

THE EASTERN CARIBBEAN SUPREME COURT

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO.: ANUHCv2017/0232

BETWEEN:

1. **ASTLEY JOSEPH**
2. **DANDRIDGE JOSEPH**
3. **KARL JOSEPH**
4. **ARLEEN JOSEPH**
5. **JANET JOSEPH**

Claimants

And

1. **ETHLYN SIMON (as Personal Representative of the Estate of Ronald Joseph)**
2. **ETHLYN SIMON**

Defendants

APPEARANCES:

Mr Leon Chaku Symister for the Claimants

Mrs Safiya Roberts-Swatton and Ms Kamilah Roberts for the Defendants

2020: October 5th & 6th;
November 20th (written closing submissions);
2023: February 27th

JUDGMENT

- [1] **PHILLIP, J:** This case commenced with a fixed date claim and statement of claim filed on 4th May 2017 by the children of the late Ronald Joseph, deceased, and persons entitled to share in his estate on intestacy (“the claimants”). The deceased died on 1st October 2008, leaving a Will dated 24th July 2008 (“the Will”), which the claimants seek to have pronounced against and to have a grant of Letters of Administration of the deceased’s estate. The claim is against the estate of the deceased (“the Estate”) and the second defendant, Ethlyn Simon (“Ms Simon”), the deceased’s girlfriend or partner and allegedly named the principal beneficiary under the Will, and seeks:

- (1) A declaration that the Will is invalid because the deceased was not of sound mind, memory or understanding during the period before and at the time of the execution of the Will;
- (2) Further or in the alternative, a declaration that the Will is invalid on the ground of undue influence having been exercised upon the deceased by Ms Simon;
- (3) Further or in the alternative, a declaration that the Will is invalid on the ground that the deceased lacked the knowledge and approval required to execute a valid Will;
- (4) Further or alternative, a declaration that the Will is invalid as it was improperly executed;
- (5) Further any other orders and directions as may be necessary; and
- (6) Costs.”

[2] On 22nd October 2008, Attorney-at-Law, E. Ann Henry (“Ms Henry”) (as she then was), as the sole Executrix named in the Will, applied for a grant of probate thereof. On or about the same day, the claimants lodged a caveat against the application for the Will’s probate, which Ms Henry warned off and obtained the Grant of Probate on 5th February 2009. However, on 26th October 2009, the court revoked the Grant of Probate on Ms Henry’s application. On 25th January 2010, she filed a renunciation of her rights to apply for a Grant of Probate. Ms Simon cited the claimants to accept or refuse administration of the Estate on 6th April 2017. By order dated 17th April 2018, Ms Simon was appointed the Estate’s representative.

Claimants’ Case

[3] The claimants plead that they are the children and the persons entitled to share in the deceased’s estate. It was always the deceased’s intention that upon his death, all of his children would share substantially in his estate and that he had no need or desire to execute a Will. The Claimants assert that the Will is invalid on the ground that the deceased was not of sound mind, memory or understanding during the period before and at the time of its execution.

[4] When the deceased executed the Will, he was 75 [sic 74] years old, having suffered a severe stroke in 2001. Accordingly, the deceased became increasingly forgetful, and it became apparent that he had senile dementia. His memory was so defective and untrustworthy that there was an almost total memory loss of recent events. In particular, he had forgotten and frequently could not

recognise his children, many of his closest relations and friends. He could not speak audibly to them or remember his name. The deceased's condition of mind and memory was such that he could not understand the nature of the act and its effects or the extent of the properties he ought to give effect.

- [5] Further, the deceased's mental and physical health continued to decline to the point that he could no longer attend to his business and/or manage his affairs, so he executed a joint Power of Attorney appointing Ms Simon and Lyndon Francis, who were residing with him, as his attorneys in fact. In collaborating under the Power of Attorney, Ms Simon became controlling in the affairs of the deceased and of him, such that in 2005 the deceased revoked the Power of Attorney granted to Lyndon Francis.
- [6] On about 24th July 2008, while the deceased was gravely ill, Ms Simon arranged for an Attorney-at-Law from the Chambers of Henry and Burnette to execute the Will. The deceased lacked the understanding, knowledge and approval required to execute a valid Will and could not communicate with anyone. Still, Ms Simon instructed the Attorney-at-Law to draft a Will on behalf of the deceased. She provided the particulars of the deceased's estate to the Attorney-at-Law, who prepared the Will. The deceased never acknowledged the presence of any of the parties present at the alleged execution of the Will, was not mentally present at the alleged execution thereof and did not understand the effects of signing the same. The Attorney-at-Law made no attempts to explain the implications of the provisions in the Will, so the deceased had no knowledge and did not approve it.
- [7] The deceased was hospitalised on 15th March 2001 for approximately two weeks and then was taken to Miami, Florida, in the United States of America for treatment. Upon return to Antigua, he was again hospitalised on several occasions. During that time, the first and second claimants visited him, and the deceased could recognise them but could not communicate. Since the deceased suffered the stroke in March 2001, he could not communicate in any manner to indicate that he wanted a Will made.

- [8] The claimants further assert that the execution of the Will was obtained by the undue influence of the first defendant [sic Ms Simon]. She was the girlfriend or partner of the deceased and considerably younger than him. The deceased suffered from a severe stroke on 5th March 2001, and because of his infirmity unable to do anything without Ms Simon's assistance. She used the deceased's complete dependence upon her for his everyday necessities of life to force him to make the Will contrary to his own wish. Shortly after the alleged execution of the Will, Ms Simon exercised total control over the deceased, making it very difficult for the claimants, the deceased's brother, close family relations and friends or anyone to see the deceased. She would not allow the brother of the deceased, Alveston Joseph or any of his children to be with him alone at any time.
- [9] The claimants further contend that the Will was not properly executed according to the provisions of the Wills Act¹ ("the Act"). The Will was marked as "a symbol" as the deceased's signature. Still, the deceased could not make such a mark and execute the same due to his infirmity due to a stroke in March 2001 and continued illness. At the time of the execution of the said contested Will, the same was not read over to the deceased. The Attorney-at-Law made no attempts to explain the implications of the provisions in the Will. The deceased gave no instructions to anyone to make a Will and never expressed a desire to consult an Attorney-at-Law to draft a Will. No attempt was made to ensure that the deceased received independent legal advice.
- [10] The claimants called three witnesses at the trial to establish their case: Mr Alvestan Joseph ("Alvestan"), the deceased's brother; Mr Dandridge Joseph ("Dandridge"), a claimant and deceased's son; and Mr George Junie Goodwin ("Mr Goodwin"), cousin and close friend of the deceased. The witnesses, Alvestan and Dandridge, will be referred to by their first names with no disrespect intended, but simply for ease of reading as there are both Mr Joseph.

Defendants' Case

- [11] The Estate and Ms Simon filed identical defences; therefore, I will deal with the defences as that of the defendants except where necessary to distinguish between them. They also called three

¹ Cap. 473 of the Laws of Antigua and Barbuda.

witnesses, Dr Jason Belizaire (“Dr Belizaire”), the deceased’s physician; Ms C. Debra Burnette (“Ms Burnette”), Attorney-at-Law of the Office of Henry & Burnette; and Ms Simon.

- [12] The defendants countered that the claimants are entitled to share in the deceased’s estate with Ms Simon as beneficiaries of the Will. Still, the defendants cannot admit or deny if Ms Simon is a principal beneficiary. The claimants are the other beneficiaries under the Will, and there has been no valuation of the assets devised for each party.
- [13] At all times, the deceased desired to make and execute a Will. He made at least seven Wills between 1993 and 2008 and revoked the previous Will at all material times. While there were changes over time, there were substantial similarities in the several Wills made by the deceased in the last fifteen years of his life. The Will of the deceased was consistent with his express wishes. He intended for Ms Simon to benefit from his estate together with his children.
- [14] The deceased was of sound mind, memory and understanding before and at the time of executing the Will. Ms Henry prepared the Will based on the deceased’s instructions. He executed the Will in the presence of two witnesses in accordance with the provisions of the Act. When executing the Will, the deceased was of sound mind and memory and could understand the contents.
- [15] The defendants admitted the deceased was approximately 74 years old when making the Will and had previously suffered a stroke in or about 2001. They denied that the deceased’s prior illness or age affected his testamentary capacity to make a Will or he had senile dementia. Following the stroke, the deceased was alert, and his mind and memory remained intact. The stroke affected his speech. Nevertheless, the deceased was able to, and did, give instructions on anything he wanted and could understand what was said to him and responded accordingly. The deceased could read and sign his name with a mark.
- [16] The defendants denied that, when executing the Will, the deceased could not understand the nature of the act and its effects or the extent of the properties he ought to give effect. They further denied that the deceased’s mental and physical health declined, so he could no longer attend to his business and/or manage his affairs. The deceased fully understood the effect of making a Will and the extent of his properties detailed in his [the contested] Will. The deceased had the mental and

physical capacity to represent himself in his affairs. In or about May 2008, the deceased appeared and gave evidence before the High Court of Justice in his divorce proceedings.

- [17] They denied that the deceased's mental and physical health declined, so he could no longer attend to his business and/or manage his affairs. Following the stroke, the deceased instructed his Attorney-at-Law to prepare a Power of Attorney appointing Ms Simon and Lyndon Francis as his lawful Attorneys to assist in conducting and managing his affairs. According to these instructions, Ms Henry prepared the Power of Attorney on 15th March 2001. The defendants denied that Ms Simon became controlling in the affairs of the deceased; she acted on the deceased's instructions and in his best interest at all times. The revocation of the Power of Attorney granted to Lyndon Francis in 2005 was not due to Ms Simon. The deceased made that decision after a series of events, including Mr Francis' refusal to come to the deceased's house to talk to him about his affairs. In or about 2005, the deceased instructed his Attorney-at-Law to revoke the Power of Attorney to Ms Simon and Mr Francis and prepare a new one for Ms Simon and Eulander Anthony. This new Power of Attorney dated 21st July 2005 was prepared in the joint names of Ms Simon and Ms Anthony and signed by the deceased.
- [18] The defendants also denied that: the deceased was gravely ill on or about 24th July 2008; the deceased lacked understanding and could not communicate with anyone; Ms Simon arranged for an Attorney-at-Law from the Chambers of Henry & Brunette to execute the Will; Ms Simon instructed the Attorney-at-Law to draft a Will on behalf of the deceased; or the deceased never acknowledged the presence of any of the parties present at the execution of the Will. They countered that in or about May 2008, the deceased appeared and gave evidence in court; on or about 28th June 2008, he visited his doctor for a checkup. Further, Ms Henry prepared the Will based on the instructions from the deceased, not Ms Simon. She did not provide particulars of the deceased's estate to the Attorney-at-Law, as the deceased could communicate with his Attorney-at-Law, friends and family. He appeared before the court in divorce proceedings approximately two months before executing the Will in May 2008 and communicated to the judge.
- [19] Further, the deceased executed the Will at his home in Johnson's Point. The Attorneys-at-Law, Ms Burnette and Shahida Ali-Schneider, witnessed him sign the Will making a mark. The deceased understood the effect of signing the same. The witnesses introduced themselves to the deceased,

and he acknowledged their presence by nodding his head. The deceased also acknowledged the witnesses' indication that they were there to witness him signing his Will. He acknowledged the further actions taken during the execution of the Will. It is also denied that the deceased was not mentally present at the execution of the Will, and he did not understand the effects of signing the same. One of the witnesses read each clause of the Will to the deceased before its execution.

[20] The defendants denied that the deceased was hospitalised in Antigua on several occasions. On or about 1st March 2001, the deceased had a stroke. On 16th March 2001, accompanied by Ms Simon, he went to a Miami hospital for rehabilitative treatment. They both returned to Antigua on 6th April 2001. After that, the deceased had physical therapy outside his home five days per week, and then a few years later, physical therapy was administered in his house three days per week. During this time, the deceased had quarterly visits to his private physician.

[21] The defendants further denied that the deceased could not communicate in any manner since his stroke in March 2001. Since 2001, the deceased has had several cases in the High Court where he signed affidavits before the Court's Commissioner of Oaths, appeared before the court, and gave evidence. In or about March 2008, the deceased instructed his Attorney-at-Law to commence divorce proceedings against his wife, Eileen Joseph. The court heard the petition on 30th May 2008, and the deceased gave oral evidence before the Honourable Justice Thomas. The court granted the divorce following the deceased's evidence before it. Following his stroke in 2001, the deceased communicated with family, friends, Attorneys-at-Law, and professional personnel, including court staff and judges using his hands, body language, a letter chart and verbal communication.

[22] The defendants vehemently denied Ms Simon undue influenced the execution of the Will, as alleged or at all, or she forced the deceased to make a Will contrary to his wishes. They admitted Ms Simon was the girlfriend and partner of the deceased. She was in July 2008, 56 years of age and had been in a relationship with the deceased for approximately 20 years. They resided together for about 14 years before the death of the deceased. Following the deceased's stroke in 2001, he did have physical impairments; however, the deceased could help himself as much as his left side would permit. The defendants denied that the deceased was completely dependent on Ms Simon. The deceased made decisions and acted on his own behalf in several situations until his death. They denied that Ms Simon exercised total or any control over the deceased or made it difficult for

the claimants, the deceased's brother and close family relations and friends to see the deceased. The deceased decided who he wished to see and would receive regular visits from his friends and family. Ms Simon did not restrict access to the deceased. His friends visited and contacted the deceased regularly while living with Ms Simon.

[23] The claimants [sic deceased] had the knowledge and approval required to execute a valid Will and properly executed the Will according to the Act. The defendants rejected that Ms Simon contacted the Attorneys-at-Law and gave instructions for drafting the Will, and the deceased did not provide instructions to make a Will nor expressed a desire to consult an Attorney-at-Law to draft a Will. It is denied that the deceased was not mentally present at the execution of the same and did not understand the effects of signing the same. The deceased instructed his Attorney-at-Law to prepare the Will, and he understood the effects thereof. The deceased always knew that he was executing a Will and the effect of same. The deceased acknowledged the presence of the parties at the execution of the Will. Ms Simon was not in the room when the Will was executed. The defendants denied that the Attorneys-at-Law made no attempts to explain the implications of the provisions in the Will. It is denied that the deceased had no knowledge and did not approve of the Will.

[24] Further, the defendants denied marking a 'symbol' as the deceased's signature in any way invalidating the execution of the Will. They rejected that the deceased could not make such a mark and that the Will was not read over to the deceased. The law firm of Henry & Burnette has represented the deceased since the 1980s. Ms Henry prepared the Will based on the instructions of the deceased, who executed the Will in the presence of two witnesses following the provisions of the Act. The defendants rebuffed that no attempts were made to explain to the deceased the implications of the provisions in the Will or to ensure that the deceased received any independent legal advice. Attorneys-at-Law from Henry & Burnette acted for and on behalf of the deceased, so there was no need for any 'independent' legal advice as alleged.

Issues

[25] From the parties' respective cases and their closing submissions, the following issues arise for the court's consideration:

- (1) Did the deceased have the testamentary capacity (sound mind, memory and understanding) to execute the Will?

- (2) Whether the deceased acted under Ms Simon's undue influence when he made the Will?
- (3) Whether the deceased knew and approved the contents of the Will?
- (4) Was the Will properly executed according to the provisions of the Act?

However, I propose dealing with the fourth issue first because it may be determinative. The other issues raise the substantial validity of a Will that may only arise if the formal validity raised by the fourth issue is satisfied.

Proper Execution - Statutory Provisions

- [26] A helpful starting point is to set out the relevant provisions of the Act. Section 7 of the Act was referred to by counsel for both sides, which provides that:

“No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say,) it shall be signed at the foot, or end, thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made, or acknowledged, by the testator in the presence of two, or more, witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.”

- [27] The claimants raised this issue of the Will's proper execution in their pleaded case and as an issue in their closing submissions. They alleged that the Will was marked as “a symbol” of the deceased's signature. He could not make such a mark and execute the same due to his infirmity due to a stroke in March 2001 and continued illness. However, the claimants have not pursued it in their arguments nor sought to challenge Ms Burnette's evidence on this point in cross-examination. She was the only witness giving evidence as to the execution of the Will and stated:

“I then gave Mr. Joseph [the deceased] a pen and asked him to make a mark as I was aware that he could not sign his name as a result of the stroke. He attempted to make an X on the three (3) copies of the Will, which both myself and Mrs. Schneider witnessed as “His Mark”. Both Mrs. Schneider and I were present at the same time when he made his mark.”

- [28] The claimants did not contest that a testator can execute a Will by his mark. In my view, quite correct, as it is well established that a testator may sign or signify by his mark.² However, they contended that the deceased could not make the mark as appeared on the Will due to his illness. In his witness statement,³ Dandridge stated the deceased could not have made that mark. He could not hold a pen to make a mark. In cross-examination, he maintained that he did not

² Goodman v J. Eban Ltd., [1954] 1 Q.B. 550

³ Para 36

believe it was the deceased's mark and that the deceased would not have understood what he was doing.

[29] The claimants did not provide any evidence to substantiate their allegation regarding when the Will was executed, nor have they challenged Ms Burnette's evidence in cross-examination. At best, the court may draw an inference from the evidence of Dandridge, which in my view, is incapable of negating the unchallenged evidence of Ms Burnette. Therefore, I agree with the defendants' submissions that the presumption of due execution (*Omnia rite et solemniter esse acta*) applies where a Will is regular on its face, with an attestation clause and the signatures of the testator and at least two witnesses in their proper places. This is the requirement of section 7 of the Act. Consequently, the claimants have failed to establish on the evidence that the Will was not, at least, formally valid or executed in accordance with the Act.

[30] However, while on its face, the Will may be formally executed by the deceased, the question remains whether it is also substantively valid. In other words, did the deceased know and approve the contents of the Will?

Knowledge and Approval of Contents of Will

Claimants' Submission

[31] A Will is valid in our jurisdiction, other things being equal, as long as the testator intended to make it. For this court to hold the Will valid, the deceased must have intended to dispose of his property in the manner set forth when he would have left this world. It is evident, therefore, that the dispositions must be a direct result of his free act. Another way to look at it is that the deceased, on 24th July 2008, must have known and approved the contents of the Will. He did not and could not have done so.

[32] It is axiomatic that a person making a Will must know and approve of the contents of their Will. This knowledge and approval must be present at the time of execution. Counsel referring to **Thomas v Thomas**⁴ submitted that the burden of proof is on the defendants to affirmatively establish that the deceased knew and approved of the contents of the Will. Further, where a party takes an interest

⁴ (1969) 20 WIR

under the Will, the onus rests on him to remove all suspicious circumstances and prove the righteousness of the transaction.

- [33] Counsel submitted, in the instant case, Ms Simon takes the lion's share of the deceased's estate to the substantial exclusion of his children, with whom he had a good relationship before her dominance over him. Thus, it is for her to demonstrate that the deceased knew and approved the contents of the Will. In **Barry v Butlin**,⁵ Parke B stated that:

“If a party writes or prepares a will, under which he takes the benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and zealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true will of the testatrix”.

- [34] Therefore, as it was in **Thomas** supra, so it is in the instant case the defendants have failed to affirmatively establish that the deceased knew and approved of the contents of the Will

Defendants' Submissions

- [35] The defendants denied the claimants' assertion that the deceased lacked the knowledge and approval to execute a valid Will. They maintain that the deceased's Will of 24th July 2008 was made on his instructions, with his knowledge and approval and expressed the last free and capable Will of the deceased. Counsel, referring to **In the Matter of Rule 27.2 and Part 68 of the Civil Procedure Rules 2000 and another v Rolston Rawlins**,⁶ submitted that the evidence before the court should lead the court to the conclusion that the Will was valid and properly executed. The deceased had the necessary testamentary capacity and duly executed the Will according to the relevant legislation. Thus, there is a rebuttable presumption that the deceased knew and approved of the contents of the Will. The evidential burden then shifts to the claimants to rebut this presumption. The claimants have failed to rebut this presumption on the evidence before the court.
- [36] The claimants' evidence is bare allegations. That the deceased could not instruct his Attorney-at-Law to make a new Will, and he could not sign the Will or understand the extent of his properties. However, these allegations appear to be based largely on the deceased's physical disability and motivated by the claimants and their witnesses' discontent with the contents of the Will. They are

⁵ [1838] 2 Moo PC 481

⁶ [2008] ECSCJ No. 101, paragraphs 43 - 46

not corroborated and run contrary to the evidence put forward by independent persons who have no interest in the estate. In particular, the medical evidence of Dr Belizaire and the evidence of Ms Burnette, who witnessed the execution of the will. Ms Burnette was the only witness present for the critical events to be considered by the court. That is when the deceased gives instructions to prepare the Will and execution the Will by the deceased. Ms Burnette's evidence contradicts the claimants' baseless accusations: that it was Ms Simon who gave instructions for the preparation of the Will, and the deceased was not 'mentally present' during its alleged execution. The claimants did not effectively challenge Ms Burnette's evidence during cross-examination. They failed to rebut the presumption of knowledge and approval.

[37] Further, the claimants have also attempted to argue that the presumption of knowledge and approval does not apply as the Will was executed under suspicious circumstances. Still, there are no such suspicious circumstances in this case that could lead the court to declare the Will invalid. The evidence before the court is that Ms Henry, the deceased's Attorney-at Law who acted for him since the 1980s, took the instructions for the Will. She took these instructions in the presence of Ms Burnette, and Ms Simon was not present while taking instructions or signing the Will.

[38] There is further evidence before the court that the deceased had communicated with his Attorneys-at-Law on several occasions concerning granting and revoking Powers of Attorneys and litigation matters. Ms Burnette and Ms Henry knew the deceased well and were accustomed to interacting with him following his stroke. The deceased's Attorneys-at-Law prepared the Will upon his instructions, and they witnessed the execution of the Will. The deceased's Attorneys-at-Law are not beneficiaries under the Will and have acted on behalf of the deceased for several years and in several other matters unrelated to the preparation of the Will.

[39] Furthermore, the evidence of Dr Belizaire is that the deceased was not suffering from any mental incapacity up to April 2008. He does not know of any other illness which would have affected the deceased's mental capacity in the three months up until the date of execution of the Will.

[40] The contents of the Will do not raise any suspicions. The deceased left his assets between his girlfriend/partner of approximately 20 years and his children, excluding his estranged ex-wife. Further, the evidence of Ms Burnette is that the deceased made seven previous Wills substantially

similar. The 2004 Will show that even before the Will, it was the deceased's intention for Ms Simon to benefit along with his children on his death. The circumstances of this case do not raise any grounds of suspicion which would warrant the court to declare the Will invalid. Even the claimant's witness, Mr Goodwin, agreed in cross-examination that there was nothing out of the ordinary in the deceased providing in his Will for Ms Simon and his children.

[41] No suspicious circumstances trigger the defendants' need to provide affirmative proof of knowledge and approval or negatively impact the validity of the Will. Even if the court finds that the presumption does not apply or the claimants have rebutted the presumption, the defendants have provided affirmative proof of the deceased's knowledge and approval of the Will. This is by the evidence of their witnesses, particularly Ms Burnette, one of the witnesses to the Will. Ms Burnette, in her affidavit [sic witness statement], confirmed that the deceased acknowledged the presence of herself and the other subscribing witness (Ms Schneider). Ms Burnette also states explicitly that she read each clause to the deceased and that he communicated his agreement to her. The defendants relied on their submissions and evidence on the deceased's ability to understand and communicate with others and his mental capacity. Based on the evidence before the court, the Will expressed the true Will of the deceased.

[42] Finally, counsel referring to ***La Tanya Hughes (Sole Executrix named in the last will and testament of Laban Hughes, (deceased) v Clement Hughes Lawful Attorney of Ena Hughes***,⁷ submitted that it is similar to this case, and the court stated (para 61):

"According to Halsbury (supra), "although knowledge of the contents of a will and approval of it by the testator are essential to the validity of the will, this is normally assumed in the case of a competent testator from the fact that he has duly executed it." In the case at bar, the evidence of Mr. Francis is that he read over the will to the Testator, who thereafter signed the Will. There is nothing in the evidence before the Court to raise a "well-grounded suspicion" that the Will does not express the Testator's mind. The Court is therefore of the view that the Testator knew and approved of the contents of the Will when he executed it."

⁷ ANUHCv2010/0455, [2011] ECSCJ No. 281

Accordingly, counsel submitted the court should adopt a similar approach and hold the deceased knew and approved the contents of the Will when he executed it. There is no basis for pronouncing against the validity of the Will.

Discussion

[43] Apart from the formalities prescribed by section 7 of the Act, it is now well-settled by judicial authorities that someone may also challenge a Will on its substantial validity. That is to say, whether the testator knew and approved the contents of the Will and had the testamentary capacity - the requisite sound mind, memory and understanding to make the Will. A Will would be invalid if these were not present when the testator made it. Both sides referred the court to the classic exposition in **Banks v Goodfellow**,⁸ where the Court of Queen's Bench held:

“For a testator to be capable of making a valid will he must be able to understand the nature of the act and its effects and the extent of the property of which he is disposing, and he must be able to comprehend and appreciate the claims to which he ought to give effect and the manner in which his property is to be distributed between them. The fact that the testator suffers from mental illness which does not interfere with the general powers and faculties of his mind, and, in particular, does not prevent his possessing the faculties mentioned above, so that there is no connexion between the illness and the will, will not render the will liable to be overthrown on the ground of the testator's incapacity. But when the fact that a testator has been subject to some form of mental illness is established a will executed by him must be regarded with great distrust and every presumption should in the first instance be made against it. The presumption against such a will becomes additionally strong where the will is an “inofficious” one, ie, one in which natural affection and the ties of near relationship have been disregarded.”

[44] Both sides also acknowledged that the onus of proof that a testator duly executed a Will, and had the requisite testamentary capacity (including knowledge and approval of its contents), lies in every case upon the party propounding a Will.⁹ Thus, the defendants must adduce evidence to establish a *prima facie* case that the deceased had soundness of mind, memory and understanding when he executed the Will.

[45] At this juncture, it is essential to emphasise a testator's testamentary capacity is integral to whether they knew and approved the contents of their Will and is often substantially determined by the same

⁸ [1870] LR 5 QB 549; [1861-73] All ER Rep 47

⁹ See paras [32] and [35] above

facts. Yet, they are different concepts or principles. In the English Court of Appeal case *Hoff and Others v Atherton*,¹⁰ Chadwick, LJ opined that:

“62 ... [T]he requirements of testamentary capacity and knowledge and approval are conceptually distinct. A finding of capacity to understand is, of course, a prerequisite to a finding of knowledge and approval. A testator cannot be said to know and approve the contents of his will unless he is able to, and does, understand what he is doing and its effect. It is not enough that he knows what is written in the document which he signs. But if testamentary capacity – the ability to understand what is being done and its effect – is established, then it is open to the court to infer that a testator who does know what is written in the document which he signs does, in fact, understand what he is doing. And, where there is nothing to excite suspicion, the court may infer (without more) that a testator who signs a document as his will does know its contents. It would be surprising if he did not.

63 Whether those are inferences which should be drawn depends, of course, on the facts of the particular case. The fact that a beneficiary has been concerned in the instructions for, and preparation of, the will excites suspicion that the testator may not know the contents of the document which he signs – or may not know the whole of those contents. The degree of suspicion – and the evidence needed to dispel that suspicion – were considered by this Court in *Fuller v Strum* [2001] EWCA Civ 1879, paragraphs [32]–[36], [73], [77], [2002] 1 WLR 1097, 1107C–1109 A, 1122 A–C, 1122 G–1123C.

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

[46] In *Re R* (deceased),¹¹ a matter on appeal from a decision of the Registrar, Willmer, J. after considering several authorities observed:

¹⁰ [2004] EWCA Civ 1554; [2005] WTLR 99

¹¹ [1950] 2 ALL ER 117

“The conclusion which I draw from these authorities is that in dealing with a question of knowledge and approval of the contents of a will the circumstances which are held to excite the suspicions of the court must be circumstances attending or at least relevant to, the preparation and execution of the will itself. This view is, I think, confirmed by the decision of the Court of Appeal in *In the Estate of Musgrove*, where it was held that a suspicion engendered by extraneous circumstances, arising subsequent to the execution of the will, was not a sufficient reason for rebutting the presumption of due execution of a will regular on its face. In the course of an exhaustive judgment Lord HANWORTH MR said ([1927] P at p 280):

“What of the suspicion? It is not such as attaches to the document itself in the sense in which SIR JAMES WILDE uses the term in *Guardhouse v. Blackburn*, or as it arose in *Tyrrell v. Painton* in the preparation of the will. The wide definition of suspicion stated by LINDLEY L.J., in the latter case, that it ‘extends to all cases in which circumstances exist which excite the suspicion of the court,’ appears to have been used in reference to the preparation of the will, its intrinsic terms, and the circumstances surrounding its preparation and execution, and Davey, L.J., seems to have had the same matters in mind. Their judgments were not intended to alter, but to affirm the principles laid down in the cases I have cited.”¹²

[47] It follows the court would not pronounce in favour of a Will prepared under circumstances which raise a suspicion the testator did not know and approve its contents unless that suspicion is removed. What, then, presents a suspicion that would arouse the court’s interest? In ***Larina Jacobs-Lamothe v Janet Hendricks et al.***,¹³ Ellis, J. (as she then was), in addressing the sort of circumstances that may cause a court to refuse probate, stated:

“(33) ... If the testator is deaf and/or dumb; cannot speak or write or is paralysed; blind or illiterate; or the will is alleged to have been signed by another person for the deceased at his direction, the court will require sufficient evidence to prove that the testator understood and approved the contents of the will.

(34) If the circumstances surrounding the will being executed raise such suspicion, it will then be for those who believe the choice to be valid to call evidence to dispel the suspicions. The greater the suspicion the greater the burden on the person trying to prove the will to dispel that suspicion. However, even if there are suspicious circumstances, if the will is a simple document, it is often easier to prove knowledge and approval.”

[48] I turn now to deal with the case at bar. The deceased was 74 years old and suffered a stroke in March 2001, over seven years earlier. The undisputed evidence is that the stroke left him with a significant physical and speech deficit. The deceased was paralysed - a weakened right side, which

¹² Ibid at 121-122

¹³ BVIHCV2015/0169 (delivered 25th September 2018)

robbed him of his mobility and writing ability. He communicated with a few words, possibly a short sentence and gestures - raising a hand, nodding, etc. There is some dispute about whether the deceased ability to communicate deteriorated or became progressively more challenging with time. However, in my view, these facts are sufficient to excite the suspicions of the court, which the defendants will be required to dispel by compelling evidence.

[49] The claimants' witnesses maintained that the deceased could not initiate communications after the stroke, and his condition deteriorated with time. Alvestan stated the deceased could only shake his head and make a sound to indicate no and nod his head and make a sound to indicate yes. In addition, the deceased communicated by constantly holding his right/left hand and shaking it when he agreed with what you were telling him. The deceased could not speak audibly to anyone. Alvestan witnessed the deceased's physical and mental health deteriorate daily.¹⁴ Mr Goodwin stated the deceased was still aware of things around him but could not communicate his wants and desires. The deceased could not speak. He could not say a single word. He was not able to give directions or directives to anyone. As time passed, the deceased's health deteriorated progressively. Mr Goodwin visited the deceased regularly and observed that communication became more and more difficult. It became apparent that as the deceased's health deteriorated, as communication became less and less, the deceased presence of mind was also going. There was less physical movement less effort to motion.¹⁵

[50] Dandridge's evidence in his witness statement is similar. I quoted the relevant paragraphs:

- "(15) ... I was able to communicate with him [the deceased] by I speaking to him and he responding by a nod of the head or raising his right hand. On other occasions it was a grunt accompanied by a shaking of his head to indicate no and a nod to indicate yes. At times my father would shake his head as if answering yes or no but the answer would be inappropriate so clear it was not at all times a nod or a shaking of the head would mean yes or no.
- (16) My father could not speak since the stroke. No sound my father made was audible enough or clear enough to decipher.
- (17) As the years go by the communication between my father and others became less and less. Things would have to be repeated over and over in an attempted to get a response.

¹⁴ Paras 8 to 13 of Mr Joseph's witness statement

¹⁵ Paras 10 to 14 of Mr Goodwin witness statement

- (18) From visiting my father weekly as his illness got worse I observe that he had difficulties recognizing me sometimes. At times when I visit with my children he had difficulties recognizing me or the children.
- (19) In the early period of his illness my father could indicate by raising his right hand as if he remembered the things we talked about. In the latter stage he could not. This was prior to 2008
- (20) In 2008 it became apparent that my father was going from bad to worse. At times I visited and more so after 2007 his presence of mind was not there. At times my father could not show that he comprehend what was said to him. He took some time to recognize me and other siblings.”

[51] On the other hand, in his witness statement, Dr Belizaire stated that the deceased understood everything said to him and could follow commands. He could also say a few words and, occasionally, a short sentence. The deceased was certainly able to let his feelings be known. He was mentally competent at his last visit in April 2008. In commenting on Alvestan’s and Dandridge’s evidence, Dr Belizaire stated the deceased capacity was pretty much the same from his first to the last visit. He did not agree that his physical and mental deteriorated day by day. Dr Belizaire stated, in 2008, the deceased condition was essentially unchanged. He spoke in short sentences and words, and no significant change.

[52] Similarly, while commenting on the evidence of Dandridge, Ms Simon stated, among other things, that she did not notice the communication getting harder and harder with the deceased. He did not have to repeat things over and over. The deceased had no difficulty recognising her or other family or friends. She denied that the deceased was getting from bad to worse because his body was getting stronger - he was getting physical therapy. In her witness statement, Ms Simon stated following the stroke in 2001, the deceased was alert, and his mind and memory were still intact. He was able to and regularly gave instructions on anything he wanted. The deceased could also understand when you communicated with him and would respond accordingly using hand signals, body language, a letter chart and verbal communication. As the occupational therapist in Miami recommended, he would point to an alphabet chart on the wall and sound out some words. The deceased could also read and sign his name with a mark.¹⁶

[53] The deceased regularly communicated with his Attorneys-at-Law. The deceased would let her know whenever he wanted to see his Attorneys-at-Law. He would beckon and say, “Ann”. She

¹⁶ Para 9 of the witness statement

would then call Ms Henry's office, who would come to visit the deceased. He was a longstanding client of Ms Henry.¹⁷ In cross-examination, Ms Simonn denied that it was easier to communicate with the deceased between 2001 and 2005 - it was just about the same. Between 2005 and 2008, the deceased ability to communicate remained the same. She could understand him about the same. The deceased could read and communicate with family, friends and Attorneys-at-Law and communicate well across the board if he wanted to. Yet, when confronted that she seldom gave Alvestan, Dandridge and Mr Goodwin any privacy with the deceased when they visited, Ms Simon stated that when she left them with the deceased, they kept calling her because they did not understand what he was saying.

[54] Ms Burnette, in her witness statement, stated that despite the stroke, the deceased could communicate with their firm in the various matters they represented him on. He was still able to speak a few words and write his name. However, Ms Burnette confirmed in cross-examination that on the occasions she went with Ms Henry, who communicated with the deceased, she would say that it was challenging having a conversation with the deceased after his stroke because he cannot enunciate words initially and then eventually, hardly any words at all. It was by the deceased agreeing to suggestions. He did not initiate the conversation. For the most part, the deceased was agreeing or not agreeing with what was said to him. She admitted that in the later years, the deceased could not communicate, for example, that he wanted 'A' to have this and 'B' to have that. She also admitted that the deceased's speech was more difficult in 2008 than previously. As time progressed, it became more difficult for the deceased to speak.

[55] The predominant evidence I accept is that after his stroke in 2001, the deceased could only communicate by responding or reacting to suggestions through gestures and as time progressed, even this became more difficult. Ms Simon testified that the deceased condition never changed; he kept improving strength-wise. Still, logically and as Dr Belizaire admitted in cross-examination, our health deteriorates somewhat slowly as we all get older. Naturally, I would expect a person in the deceased condition to show some signs of deterioration over the years after the stroke. For these reasons, on this point, I prefer Ms Burnette's evidence as an independent witness over that of Dr Belizaire and Ms Simon.

¹⁷ Para 13 of the witness statement

[56] The defendants' counsel submitted that there is evidence before the court that the deceased communicated with his Attorneys-at-Law on several occasions concerning granting and revoking Powers of Attorneys and litigation matters. Also, Ms Burnette and Ms Henry knew the deceased well and were accustomed to interacting with him following his stroke. However, while this may have been so, the court cannot speculate. The court must be satisfied that Ms Henry and Ms Burnette could communicate with the deceased to understand his instructions effectively based on the evidence. Indeed, in cross-examination, Ms Burnette stated that she did not believe she took instructions to revoke the Power of Attorney in 2008. Ms Burnette accepted that her signature indicated that she witnessed his mark but could not recall taking the deceased instructions. Ms Burnette indicated that she would not have taken any instructions directly from the deceased. Not for the divorce petition, the revocation of the Power of Attorney or the Will, Ms Henry would have taken those instructions. Ms Burnette accepted it would be fair to say that her direct contact with the deceased after his stroke would have been limited.

[57] Further, Ms Burnette stated in cross-examination that she accompanied Ms Henry when she took instructions for the Will and was present when Ms Henry took the instructions. Quite telling, she said:

“He [the deceased] would respond based on a previous Will she [Ms Henry] took and would have read each clause, and then he would have responded to her when she reached a particular area in the clause that she was reading by nodding his head or sometimes putting up his hand.”

When asked if it was to say he agreed, Ms Burnette responded, “I don't know what he meant to say. I couldn't say.” [emphasis added] Indeed, there is no evidence before me of how the Attorneys-at-Law, especially Ms Henry, could interpret and understand the deceased responses. One would have expected the defendants to demonstrate how Ms Henry did this after the deceased's stroke.

[58] The burden falls on the defendants to prove the deceased knew and approved the contents of the Will. Knowledge of the Will involves instructions to prepare it and reading the document or having it read to him before execution. This is an evidential rule. Unfortunately, Ms Henry, who purportedly took the instructions from the deceased to prepare the Will, was not called as a witness. She needed to satisfy this court of how she could discern the deceased's instructions. I believe the lack

of evidence on how Ms Henry decerned the deceased's instructions to prepare the Will is so grave that the defendants can hardly dispel the suspicion.

[59] *In the Goods of Francis Owston (deceased)*,¹⁸ a deaf and dumb testator communicated his testamentary instructions to Mr Robert Bradley, an acquaintance of over 40 years, using signs and motions. A Will was prepared in conformity with those instructions, which the testator duly executed afterwards. The court required evidence from Mr Bradley, the drawer of the Will, stating the nature of the signs and motions by which the testator communicated the instructions to him. Upon further affidavit from Mr Bradley, the court ultimately refused to grant probate on the motion. Sir C. Cresswell opined:

"I cannot consider this as a sufficiently satisfactory account of the method in which the instructions of the deceased are said to have been taken. I am not inclined to let probate of this paper pass on motion, at least without the consent of the next of kin."

[60] The relevant portion of the further affidavit evidence from Mr Bradley is quoted in some detail so that the defendants, as propounders of the Will, can appreciate the nature and quality of proof required to discharge their evidential burden. Mr Bradley deposed:

"That my late father was the occupier of a farm at Thornholme, in the county of York, comprising about 400 acres of larid, for nineteen years, and after leaving that farm removed to Wetwang, in the same county, and occupied a farm there for eleven years, and that the said Francis Owston, the testator, who was deaf and dumb, was a labourer in the employment of my said father at Thornholme and Wetwang for a period of twenty-five years, namely, from the year 1814 to the year 1840, and during part of that period resided in the house of my said father. That the said testator used to take me to Burton Agnes School when I was a child, and from seeing him daily for upwards of twenty years I learnt to converse with him by signs and motions, making letters on the palm of my hands, and by the deaf and dumb alphabet. That all my brothers did sisters could also understand and converse with him by signs and motions, but none of them so well as I could. That while the said testator was in the employ of my said father, he (the said testator) taught me to plough, to shear sheep, and to play at whist, he being a very good whist player. That I frequently sent him on numerous errands, and frequently sent him into my father's fields to fetch up a particular horse, and he has gone away alone and brought back without any other means of information than the signs and motions which I had used. That when I marked with the finger on the palm of the hand the name of any person the said testator was acquainted with, he knew it directly, arid would give me to understand that he did so by making signs indicative of the trade or business of such person. That the said testator could and did also converse with me by these signs and motions, and give me information as to my grandfather, and told me his age. That when I attended at the house of the said testator to interpret for him on the making of his will, as mentioned and set forth in my affidavit, sworn herein on the 13th of February, 1862, the

¹⁸ 164 ER 1075, [1862] 2 Sw & Tr 461

said testator used both signs and letters on his hand, he made signs indicating that all his money, furniture, and everything he possessed, was to be given to his nephew, Richard Mosey Owston, who was then present, and marked his said nephew's initials on his hand putting his finger in his mouth, which was a sign that the person he referred to was a relation. The said Richard Mosey Owston had attended to the said testator's business matters for some time, and was present at the testator's request, and the testator pointed to him as the person he wished to have all his property. That the said testator had separate signs or marks for gold, silver, and copper, for gold he touched his neckerchief, silver his shirt, and copper the buttons of his coat. He used all these signs, touched most of the furniture, and gave me, by aid of the marks and signs, to understand they were all for his said nephew. When I replied to that effect, he understood at once, and expressed himself satisfied."

[61] The defendants also seek to rely on the deceased's participation in litigation matters, particularly giving oral evidence in the divorce proceedings. Still, they did not adduce the transcript of the divorce proceedings (which will have inherent limitations) so that I could examine how the deceased participated in those proceedings. The only evidence of what may have transpired in the divorce court is from Ms Burnette's witness statement (para 5), which states:

"Ms. Henry explained to the Judge that Mr. Joseph [the deceased] had a stroke and can communicate with very limited words and by shaking and nodding his head. Justice Thomas asked Mr. Joseph if he knew where he was and what he was there for. Justice Thomas asked Mr. Joseph if he knew he was in Court and he nodded to signal yes and he asked him if he knew he was divorcing his wife and he nodded to signal yes. The divorce was granted at the hearing on May 30, 2008."

With the greatest deference to the late Honourable Mr Thomas, J., this court is in no position to assess the capabilities of the deceased simply from the above-quoted statement. Indeed, it is not unusual for uncontested divorces to be conducted in a manner similarly described above, even where the parties are capable of speech. It does not say much about the deceased ability to communicate and give oral evidence.

[62] However, I firmly believe that this undoubtedly cannot suffice how a testator may provide instructions for preparing (or even changing) a Will. I think a testator must actively initiate such instructions rather than respond or react to suggestions, as was purportedly done in this case. The defendants did not provide me with any authority that suggests the contrary.

[63] The difficulty with the reactive manner of taking instruction may be illustrated by reference to clause 3 of the 2004 Will,¹⁹ which provided:

¹⁹ Supplemental Trial Bundle 2 at pp 9 -11

“I give, devise and bequeath my dwelling house and the land appurtenant thereto and the property known as “Joseph’s Supermarket” and the lands appurtenant thereto to my wife EILEEN JOSEPH for her life and upon her death to my children ASTLEY JOSEPH, DANDRIDGE JOSEPH, CARL JOSEPH, ARLEEN JOSEPH and JANET JOSEPH in equal shares absolutely. ...”

In reading clause 3 of the 2004 Will, how did Ms Henry determine that the response or reaction the deceased gave was concerned with which of the two properties - dwelling house and the land appurtenant to it or the “Joseph’s Supermarket” and the lands appurtenant to it, or both? Then regarding the deceased’s (former) wife, Eileen Joseph, when Ms Henry reads her name and the deceased reacts, what did it mean? Is it remove her altogether, or only concern one of the two properties and if so, which one? Alternatively, did it instead means changing the gift to her from life to absolutely and even so, is it for both properties or either of them? Further, in the alternative scenarios, is it for her solely or in equal shares with the children or some other proportion? Just from this brief excursion, which did not consider the situation with the five children, one can readily see enumerable permutations and possibilities. It would have been virtually impossible to ascertain what the deceased intended or desired. This, in my view, creates an unacceptable doubt that the court cannot ignore.

[64] Moreover, the execution of the Will is, in a similar vein, plagued with the same defects, if not worst, as the taking of the deceased instructions. Ms Burnette indicated (para [57] above) that when she accompanied Ms Henry to take the deceased instructions for the Will, she did not know what raising the hand and nod meant. Yet, Ms Burnette indicated that when she attended the deceased for the execution of the Will, she introduced herself and Mrs Schneider, their associate. He would have nodded. She told the deceased why they were there and asked him if he recalled that Ms Henry had taken instructions from him and that she had made the changes. He nodded his head. Ms Burnette then proceeded to read each clause of the Will, and the deceased agreed by indicating in some way he agreed. She did not ask the deceased if he recalled the changes he wanted or if the changes read to him were what he wanted.

[65] Ms Burnette did not have the previous 2004 Will, and the deceased did not have the opportunity to read the 2004 Will and the Will. She stated that the deceased did not indicate there was anything there he disagreed with. Ms Burnette confirmed that she did not give the deceased the Will to read, she read it and asked the deceased if he understood what was in the Will, and he nodded. With

each clause going down, she asked the deceased if he understood, and he nodded. She did not ask the deceased if he understood the effect of the Will, that is, who is getting what. Ms Burnette disagreed that the deceased did not know the effect of the Will. As far as she is concerned, the deceased knew what he was doing. His response was an indication of yes or no. She cannot recall asking the deceased if he needed the clause explained. Still, she made two minor changes for grammatical corrections.

[66] Counsel for the defendants further submitted the execution of the Will raises no suspicious circumstances that could rebut the presumption of knowledge and approval and lead the court to declare the Will invalid. Further, the contents of the Will do not raise any suspicions. The deceased left his assets between his girlfriend/partner of approximately 20 years and his children, excluding his estranged ex-wife.

[67] I cannot accept this submission. On its face, the Will is not in and of itself suspicious, but when coupled with the other factors in the case, it raises concerns. Even if one assumes the deceased had testamentary capacity for purposes of this discussion, the court's primary difficulty, as discussed above, is to be assured that the contents of the Will were what the deceased intended and desired, considering his undisputed communications difficulties resulting from the stroke. It is undisputed that the deceased could not initiate the conversation but only responded to the questions or suggestions made to him. Ms Burnette's interaction and communication with the deceased were limited. She admits that after the stroke, communication became progressively more difficult. When the deceased gave Ms Henry instructions to prepare the Will, she did not know what the deceased response to Ms Henry meant. It begs whether, on her next visit without Ms Henry, on 24th July 2008, for the execution of the Will, she would have understood what the deceased responses meant.

[68] Further, Ms Burnette stated when she attended the deceased for the execution of the Will, Ms Simon received and showed them to the dining room area where the deceased sat around the dining room table in his wheelchair. She introduced herself and Mrs Schneider to the deceased, who acknowledged our presence by nodding his head. Ms Simon was in the kitchen.²⁰ Still, Ms Simon stated that on 24th July 2018, two Attorneys-at-Law from Henry & Burnette visited the home.

²⁰ Para 10 of the witness statement

They indicated they were there to witness the deceased's Will. She directed them through to the living room and went into the kitchen. After they were finished, she escorted them out, and they left.²¹ However, under cross-examination, Ms Simon was adamant that after the initial seven months after the deceased returned from Miami, he saw all visitors (including the Attorneys-at-Law) in the kitchen with no exception. When confronted that if there is evidence that the Attorneys-at-Law met with the deceased in the dining room to execute the Will while she was in the kitchen, she indicated this would be false. She stated that she was about 30 feet away in the bathroom when the Will was executed.

[69] There were other notable inconsistencies in the evidence of Ms Simon. She stated the deceased's last Will accords with his true intentions, having seen it. He regularly told her that he wished for his assets to be shared between her and his children but would not leave them to share anything.²² Still, under cross-examination, Ms Simon stated she and the deceased did not talk about everything, including his affairs, like his Will, revocation of the Power of Attorney and divorcing his wife. She maintained they never communicated about anything legal – all he would say was to call the lawyer. He communicated with the lawyer.

[70] Regarding being aware that the deceased was divorcing his wife, Ms Simon denied having personal knowledge that the deceased would divorce his wife and did not know he was divorced on 20th May 2008. However, she knew he was going to divorce court. Later Ms Simon acknowledged that she brought the deceased to the court but did not go into the courtroom. She knew he was going to court to be divorced, and yes, she knew the deceased gave instructions to commence divorce proceedings.

[71] The court finds all of this to be incredulous. Further, in cross-examination, Ms Simon was evasive about how regularly Alvestan, Dandridge and Mr Goodwin visited the deceased and that she seldom gave them any privacy with the deceased when they visited.

[72] Indeed, it may not be suspicious that the deceased purportedly shared his assets between Ms Simon, a long-term partner and caregiver, and his children. Still, some circumstances warrant

²¹ Para 25 of the witness statement

²² Para 28 of the witness statement

further interrogation. Ms Simon contacted the Attorneys-at-Law to attend at the deceased to prepare the Will. In cross-examination, Ms Simon admitted she would call Ms Henry but said she was not part of it. Still, Ms Simon knows the deceased made a Will in July 2008. The deceased conducted all legal matters in her house in the kitchen, and she would have been present in the house but not present while the legal matters were happening.

[73] However, it begs how Ms Henry knew in attending to take the previous Will and then read it to the deceased to get his instruction. Logic and commonsense would suggest that Ms Simon must have indicated to her, at the very least, the purpose of the visit. However, Ms Simon gives the impression in her evidence and under cross-examination that she was not involved and did not know the deceased was making a Will. Ms Simon is the principal beneficiary of the gifts under the Will, including removing a co-beneficiary to make her the sole beneficiary. All this is in the context that during the previous month, the deceased was twice hospitalized and purportedly revoked the Power of Attorney (jointly between Ms Simon and another party) - there had always been a joint Power of Attorney since his stroke. Still, the defendants adduced no evidence nor explained the deceased reason(s) for wishing to change his Will.

[74] The court notes Ms Simon's assertion that she cannot admit or deny if she is a principal beneficiary as the claimants are the other beneficiaries under the Will, and there has been no valuation of the assets devised for each party. This is somewhat disingenuous as it does not require a valuation to determine that the Will gifted Ms Simon a more significant portion of the deceased assets. Moreover, Ms Simon, in her affidavit sworn 31st March 2017 in support of the citation to accept or refuse administration to the claimants, deposed that substantial real property was devised to her under the Will and the gross value of the deceased estate amounts to EC\$1,000,000.00 and no more. It is curious how she knew this without knowing the value of the assets.

[75] Without casting any aspersions and with the greatest respect to learned counsel Ms Henry and Ms Burnette, I find that Ms Simon was involved in obtaining the preparation of the Will. Her benefits under the Will substantially increased. The defendants have not removed the apparent suspicion surrounding the deceased's ability to communicate, know and approve the Will. Therefore, on the totality of the evidence I find for the claimants. The Will is invalid because the deceased lacked the knowledge and approval required to execute a valid Will and so declares.

Conclusion

[76] Having found as I did, it is not still necessary to go on to consider the other two issues of whether the deceased had the requisite testamentary capacity or he was under the undue influence of Ms Simon. In any event, I do not believe the evidence before was satisfactory for me to decide on these issues.

[77] Finally, I note the defendants' submissions that in the claim form filed on 4th May 2017, the claimants ask the court to pronounce against the Will of the deceased dated 24th July 2008, and grant letters of administration in the deceased's estate. It is unclear if the claimants are pursuing this remedy as they did not mention it in the statement of claim. However, even if the court were to pronounce against the Will, the deceased would not have died intestate as the claimants have not challenged the previous Will of the deceased dated 27th August 2004. The defendants did not plead or pray such a proposition in their defences, nor was the issue ventilated at the trial. Consequently, this judgement proposes no opinion on that matter.

[78] For these reasons, IT IS ORDERED AND DECLARED THAT:

(1) The Will dated 24th July 2008 is invalid and shall not be admitted to probate because the defendants have not proven that the deceased had the knowledge and approval of the contents of the Will.

(2) The defendants shall pay prescribed costs to the claimants unless otherwise agreed.

**Justice Rohan A Phillip
High Court Judge**

By the Court

Registrar