

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(Civil Division)

COMMONWEALTH OF DOMINICA

Claim No: DOMHCV 2019/0108

BETWEEN:

HELEN DOVER

Claimant

AND

[1] ALICK "BOBBY" DOVER

[2] GENELLE DOVER

Defendant

Before: Hon. Madam Justice M E Birnie Stephenson

Appearances:

Heather Felix Evans of Optimum Legal for the Claimant

Jilane-Milani Prevost of Prevost & Prevost for the Defendants

2022: September 15th (Closing submissions)

2023: June 12

[1] **STEPHENSON J.:** The subject of the claim herein is property located at 39 Bowers Lane Goodwill Housing Scheme registered in the Book of Titles N 19 Folio 95 M registered in the name of the Claimant Helen Dover. ('The property'). This property was originally owned by Miss Uraline Mary Richards aka Euraline Mary Richards ('Ms. Richards') and according to the

claimant she inherited the property from Ms Richards who was her mother by virtue of the terms of her mother's will.

- [2] This court has very carefully reviewed the evidence adduced at the trial on behalf of all the parties, and this court has also given deliberate consideration of the written submissions with authorities made by counsel on both sides of the case.
- [3] Ms Richards died on the 1st October 2008 leaving a will, grant of probate was made on the 18th May 2011.
- [4] The claimant was named as the sole executrix and sole beneficiary of the estate. The property was duly registered in the name of the claimant. Essentially the claimant submits that her title to the property is indefeasible which can only be disturbed by the defendants if they properly plead and prove at trial that the will was fraudulently produced or that the testatrix had no *animus testandi* when the will was attested therefore making the will invalid and capable of being set aside.
- [5] The claimant on 16th May 2019 commenced proceedings against her brother Alick "Bobby" Dover and her niece Genelle Dover for possession of her property and for damages for trespass, pre action costs and costs.
- [6] The claimant's claim damages for trespass against the first named defendant is in the sum of \$200.00 per month and against the second named defendant for \$500.00 per month both from the 16th March 2019 until she obtains possession of the property.
- [7] The essence of the defence is that the will under which the claimant claims she inherited the property was a fraudulent one and one which was contrary to the expressed intentions of Ms Richards. The defendants contended that the will was produced by fraud or in the alternative that Ms Richards who was illiterate did not know the nature of the document that she executed.
- [8] The defendants and their witnesses all contended that Ms Richards always said that she would not make a will. This court pauses to say that if this is so there seems to have been conversation and discussion between the defendants and their witnesses with Ms Richards about her making a will.

[9] The defendants further claimed that even if Ms Richards made her "X" mark that when she did so that she did not know what she was signing, that is she did not possess the *animus testandi* in making the will.

[10] The defendants in their counterclaim sought the following remedies:

- a. An order restraining the claimant from acting on the grant of probate granted to her and from her, in any way whatsoever from disposing of any part of Ms Richard' estate.
- b. An order restraining the claimant from holding herself out as the executrix of the estate of Ms Richards pending the determination of this matter;
- c. An order compelling the claimant to return the probate obtained to the estate of Ms Richards;
- d. A declaration that the purported will of Ms Richards be relied on by the claimant be voided in accordance with the legal principle of *Animus Testandi*; and
- e. Damages and costs.

[11] In her reply and defence to the defendants' statement of case the claimant contended that:

- a. The will of Ms Roberts, which was probated, was prepared by a solicitor upon the instructions and free will of the testatrix;
- b. That the said will was witnessed in the presence of and by the solicitor and the solicitor's secretary after the will was read over to her and she appeared to the solicitor to have understood the contents thereof.

[12] It is the claimant's case that she was born on and raised on the property in Bowers Lane and that the first building on the land was destroyed by Hurricane David and that a second wooden structure was constructed on the land where Ms Richards and her children lived.

[13] That the second wooden structure fell into disrepair and around 1995 several of Ms Richards children who are the claimant's siblings, and the claimant all came together and assisted and contributed to the building of a comfortable and respectable home for their mother. This included the brothers Lennox and Augustus Dover together taking out a loan from the bank to assist in the financing of the building.

[14] The claimant further contended that she went to St Maarten several years before where she worked and repatriated funds, goods, and clothing over the years to her mother to assist in the maintenance of her mother, siblings, and niece (the second) named defendant and that it was she who furnished the newly constructed home.

[15] The claimant asserted that at all material times Ms Richards' children knew and understood that they were providing a home for their mother. Further, that there was never any understanding that after their mother's death that the house would become the family home.

[16] The claimant in her pleaded case contended that at all material times the property was registered solely in Ms Richards' name and that Ms Richards treated the property as her property absolutely, so much so that she refused to allow two of her sons to use her certificate of title as security for loans which they were seeking to obtain from the bank for their personal business.

[17] The claimant further asserted that Ms Richards always said that what she owned was for one and only daughter. The claimant in her pleaded case denied that her mother said that she would never make a will.

[18] The claimant agreed that her mother was hypertensive and diabetic and that she was illiterate. She also did not deny that her mother became nervous when she was required to write.

[19] The claimant contends that Ms Roberts died at the age of 71 years and was mentally and physically active and conducted her own affairs up to four days prior to her death.

[20] The claimant denies exerting any influence over her mother and contends that at all material times her mother was always independent and as it regards her will she acted independently.

[21] The claimant rejected the image of her mother as portrayed defendants'.

[22] The questions that ultimately arise for determination is whether Ms Richards' will was fraudulent as contended by the defendants in their statement of case or whether or not Ms Richards possessed the relevant *animus testandi* to execute the will making the bequest that she did.

[23] Should the court find that the will was fraudulent or in the alternative that Ms Richards did not possess the relevant *animus testandi at the time that the will was prepared and when she made her "X" mark*, this court would not doubt declare the will void and grant the defendant's prayer as sought.

[24] Should this court find that Ms Richards' possessed the *animus testandi and that the will was not fraudulent* then the court will have to consider and grant the claimant's prayers.

[25] In the defence and counterclaim which was filed on behalf of the defendants it was pleaded that "Uraline Mary Richards aka Euraline Mary Richards did not make a Will and that the paper probated by the claimant purporting to be the Will of Uraline Mary Richards aka Euraline Mary Richards was produced by fraud ..." ¹

[26] Where a will makes unexpected gifts of a person's bounty to named beneficiaries then one of the things to be considered, as if often contested, is whether the will is a genuine one.

[27] Normally wills are contested when it is felt that the will was forged or some fraud has taken place, as in the case at bar. Allegations of fraud and forgery are very serious allegations which in law require compelling evidence for a such a challenge to be successful². (emphasis mine) The learned judge applied the definition in **Derry -v- Peek** ³as stated in Chitty on Contracts and noted that even though the case was not grounded in contract law the same principles apply.

[28] The fact that a person's will may makes unexpected gift does not automatically or *ipso facto* mean that the will is fake or fraudulent or that the signature on the will is forged is perhaps one of the most popular grounds for challenging the validity of a will.

[29] For a will to be valid it must comply with the formalities for making a will according to law. If it can be proved that the will is fraudulent or a forgery or not made in compliance with the law, then the estate of the deceased would fall to be considered and distributed under the rules of intestacy.

¹ Paragraph 3 of defence filed on the 22 July 2019

² Yvette Powell Freeman and others -v- Olrick Llewelyn Powell NEVHCV2015/0117

³ [1886-90] All ER Rep 1, 61 LT 265

[30] In the case at bar this would mean that the property at Bowers Lane would be inherited by all the surviving children of Ms Richards who were alive at the time of her death.

[31] It is in fact the contention of the defendants that the will is fraudulent, and that Ms Richards died intestate and the property at Bowers Lane is to be owned by all her children as a family home.

[32] There is some difficulty in successfully challenging a will based on fraud or forgery if the will has been prepared by a lawyer and witnessed by the lawyer as the reality is that the lawyer would have to be involved in the fraud which is something the courts over the years have been reluctant to consider.

[33] It is well established law in our courts that fraud must be pleaded with particularity and must be judicially considered and deliberated on by the court. The pleading must not be vague. CPR 2000 Part 8.7 provides that a statement of claim must contain all the facts relied on by the Claimant. Likewise pursuant to Part 10.5 ... a defence must contain all the facts on which a defendant seeks to rely to defend the claim. Failure to state the facts would result in a party not being able to rely on them re: – Part 10.7. The House of Lords in the **Three Rivers case**⁴ confirmed the well settled principle that allegations of dishonesty, improper conduct, fraud, misconduct must be pleaded. Millet J⁵ said

'[184] It is well established that fraud or dishonesty [...] must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence [...]. This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.'

'[185] It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means 'dishonestly' or 'fraudulently', it may not be enough to say 'wilfully' or 'recklessly'. Such language is equivocal. [...]

'[186] The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary

⁴ Three Rivers district Council -v- Bank of England [2001] 2 ALL E R 513

⁵ Ibid at paragraphs 184 to 186

facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud.

It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved.'

[34] This court can do no better to but to adopt the words of the Learned Judge. Fraud can be proved from circumstantial proof but still that proof must be of the clearest and most indisputable evidence.

[35] In civil cases, the standard of proof is on a balance of probabilities and fraud requires proof that the fact in issue more probably occurred than not. **Re:B**⁶

[36] This test was applied in the **East Pine Management Limited**⁷ case it was held among other things that fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. To prevent a false statement being fraudulent, there must always be an honest belief in its truth.

[37] Given the legal requirements as regards the allegation of fraud this court proposes to examine the evidence as regards the allegations raised as pleaded and the evidence adduced by the defendants.

[38] In the evidence adduced by the defendants in this court the witnesses were adamant that "the will was a fraud". A review of counsel's written closing submissions it is to be noted that the issue of fraud was never addressed. Instead Counsel Ms Prevost on behalf of the defendants focussed on the following issues:

- a. "Whether the Deceased illiteracy and phobia of literacy constituted a disturbance of the mind rendering her incapable of the requisite animus testandi"

⁶ [2008] UKHL 35

⁷ East Pine Management Limited -V- [1] Tawney Assets Limited [2] Oldril Holdings Limited [3] Guildron Trading Limited BVIHCVAP2015/0035

- b. Whether the deceased was capable of independently marking and therefore did mark the purported will (with reference to the evidence of the attesting witness)?
- c. Whether overall, the purported Will was created under suspicious circumstances rendering it invalid?
- d. Whether the Claimant exercised undue influence over the Deceased in the making of the purported Will, rendering it invalid?
- e. Whether the Deceased, by her words and conduct, expressed a clear intention to fulfil that promise to her children that the property would be inherited equally?"⁸

[39] There is no dispute that the property at Bowers Lane in the Goodwill Housing Scheme was previously registered in the name of Ms Richards and that in her lifetime she lived there with her eight children. Further there is no doubt that the evidence establishes that the house as is on the property or that was occupied by Ms Richards at the time of her death was built through the joint efforts of her children.

[40] The claimant adduced evidence from three witnesses, they were from David Bruney the attorney at law who prepared her mother's will, from her brother Glen Augustus Dover and herself.

[41] The claimant in her claim seeks to revoke the licence granted to her brother and niece to occupy her property the defendants refused to oblige the claimants request and subsequent demand for them to leave the premises.

[42] In the claim at bar the defendants by way of defence and counterclaim sought to challenge the validity of the will of Uraline Mary Richards aka Euraline Mary Richards. They contend that the will was fraudulent or in the alternative that the testator did not know the nature of the document she allegedly executed in that she lacked testamentary capacity at the time of the execution of the will. The defendants seek to have the will avoided on the basis that the deceased did not have the *animus testandi* at the time of the execution of the will and based on their viva voce evidence they also contend that the will was a fraud.

[43] The claimant's response to the allegations of fraud are essentially as follows:

⁸ See Summary of issues at trial (Combined Factual & Legal Issues) page 2 of the closing submissions filed by the defendant on 15th September 2022

- a. That the will was prepared by a solicitor on the instructions and with the full participation of the testatrix and the solicitor was satisfied that the testatrix knew and understood the nature of what she was doing;
- b. That the said will was properly executed by the testatrix by making her “x” mark in the presence of her solicitor and his clerk after the will was read over to her and she appeared to have understood it;
- c. That the claimant and the testatrix had a closer relationship than that which existed between she and her sons, the claimant being her only daughter;
- d. That the testatrix always said that everything she left was for her “one and only daughter”;
- e. That the testatrix decided which lawyer she would go to, to make her will;

[44] The thrust of the defendant’s pleaded case is that the will of Ms Richards as probated by the claimant was produced by fraud and in the alternative that the testatrix did not know the nature of the document that she executed.

[45] The repeated evidence adduced by the defendants was that will is a fraud for the following reasons:

- a. That Ms Richards would never have made a will based on her repeated statements to her children;
- b. That Ms Richards was old and suffered from high blood pressure and diabetes that she was illiterate and had a morbid fear of making her “X” mark;
- c. That the property subject to the litigation was procured through a united family effort that is through the effort of all the children and it was understood that at all material times it would have remained a family home;
- d. That the claimant made very little contribution to the acquisition and building of the family home property of the Ms Richards; and
- e. That it was suspicious that Ms Richards failed to make any provision for the second named defendant who was at all material times her right hand.

[46] The defendants allege that the will was effected through fraud which is a good starting point for discussion and analysis.

[47] It is worth repeating the principle of law regarding fraud that fraud must be pleaded with particularity and the pleading must not be vague. Fraud must also be proved with certainty. It is

also well established law that fraud must be proved in order to invalidate the document under challenge, in this case it would be Ms Richards' will.

[48] It is also necessary to state that for an allegation of forgery to succeed it is necessary for the court to be satisfied that the will pronounced upon does not comply with the terms of section 9 of the Wills Act 1837 that is *"No Will shall be valid unless—*

(a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and
(b) it appears that the testator intended by his signature to give effect to the Will; and
(c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
(d) each witness either—
(i) attests and signs the Will; or
(ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness),
but no form of attestation shall be necessary."

[49] Counsel Felix Evans on behalf of the claimant submitted that the law is that allegations of fraud must be fully, clearly and distinctly pleaded and particularised. Counsel cited and relied on the **Sara Tannis Joseph and another -v- Dorothy Abraham**⁹ case and the learning in Bullen & Leake & Jacobs **Precedents of Pleadings**¹⁰.

[50] Counsel for the claimant further submitted that the claim or allegation of fraud must be allegation of fact or specific conduct and she cited and relied on **St Lucia Motor & General Insurance Co Ltd. -v- Peterson Modeste**¹¹

[51] In the old case of **Davy -v- Garrat**¹² Thessinger L J said

"In Common Law Courts no rule was more clearly settled than that fraud must be distinctly alleged and as distinctly proved and that it was not allowable to leave fraud to be inferred from the facts".

⁹ GDAHCVAP2018/0016

¹⁰ 16th Edition 2008 Volume, Chapter 49 at pages 841 to 843

¹¹ [2010] ECSCJ No 8 at paragraphs [7] to [20]

¹² (1877) 7 CD 473

[52] In **Thomas -v- Stoutt and others**¹³ as quoted by George Creque JA in the **St Lucia Motor and General Insurance Co Ltd -v- Peterson Modeste**, Byron CJ said¹⁴

“The mere averment of fraud in general terms, is not sufficient for any practical purpose in the prosecution of a case. It is necessary that the particulars of fraud are distinctly and carefully pleaded there must be allegation of definite fact, or conduct. The definite character must be given to the charges by stating the facts on which they rest.”

[53] **Wallingford -v- Mutual Society and Official Liquidator**¹⁵ was also cited by George Creque JA where it was stated that

“With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud which any court ought to take notice”

[54] In the **Modeste**¹⁶ case George Creque JA at paragraph 16 of the court’s judgment said

“Notwithstanding the fact that the CPR does not contain a specific rule with regard to the manner in which allegations of fraud are to be pleaded, the principle that where an allegation is made particulars must be given is a long and well settled principle which does not require restating in CPR for giving it force.”

[55] The evidence presenting the defendants’ case for fraud came from all their witnesses who are siblings of the first named defendant and claimant who all contended that Ms Richards was unable to easily make her “X” mark.

[56] Alick Bobby Dover claimed that the will was a fraud as his mother could not put her “X” mark on paper. The witness Phillip Dover told this court that he knew that his mother would never go in a lawyers’ office by herself that is she went she would have been accompanied by either Genelle Dover the second named defendant or her son Leroy Dover.

[57] Phillip Dover told this court that his mother never voted during her lifetime because she was afraid to make her “X” mark. He stated further that his mother never made a will neither did she have the intention to make a will. Phillips theory as was stated to the court was that the document purporting to be a will was made after his mother’s death by Counsel Mr David Bruney and his brother Augustus Dover.

¹³ (1997) 55 WIR 112

¹⁴ Ibid page 117

¹⁵ (1880) 5 App. Cas 685 at 697

¹⁶ Op cit

[58] Witness Lennox Lenroy Dover told this court that his mother was illiterate and that she had a lot of pride. That when it came to her having to sign her name he knew that how embarrassed she was and that based on his experience of the way she would behave whenever he took her to the credit union to withdraw monies from her account. He told this court that his mother could not make the "X" mark on her own and in fact when he was with her he would have to hold her hand for to do so.

[59] Lennox Dover in his witness statement spoke of his close relationship with his mother and the fact that she did nothing business wise without consulting him or discussing it over with him. Mr Lennox Dover further stated in his evidence that his mother always said that her house was a family house and that she would not leave it for a selected few but for all of her children.

[60] This witness said he did not believe that his mother made a will and if she did it was because she was coerced into to doing so.

[61] It is interesting to note that this witness said "his mother" repeatedly and reiterated that she did not want to make a will at all. This indicates to this court that Ms Richards knew what a will was and addressed her mind to making one for her to have purportedly say so over and over again.

[62] Mr Lennox Dover contended that there was no special bond between his mother and the claimant as the claimant contends and in fact he told this court that his mother had a special relationship with all of her children.

[63] Under cross examination, Mr Lennox Dover was adamant that his mother did not know Mr David Bruney the lawyer who did the will and under rigorous questioning from the claimant's counsel Mrs Heather Felix Evans, Mr Lennox Dover told this court a number of things that this court finds to be contradictory. He said he was his mother's right hand and that she authorised him to access her credit union account and that he knew all of her business, however at the same time he did not know where his mother kept her credit union book or her certificate of title and he attended the credit union with her when she wanted to transact business she did not send him.

[64] Another very glaring inconsistency in this witness' testimony when taking the defendant's case as a whole, was relating to his wife's relationship with his mother, He maintained that his mother

and wife had a good relationship however, when the second named defendant Genelle Dover gave evidence, she said that Lennox's wife did not have a good relationship with her mother in law. Lennox when confronted with this told this court that Genelle who is a defendant was not speaking the truth.

[65] It is to be noted also that this court had the opportunity to observe the demeanour of this witness and his attitude when he was being cross examined, to the point where it was noted that he became very agitated and belligerent. At one point under cross examination, he said he did not know where his mother's certificate of title was or her credit union book and then later he said he knew where they were. It is this court's view that this witness came to this court bent on discrediting everything as it regards his sister the claimant, and her involvement in her mother's affairs.

[66] Not surprisingly the picture painted by the defendants' evidence in the case at bar was in stark contrast to the evidence adduced by the claimant.

[67] In this court's respectful view, there are two questions for consideration or determination when there is an allegation of fraud as has arisen in the statement of case and the viva voce evidence present on behalf of the defendants.

[68] The first is whether the case of fraud has been properly pleaded and on the evidence adduced by the defendant whether they have discharged the burden of proof requiring them to show that the will as probated by the claimant was produced by fraud.

[69] The evidence presented to this court is that Ms Richards' will was prepared in a solicitor's office and witnessed by the solicitor himself and his clerk. The defendants' contentions were based on their views that their mother Ms Richards said repeatedly that she would not make a will. Their case as regards fraud was also that Ms Richards was illiterate and that she had a phobia of holding a pen to make an "X" mark and that she could not have made the "X" mark on her own. In fact in the closing submissions counsel focussed on this which oddly enough these phobias were not put to the claimant in the way and manner of her case as appears from her submissions.

[70] This is to be considered against the evidence of Mr David Bruney a duly qualified attorney at law who has been practicing before the courts in the Commonwealth of Dominica for twenty-three plus years.

[71] An attorney taking instructions for a will has a duty to be satisfied that the testator/testatrix as in this case, has capacity. It is the lawyer's duty when preparing a will to ensure that a legally effective will is prepared. Where a lawyer harbours doubt it is the best practice this court would think, for that lawyer to record his or her impression of the testatrix state of mind.

[72] In the case at bar Mr David Bruney quite candidly told this court that the testatrix visited his office with her daughter the claimant for purposes of making a will. Mr Bruney told this court that he took instructions solely from Ms Richards and particularly that this was done in the absence of her daughter the claimant who he requested to step out of his office and sit in the reception area.

[73] Mr Bruney in his witness statement said his recollection was that Mrs Richards told him that she had several children and only a single daughter with she shared a close and loving relationship with and that she wanted to ensure that her daughter would always have a house and that her boys were men who could always fend for themselves.

[74] Mr Bruney in his witness statement said that it was clear to him that the testatrix understood that she owned a house and she knew exactly what she wanted to do with it.

[75] This court heard from Mr Bruney that based on the instructions given to him the will was prepared by his secretary and that in taking the instruction Ms Richards gave him a copy of her certificate of title to the property she owned. Further, that the testatrix told she could not write her name but would make her mark.

[76] Mr Bruney said he read over the will in the presence of his secretary to the testatrix in the absence of her daughter and both he and his secretary signed as witnesses to the testatrix's signature as is required by law. Thereafter Ms. Richards left his office with the will in her possession.

[77] Under cross examination from Ms Jilane-Milani Prevost counsel for the defendants Mr Bruney was questioned about his notes of the meeting with Ms Richards. Mr Bruney said he would have made notes however the file as he would have had it was destroyed in the passage of Hurricane Maria.

[78] Mr Bruney said as it regards making of this particular will that he remembered it and pointed out a few reasons why he remembered it. Firstly that it was the first and only time that he actually had cause to witness a will and this was due to the fact that one of his staff, who happens to be his life partner was out of office having given birth to their son and at the time there were only two members of staff at work which is what caused him to sign as a witness.

[79] This court understands Mr Bruney to be saying that if all three members of his staff were at work he would have had to sign as a witness and in fact the circumstances of the day stood out in his mind and memory clearly. The court accepts Mr Bruney's evidence.

[80] When questioned about Ms Richards inability to sign her name and the fact of her having other children "whether or not warning bells did not go off in his head" that she was instructing him to prepare a will to leave everything to only one of her children. Mr Bruney's response was quite clear and forthright. That is, that in his view Ms Richards as very lucid and clear. Mr Bruney repeatedly said that the testatrix was clear that she had a single daughter and she wanted to make sure she had a roof over her head.

[81] Mr Bruney also told this court that, Ms. Richards showed him her title to the property she owned and further that she paid for the consultation and preparation of the will herself.

[82] This court accepts that Ms Richards was self-conscious about her illiteracy and anxious about making her "X" mark. However, there is no acceptable evidence that she would not have made her "X" mark in making her will. It is to be noted that unlike in the credit union she was in the privacy of counsel's chambers.

[83] Mr Bruney was also quite certain that she made her "X" mark on the will after it was prepared and read over to her that that he was satisfied she understood the contents of the will and her instructions to him.

[84] Counsel Ms. Jilane-Milani Prevost asked Mr Bruney this question. “*Did you consider yourself to have a professional duty towards the testator*” and Mr Bruney’s response was “*of course*”.

[85] This court accepts the evidence of Mr Bruney that he made the will on behalf of Ms Richards whose instruction to him were given solely and clearly.

[86] In the case at bar, there is the evidence adduced by the claimant which has been accepted by this court that the will contained the “X” mark of the testatrix and that there were two signatures of witnesses with an attestation clause in conformity with the requirements of the law.

[87] It is this court’s understanding of the law that the presumption of due execution arises which presumption can only be rebutted by the strongest evidence that the witness did not intend to attest to the deceased signature.

[88] The courts notes with concern the departure from the pleaded case by the counsel for the defendants in her closing submissions and the court is forced to conclude that the marked variance accounts for or supports the view of the defendants acknowledges that they have not reached the high threshold for their allegation for fraud

[89] The defendant by making no submissions on fraud that the faith in her claim seems to have whittled away.

[90] The defendants in fact have failed to substantiate their allegation of fraud.

[91] A person making a will is required to have the requisite *animus testandi* at the time of the execution of the will. In order for a will to be valid the court must be satisfied that:

- a.* There was the mental capacity required to make a will;
- b.* There must be intention to make a will; and
- c.* The person making the will must exercised her genuine and free choice of making a will.

[92] The issue arising in the case at bar is did Ms Richards know and approve of the contents of her alleged or purported will? Did she understand the nature of her act and its effects, did she understand that she was disposing her property? It is trite law that the legal burden rests on the

person seeking to propound the will to prove that the testatrix had the testamentary capacity at the time of making the will.

[93] According to Mr David Bruney the attorney at law who prepared the and who also signed as a witness to Ms Richards making her "X" mark, Ms Richards was very lucid and clear in her instructions to him about making the will. That is that the beneficiary was here only girl child and she felt her sons could fend for themselves and that she did not want her daughter not to have a house.

[94] In giving his evidence Mr Bruney said subsequent to preparing the will for Ms Richards he had contact with Mr Phillip Dore one of Ms Richard's sons and the issue of the will was never brought up.

[95] It was submitted by counsel Mrs Felix Evans on behalf of the claimant that in giving his evidence Mr Bruney was clear credible, consistent and reliable.

[96] On the evidence as adduced and accepted by this court there is no doubt that Ms Richards executed her will after duly instructing her solicitor Mr Bruney to do so and that the will was read over to her and that she understood what it is that she was doing. There has been no evidence adduced during the trial of this case that Ms Richards was a person having mental difficulties I am persuaded on the totality of the evidence before the court that Ms Richards at all material times had the requisite mental capacity at the date of the execution of her last will and testament.

[97] This court accepts the case as presented by the claimant and the submissions made on her behalf in preference to the case as presented by the defendants. This court is fortified in its view that no evidence has been adduced to suggest that Ms Richards did not possess the necessary mental capacity. There was no medical evidence brought forth to even suggest this.

[98] This court is satisfied that Ms Richards knew what she was doing the day she made the will. This court is confident in its view having accepted the uncontroverted evidence of counsel Mr David Bruney who prepared the will.

[99] It is noted that the person producing the will and propounding the will must prove that the will was duly prepared, marked and made of the free will of the testatrix who knew at all times what it is she was doing. This court accepts that the claimant has proven to this court on the balance of probability that the will was a duly made and attested will.

[100] This court has examined the circumstances based on the evidence before the court and this court has formed the view that there are no circumstances raised that can properly ground suspicion that the will was not duly made by Ms Roberts or that the will does not express her intentions. It is not a far fetched thought that the testatrix have a single daughter would have wanted to provide for her over and above her brothers who were men and who could fend for themselves. There are no circumstances attendant or relating to the preparation and execution of the will in this case which would excite the court's suspicion.

[101] It is this court's view that the claimant has on the totality of the evidence adduced in this court that the will of the testatrix was a valid one and therefore the gift made under the will was a valid one and that the title obtained by the claimant is indefeasible entitling her to take the action she has sought in the case at bar.

[102] This court also finds as a fact that the defendants were permitted to remain on the premises by the claimant as tenants and will which was terminated when she delivered to them notices to quit which they failed and or refused to obey.

[103] It is therefore the decision of this court that judgment will be entered in favour of the claimant against the defendants and that the counterclaim brought by the defendants is hereby denied and stands dismissed.

[104] The order of Court is as follows:

1. The claimant is entitled to possession of the property located at located at 39 Bowers Lane Goodwill Housing Scheme registered in the Book of Titles N 19 Folio 95 M and registered in the name of the Claimant Helen Dover.
2. The first named defendant shall quit and deliver up possession of the property located at 39 Bowers Lane Goodwill Housing Scheme on or before the 31st August 2022 and shall pay to the claimant the monthly sum of \$200.00 per month from the 16th March 2019 until he delivers up possession of the said premises.

3. The second named defendant shall quit and deliver up possession of the property located at 39 Bowers Lane Goodwill Housing Scheme and pay \$500.00 per month from the 16th March 2019 until she delivers up possession of the said premises.
4. Costs is awarded to the claimant to be assessed if not agreed.

[105] This court wishes to record its thanks to counsel for their written closing submissions which assisted the court in coming to its conclusion.

M E BIRNIE STEPHENSON
High Court Judge

By The Court

[SEAL]

Registrar