executed by The Testator, wherein the defendant Radcliff Prince is named as the sole executor and sole beneficiary of the said estate, is not a will which truly represents the conscious, voluntary intention of the said The Testator and was not freely executed by the Testator and is therefore null, void and of no effect.
- (2) A **declaration** that the Will dated the 3rd day of February 1996 executed by The Testator wherein Davidson Boland was appointed and the Claimant is expressly named as one of the beneficiaries, is the only true, current and valid last will and testament consciously and voluntarily executed by the said Testator and truly representing the intention of the Testator regarding the administration and distribution of his estate.
- (3) An **Order** revoking the grant of probate dated the 21st day of August 2018 recorded in Book of Probates “NX2” Folios 260-261, made in favour of the Claimant Radcliff Prince as sole executor and trustee of the estate of The Testator.
- (4) An **injunction** to restrain the Claimant by himself, his agents or servants or however otherwise, from unlawfully or otherwise, administering, distributing, or apportioning, dissipating, wasting and or disposing of any properties belonging to the estate of The Testator, until after the hearing and determination of this case or until further order; AND OR, **and injunction** restraining the Claimant by himself, his agents or servants or however otherwise, from unlawfully evicting the Defendant from the said house and premises known as a Lot in Marigot containing 6842.5 square feet, situate in Marigot, in the parish of St. Andrew, Commonwealth of Dominica, which form part of the estate of The Testator who died on the 16th

day of September 2018; and otherwise from unlawfully or wrongfully interfering with the Defendant's quiet possession and enjoyment of the said house and premises, until after the hearing and determination of this case or until further order.

THE EVIDENCE

- [10] The Claimant's evidence involved witness testimonies of the Claimant himself, Radcliff Prince, Verdan Prince testified as the Claimant's first witness. Martha Elenora Alexander testified as the Claimant's second witness and Nika Alfred as the Claimant's third witness.
- [11] The Defendant's evidence included the testimony of the Defendant Brendalee Thomas herself, Andrew Thomas as the Defendant's 2nd witness and Felix Bruno as defence witness No. 3.
- [12] Exhibited and relied on at trial are the following Exhibits marked as follows:
- Copy of grant of probate in the estate of The Testator, dated 21st August 2018 with will dated 31st August 2017 annexed³;
 - Copy of Letter dated 23rd August 2018 from Rose-Anne Charles to Brendalee Thomas⁴;
 - Copy of Certificate of Title L5 folio 33 registered in the name of Rupert Prince, the Testator⁵;
 - Copy of Will of Rupert Prince, the Testator dated 3rd February 1996⁶;
 - Copy of letter to Brendalee Thomas from Rose-Anne Charles dated 31st October 2017⁷;
 - Copy of Letter from Gildon Richards to Rose-Anne Charles dated 10th November 2017⁸;
 - Copy of letter to Brendalee Thomas from Rose-Anne Charles dated 23rd August 2018⁹;
 - Copy of letter to Brendalee Thomas from Rose-Anne Charles dated 20th January 2021¹⁰

³ Exhibited at pages 1-6 of Trial Bundle No. 3

⁴ Exhibited at pages 7-10 of Trial Bundle No. 3

⁵ Exhibited at pages 11-18 of Trial Bundle No. 3

⁶ Exhibited at pages 19-20 of Trial Bundle No. 3

⁷ Exhibited at pages 21-24 of Trial Bundle No. 3

⁸ Exhibited at pages 25-28 of Trial Bundle No. 3

⁹ Exhibited at pages 29-32 of Trial Bundle No. 3

¹⁰ Exhibited at pages 33-34 of Trial Bundle No. 3

THE ISSUES

[13] In the resolution of the issues formulated by the respective counsel for the parties, I have distilled the issues down to two issues for determination as follows:

1. Whether the Claimant has proved due execution of the will of The Testator dated 31" August 2017; and
2. Whether the Claimant is entitled to the reliefs claimed?

RESOLUTION OF ISSUE NO. 1- Whether the will of The Testator dated 31" August 2017 is a valid will and has precedence over the will executed in 1996

[14] The core issue of this dispute between the parties surrounds the creation of two testamentary documents: a will created in 1996 and a subsequent will in 2017 purportedly made by the Testator. The contents of the 1996 Will, Exhibit 4, provided as follows:

"THIS IS THE LAST WILL AND TESTAMENT of me, The Testator, farmer of Marigot, which I make this 5th Say of February 1996

- 1. I revoke all former Wills and Codicils made by me and declare this to be my Last Will.***
- 2. I appoint Felix Bruno of Marigot to be the executor of this Will. If he predeceases me or is unable or unwilling to accept the position of or continue as executor, then I appoint Davidson Boland as alternate executor.***
- 3. Subject to Clause 4, I leave my house at Arrow Park, Marigot and all the land surrounding it which is owned by me to my granddaughter Brenda-Lee Samuel absolutely. If she predeceases me, then I devise the said land and house to her children equally.***
- 4. I devise to my daughter Verdon Prince that portion of my land at Arrow Park aforesaid on which her house stands, measuring 39 feet along my boundary with Martin Prince and 28 feet along my boundary with Nathaniel Robert together with a 4-feet-wide right of way along the said boundary of Nathaniel Robert to the footpath by which my said land is accessed land which is shown on the plan attached to my Certificate of Title.***
- 5. (i) I devise my approximately acres (18) acres of land at Crown Valley, Marigot as follows***
 - (a) three (3) acres to my grandson Charlton Alfred and if he predeceases me, then to his children;***
 - (b) three (3) acres to my daughter Eleanora Alexander;***
 - (c) two (2) acres to my grand-daughter Gabriella Samuel and if she predeceases me, then to her children;***
 - (d) two (2) acres to my grandson Kenroy Sylvester and if he predecease me, then to his children; and***
 - (e) the balance to my son Racliffe Prince.***

(ii) The location of the lands to be distributed under sub-clause (i) shall be determined by Racliffe Prince, but if he predeceases me or dies before completing the partitioning, then it shall be done by my executor.

(iii) For the avoidance of doubt, it is hereby stated that the cost of the partition required by this clause shall be borne proportionately by the beneficiaries under this clause.

6. I devise my house lot at Over Gutter, Marigot to my daughter Eleanora Alexander absolutely.

7. I bequeath all the furniture and other contents (except my clothes) of my house at Arrow Park to my granddaughter Brenda-Lee. I bequeath my said clothes to my son Racliffe to be distributed as he wishes.

8. I give the rest, remainder and residue of my property, whether real or personal, and wherever situated and not hereby or by any codicil hereto specifically disposed of which I now possess or which I may hereafter become possessed to all my children absolutely”.

The contents of the 31st August 2017, Will Exhibit 1 also provided as follows:

“THIS IS THE LAST WILL AND TESTAMENT of me, The Testator, of Arrow Park quare, Marigot, in the parish of St. Andrew, Commonwealth of Dominica being of sound mind, I hereby revoke all former wills made by me and declare this to be my last will and testament.

I hereby appoint my son Radcliff Prince, of Marigot, Commonwealth of Dominica to be the executor and trustee of this my last will and testament.

After payment of my just debts if any, funeral and testamentary expenses, i give devise and bequeath:

1 My house and land at Arrow Park Square, Marigot where I reside to my son Radcliff Prince for his own use and benefit.

2 All the rest of my property real and personal wherever situated which i possess or may hereinafter possess to my son Radcliff Prince for his own use and benefit”.

[15] The foregoing wills concluded with the customary attestation clause, indicating that the execution of the will by the Testator was conducted in the presence of two witnesses who witnessed the Testator's signing, this is so for the 1996 will. However, the 2017 will shows that the Testator purportedly marked the same with an X on 31st August 2017, and the one attesting witness purportedly signed on 31st August 2017. The attestation was completed on 6th June 2018 before a commissioner for oaths.

[16] Before delving into this judgement proper, it is important to restate the fundamental tenet that “a will is to speak from the death of a testator. Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it has been executed immediately before the death of the testator, unless a contrary intention appears by the will”, As held in **Gill v Woodall and others**¹¹: “*Wills frequently*

¹¹ [2010] EWCA Civ 1430 (14 December 2010) at paras 16 & 17

give rise to feelings of disappointment or worse on the part of relatives and other would-be beneficiaries. Human nature being what it is, such people will often be able to find evidence, or to persuade themselves that evidence exists, which shows that the will did not, could not, or was unlikely to, represent the intention of the testatrix, or that the testatrix was in some way mentally affected so as to cast doubt on the will. If judges were too ready to accept such contentions, it would risk undermining what may be regarded as a fundamental principle of English law, namely that people should in general be free to leave their property as they choose, and it would run the danger of encouraging people to contest wills, which could result in many estates being diminished by substantial legal costs. Further, such disputes will almost always arise when the desires, personality and state of mind of the central character, namely the testatrix herself, cannot be examined other than in a second hand way, and where much of the useful potential second hand evidence will often be partisan, and will be unavailable or far less reliable due to the passage of time.

[17] As I compose this judgment, I remain mindful of the aforementioned principle. Now, the Defendant herein has challenged the later will for the reasons that the Testator executed a will in 1996 in which the Claimant was not named as the executor and that the 2017 will was not made “consciously, voluntarily and without undue influence or pressure” as she did not believe that the Testator would have disentitled all of his other beneficiaries named in the earlier will; that this 2017 will was not made by the Testator.

[18] The Claimant refutes the assertions of the defendant and claims that the Testator made his will of 31st August 2017 voluntarily having full testamentary capacity. He avers that this will is valid and revokes any prior will made by the testator. The Claimant avers that he is entitled as the executor of The Testator to the reliefs claimed in his Statement of Claim and the Defendant ought to vacate the property to which she has no valid claim so as to allow him to complete the administration of The Testator's estate.

THE LAW AND DISCUSSIONS

Burden of proof

[19] It is trite that where there is dispute as to the validity of a Will the initial onus of proof is on the propounders of the Will (in the instant case, the Claimant) who ought to show by credible prima facie evidence that the Will was duly executed and that the Testator (in this case Radcliffe Prince) had the mental capacity or corpus mentis to execute the Will as a free agent without undue influence or fraud.

[20] Once the Claimant has discharged this initial burden, the onus shifts to the Defendant who challenges the Will and its validity, to prove the contrary, also with credible evidence. In the instant case, since the Defendant alleges undue influence, she has to establish these allegations of lack of mental capacity of the Testator. In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity. If a real doubt is raised, the evidential burden shifts back to the propounder of the will to establish capacity nonetheless **Key v. Key**¹².

[21] The relevant law herein is the **Wills Act**¹³, and in particular section 8 thereof which provides in very clear terms on the Validity and requirements for the execution of a Will, that a valid will must be:

- i. Made by a person who has attained the age of majority;
- ii. The person making the will must have testamentary capacity or animus testandi to so do;
- iii. In writing;
- iv. Signed at the foot or end by the testator or some other person in his presence and by his direction;
- v. The signature is made or acknowledged by the testator in the presence of two or more witnesses who must be present at the same time; and
- vi. The witnesses must also attest and subscribe the will in the presence of the testator.

UNDUE INFLUENCE

[22] The Defendant contends that the 2017 will was not made “consciously, voluntarily and without undue influence or pressure” as she did not believe that the Testator would have disentitled all of his other beneficiaries named in the earlier will. **Rule 68.8(3) of the Civil Procedure Rules (CPR)**¹⁴ provides that:

“Any party who pleads that at the time when a will, the subject of the proceedings, was alleged to have been executed the testator did not know and approve of its contents, must specify the nature of the case on which he or she intends to rely, and no allegation in support of that plea which would be relevant in support of any of the following other pleas, that is to say that –

(a) at the time of the execution of the will the testator was not of sound mind, memory or understanding;

¹² [2010] EWHC 405 at para 97

¹³ Chapter 9:01 of the Laws of the Commonwealth of Dominica

¹⁴ (Revised Edition) 2023

(b) the execution of the will was obtained by undue influence or fraud; or

(c) the will was not duly executed; may be made by that party unless that other plea is also set out in his or her statement of case”.

- [23] As stated in Paragraph 41 of this judgement, where undue influence is alleged, the principle of he who asserts must prove is clearly outlined in Halsbury’s laws of England Vol 22 as follows:

“if the execution of the will is not in dispute the party alleging undue influence “must discharge the burden of proof by clear evidence that the influence was in fact exercised. the question for the court is whether, in making his disposition, the testator had acted as a free agent. In this instance, the burden of proof is squarely on the accusers. It is not sufficient to prove that a testator was persuaded to take a particular course; what must be established is that the testator's own free will was overborne”.

- [24] **In Hall v. Hall**¹⁵, Sir J P Wilde gave the following directions to the jury that: “To make a good will a man must be a free agent. In a word a testator may be led not driven; and his will must be the offspring of his own volition and not the record of someone else’s.”

- [25] And coercion is said to be in the in the case of **Wingrove v. Wingrove**¹⁶, of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person *in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything. This would be equally be coercion, though not actual violence.*

- [26] Accordingly, to constitute undue influence the testator must be coerced into making a will or part of a will which he does not want to make pressed on a testator. The question that behoves on me as this point is whether the testator executed the 2nd will with his own free will and if he did, did he do so with full mental capacity?

- [27] It is the evidence of the Defendant that she was raised by the testator from the age of 9 and he relied on her for support most of the time. This piece pf evidence was corroborated by all the witnesses, and it is therefore an established fact. She states that in 2007, the testator had given to her the certificate of title of the property for the house at Arrow Park, Marigot

¹⁵ (1868) LR 481

¹⁶ (1885) 1 PD 81

(affidavit of the defendant para 11). She claims that in 2016 the testator urged her to put water in the house and register same in her name and she had the indication that her uncle, the claimant and her aunts were displeased by the fact that she had been given this property. She states that she had a conversation with the testator one day and he said to her *“that if he didn’t undo what he has done, there will be bloodshed”* (para 17 of her affidavit) from paragraphs 22 to 25 she avers to the fact that she witnessed first-hand the ill treatment of the testator by his children because of the will he made in 1996.

[28] She also testifies that the Claimant was particularly abusive and disrespectful to the testator, would charge a fee from him whenever he did any work, and that the testator had told her that they have his neck on a platter and that there will be bloodshed in the yard after his death if he didn’t change his will. She states that although the claimant took the testator to hospital when he fell ill, he hardly visited him as well her aunt Verdan (para She also claims that on the day the testator died he “looked very stressed, he could not sit upright, he seemed weak and mentally unstable and kept saying he is going”, she denied seeing the Claimant and his children.

[29] The Claimant under cross examination admits that his father made the second will whilst he was hospitalised and that he was not present when the will was made but his father sent him and his two sisters to bring his Lawyer to him. It is also his evidence that whilst his father was hospitalised, he visited him often (para 12 and 13 of his affidavit) and was present when his father passed away in hospital. That his father had all his senses about him and could speak clearly and rationally until the day before he died. It is also the evidence of the claimant that during the time his father was in hospital, he contacted the lawyer that made the 1st will of 1996 and he went to the offices of the lawyer with his sisters. It is also a fact that the testator died in hospital.

[30] From the totality of the evidence, both the Claimant and the Defendant have accused each other of having a fraught relationship with the testator and it is safe to assume that this was the case. I shall leave this here as the burden of proof has once again shifted back to the Claimant to show that the will was made in accordance with section 8 of the Wills Act.

Mental capacity/Knowledge and Approval

[31] While the overall burden of proving a will lies on those who propound it, such burden is generally discharged by showing that the will was duly executed and that the testator had testamentary capacity. ***“The Legal burden of proof always lies upon the person seeking to propound a will to prove that the testatrix had the testamentary capacity at the time. If that person fails to do so, the will would not be admitted to probate. The testatrix must have known and approved of the contents of the will. The will must be that of a free and***

capable testatrix exercising her genuine free choice and not a result of undue influence by another,” per Blenman J in **Aubrey Sylvester Edwards vs Rolston Rawlins**¹⁷.

- [32] The question therefore remains, whether the Claimant has on a balance of probability proved that the testator executed his will by meeting all the requirements of Section 8 of the Wills Act. The requirement is that a testator must not only have the necessary mental capacity to make a will but that he should be aware of the contents of the will and approve same.
- [33] The case of **Banks v Goodfellow**¹⁸ is sound authority for the proposition that at the time of making the will, the testatrix must possess a “sound disposing mind and memory”. Cockburn CJ at page 565 Observed that :***“It is essential to the exercise of such a power that a testatrix shall understand the extent of the property of which she is disposing; shall be able to comprehend and appreciate the claims to which she ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, prevent his sense of right, or prevent the exercise of his natural faculties—that no insecure delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would have been made”***.
- [34] The evidence in this case establishes that the testator was 97 years old and was severely ill as an ambulance had to transport him up from his home in Arrow Park to the hospital. The evidence also demonstrate that he was ill and hospitalised until his death. Nika Alfred, the Claimant’s 4th witness under cross examination admits that the testator died a few days after he made the will but could not recall the exact days. She also admits that although the testator could write his name ordinarily, but on the day in question he made a mark on the will. In fact, all the witnesses in this case confirmed under oath that the testator was literate and could write his name. The pivotal inquiry at this juncture is why did he mark an X instead of writing his name.
- [35] Although the mark of an X should not be fatal a testator’s thumbmark may constitute a valid signature. **“Where the signature of the Testator is not completed, the court will not necessarily refuse to pronounce in favour of a testamentary document. Although there must either be the name or some mark which has been acknowledged by the testator, the particular circumstances should be considered in deciding the effectiveness of the signature; and it must be decided whether the inference can be drawn that what was written was intended by the Testator to be the best that could**

¹⁷ [ECSC] ANUHPB2005/0513 at para 35

¹⁸ [1870] 5 QB 549

be done by way of writing his or her own name. The court will allow a certain degree of latitude with regard to the attestation by the witnesses when it has been satisfied that the document was properly signed by the Testator and was intended to be of a testamentary character”: the Estate of Finn¹⁹.

- [36] The Claimant submits that Nika Alfred’s testimony revealed that on the date of the execution of the will, the testator was able to speak to her about family members. She states that the testator told her that he was going to sign his will and also told her that she should not say anything about his will to other family members because he did not want any problems. The claimant therefore submits that based on this testimony, the testator was aware that he intended to dispossess beneficiaries in his earlier will which would be a source of disappointment to the beneficiaries particularly the Defendant and could provoke anger. I find these submissions peculiar having seen this witness give evidence and forming the opinion that she is not a witness of truth. The resultant effect of this is that the court’s suspicion is excited and begs the question why did the testator not sign his will with his name if he was so lucid that he could say all that he said to Nika Alfred.
- [37] In the cases of **Anne Marie Mcleish v Avison Albert Marryshow²⁰**, the learned Justices of Appeal pronounced on the principle emerging from the cases of *Pendock Barry Barry v James Butlin*, (1838)ii 2 Moore P.C 480 that ***“wherever a Will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testatrix, the Court ought not to pronounce in favour of it unless the suspicion is removed...; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the Will to remove such suspicion of the Court; and prove affirmatively that the testator knew and approved of the contents of the document. It is only where this is done that the onus is thrown on those who oppose the Will to prove fraud or undue influence or whatever else they rely on to displace the case made for proving the Will”***.
- [38] Having regard to the foregoing, I must say that the suspicion of the court is aroused in this case as the Claimant herein was active in the preparation of the will. The evidence revealed that he took part in bringing the lawyer to his father’s bedside and also actively sought a witness to witness the will as disclosed by Nika Alfred in her testimony. Further, the will in question also seeks to dispossess all other beneficiaries from the 1996 will and makes the Claimant the sole beneficiary. To my mind, this is a classic situation to further arouse the suspicion of the court and authorities already cited confirm that one of the

¹⁹ [1935] 105 LJ (P) 36, 154 L.T 242

²⁰ [ECSC] HCVAP2010/12 (Grenada)

circumstances that increase suspicion is “where a person is active in the preparation or execution of the will under which he benefits”.

- [39] Still on establishing testamentary capacity of the testator, I move to consider whether the testator was aware of the contents of the will and that he confirmed that his instructions were correct, and he approved same. As articulated by the Eastern Caribbean Supreme Court of Appeal, ***“the testator must, in the language of the law, be possessed of sound and disposing mind and memory. He must have a memory...But his memory may be very imperfect; it may be greatly impaired by age or disease; ...To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed his will?”***²¹*Anne-Marie Mac Leish and Lynette Rooker vs Avison Albert “Bert”*.
- [40] With the above in mind, what compelling and credible evidence has the Claimant put before the court to dispel the suspicion? The simple answer is that there is no evidence to confirm that the Solicitor present read the will to the testator and that it was confirmed by him. The evidence of Nika Alfred, the only witness present for the execution of the will, admits that she did not hear the solicitor explain the contents of the will or the extent that this will would dispossess others of property earlier bequeathed.
- [41] The capacity of the Testator currently under scrutiny could have been dispelled by the examination of a medical practitioner This is the so called ‘Golden Rule’ which is a precaution to be taken by the solicitor to avoid the challenge of the capacity of the Testator. while the law does not require a medical practitioner's presence during the execution of a will, their involvement is prudent in cases where the testator's mental capacity might be subject to scrutiny as in this case instant.
- [42] The rule is aptly explained in **Kenward v. Adams**²² wherein Templeman J in November 1975 stated that **“When a solicitor is drawing up a will for an aged testator or one who has been seriously ill it should be witnessed or approved by a medical practitioner, who ought to record his examination of the testator and his findings. That was the golden if tactless rule ... Other precautions were that if there was an earlier will it should be examined, and any proposed alterations should be discussed with the testator.”**

²¹ Ibid at 20

²² (1975) Times 29 November 1975

- [43] The Law therefore imposes a heavy burden on a solicitor confronted with circumstances where an aged or seriously ill testatrix with failing memory is giving him instructions, to prepare a will, or change the previous disposition in an existing will, or to make sweeping change from an earlier will.
- [44] In **Sherwin Williams and Sheldon Williams vs Rober B Layne and Vervina Lynch**²³ the Court provided some guidelines to Counsel preparing Wills for persons who are elderly, weak and ill; *“A prudent solicitor faced with preparing a last will for an elderly and obviously weak and very ill client, will normally require a medical examination of the proposed testator at the time of the execution of the will and certification by a doctor as to the competence at the time of the proposed testator. This is even more useful if the solicitor’s instructions are that the bulk of the estate is being left to the beneficiary who is giving him the instructions to prepare the will. It is an appropriate safeguard where the solicitor is asked to hurry the preparation of the will as the testator has not much longer to live. But, the court must be satisfied that that was indeed the intention of the testator... A careful solicitor will normally ensure that he personally interviews an ill, weak and elderly proposed testator; he will keep on file his notes as to his observations and discussions with the elderly testator, so that he can give evidence when called upon to do so as to the state of health and competence of the testator at the time he received the instructions to prepare the will. He will keep on file the medical certificate that he has obtained as described above as to the state of the mental and physical health of the proposed elderly and dying testator to produce at trial when called upon to do so...”*.
- [45] In this case instant, the instructing solicitor herein Rose Anne Charles is also the Attorney conducting the claimant’s case. Counsel for the Claimant has clearly not paid heed to the Golden Rule as she has acted as counsel in this matter, she did not appear as a witness at the trial and there was no medical examination of the Testator conducted prior to his execution of the Will that would help the court to determine his capacity to understand what he was doing. This omission of counsel is fatal to the Claimant’s case.

The Requirement Of Two Witnesses

- [46] Finally, in considering the requirement of two witnesses as provided by law, The will in contention was said to be concluded with the customary attestation clause, indicating that the execution of the will by the Testator was conducted in the presence of two witnesses who witnessed the Testator's signing, this is so for the 1996 will. However, in the 2017 will the testator has purportedly marked the same with an X and that only one attesting witness signed the will. The attestation was completed on 6th June 2018 before a

²³ [ECSC] Civil Suit No. 440 of 1996 at para 7 (St. Vincent & the Grenadines)

commissioner for oaths. Nika Alfred was the only witness to the Will whilst section 8 of the Wills Act clearly prescribes that “two or more witnesses” must be present to attest. **Tristram and Coote's Probate Practice**²⁴ states: “The signature of the testator must be made or acknowledged in the actual visual presence of the witnesses, present at the same time, and before either of them has signed as a witness”.

- [47] In *Colling Re, Lawson v von Winckler*²⁵, the Chancery Division held that the requirements of s 9 of the Wills Act 1837 were not complied with. It was essential that the testator should have signed the will in the presence of both witnesses before either of them attested and subscribed the document. This case reinforced the requirement that both witnesses must be present at the same time to witness the testator’s signature for the will to be valid.
- [48] In view of the above, it is safe to say that no clear or cogent evidence has been offered by the claimant in this case to prove that the testator had known and approved the contents of the will. I find that the onus of establishing testamentary capacity has not been discharged in this case, I say so because there is insufficient evidence herein that the testator was able to comprehend or recall the extent of his property or those he was excluding. I also find that the requirements of section 8 of the Wills Act were not complied with. On these grounds alone the Court holds that the will of 2017 is invalid.

RESOLUTION OF ISSUE NO. 2: Whether the Claimant is entitled to the reliefs sought?

- [49] In the final analysis therefore and having determined that the Claimant has failed to convince this court on the balance of probability that the 2017 will was valid it is therefore a natural consequence that the claims for trespass and damages must fail.
- [50] The Courts have continuously held that actual possession is good against all except those who can show better right to possession. It is trite law that trespass to land is actionable at the suit of a person in possession of land, and such a person can sue for trespass even if he is neither the owner nor a privy of the owner. This is because exclusive possession gives the person in such possession the right to retain it and have undisturbed enjoyment.

²⁴ Part I the Common Form Probate Practice, Chapter 3, Wills and Codicils Execution of Wills – internal laws of England and Wales on the presence of witnesses at para [3.106]

²⁵ [1972] 3 All ER 729, [1972] 1 WLR 1440, 116, Sol Jo 547

[51] Clearly the Claimant was not in possession of the property in question and the defendant lives on the property and according to law has the actionable right for trespass. Furthermore, the Claimant has failed to prove his entitlement to the property through the will of 2017 and is not entitled to any of the reliefs claimed.

[52] On the issue of costs, the general rule is that costs follow the event unless the court, for good reason, otherwise directs. This means that the successful party is to obtain an order for costs to be paid by the other party and I so hold.

[53] In conclusion, the Claimant's claim fails and the Defendant's counterclaim succeeds as follows:

- (1) it is declared that the Will dated 31st day of August 2017, probated on 21st day of August 2018, recorded in Book of Probates "NX2" Folios 260-261 purportedly executed by The Testator, is hereby revoked wherein the defendant Radcliff Prince is named as the sole executor and sole beneficiary of the said estate, is hereby revoked;
- (2) It is also declared that the Will dated the 3rd day of February 1996 executed by The Testator, is deemed to be a valid will;
- (3) The grant of probate dated the 21st day of August 2018 recorded in Book of Probates "NX2" Folios 260-261, made in favour of the Claimant Radcliff Prince as sole executor and trustee of the estate of The Testator is hereby revoked;
- (4) The Claimant is restrained by himself, his agents or servants or however otherwise, from unlawfully or wrongfully interfering with the Defendant's quiet possession and enjoyment of the said house and premises known as a Lot in Marigot containing 6842.5 square feet, situate in Marigot, in the parish of St. Andrew, Commonwealth of Dominica, which form part of the estate of The Testator; and
- (5) The Claimant shall pay the Defendant's costs in the sum of \$10,000.00.

Justice Zainab Jawara-Alami
High Court Judge

BY THE COURT

REGISTRAR