

THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

SLUHCV2014/0461

BETWEEN:

[1] PETER BASCOM
[2] PATRICK BASCOM
[3] DESMOND BASCOM
[4] ROGER BASCOM
[5] MARCIA LINES
[6] ROSELYN YOUSSEF
[7] ANNETTE DU BOULAY

Claimants

and

MARGARET ROSE MORGAN-GEREGHTY

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Dexter Theodore QC for the Claimants

Mrs. Veronica Barnard for the Defendant

2018: September 17, 19, 20, 21;
2019: April 1;
2020: January 21.

JUDGMENT

Background

[1] **CENAC-PHULGENCE J:** This claim was filed by the claimants, Peter Bascom and six others against the defendant, Margaret Rose Morgan-Gereghy

(“Margaret”) seeking (i) a decree pronouncing the validity of a notarial will of John Richard Bascom (“John”) dated 1st April 2010; (ii) alternatively, a decree pronouncing against the validity of the holograph will dated 14th July 2013; (iii) an account of the dealings with John’s bank accounts; (iv) repayment of any sums found to be due together with interest thereon and (v) costs.

- [2] The trial in this matter was heard over the course of four days, 17th, 19th -21st September 2018 with the evidence of four of the witnesses being taken via Skype primarily to accommodate the defendant who was in Australia but was unable to travel due to her medical condition. Due to the extensive evidence, the parties requested the transcript to assist in preparation of their submissions which were filed on 1st April 2019. The witness statement of Roselyn Youssef filed on behalf of the claimants and those of Angela Gustave, Susan Rambally and Stephen Devaux filed on behalf of the defendant were all struck as none of these witnesses attended the trial.

The Claimants’ Case

- [3] The claimants, Peter Bascom (“Peter”), Patrick Bascom (“Patrick”), Desmond Bascom (“Desmond”), Roger Bascom (“Roger”), Marcia Lines (“Marcia”), Roselyn Youssef (“Roselyn”) and Annette Du Boulay (“Annette”) are all nieces and nephews of John and some of the named beneficiaries in one of the two wills made by John. For the sake of convenience, I will refer to persons by their first names where necessary to avoid confusion as most of the parties in the case have a common surname.
- [4] The claimants seek an order pronouncing against the validity of a holograph will dated 14th July 2013 (“the 2013 holograph will”). They contend that the 2013 holograph will was procured by actual undue influence of Margaret who was John’s stepdaughter and caretaker at the time of his death on 28th January 2014. In the alternative, the claimants contend that the 2013 holograph will was executed by John at a time when he was not of sound mind, memory or understanding.

- [5] John was ninety-six years at the time of his death. Margaret was his caretaker and resided with him from about 2008. The claimants claim that John executed a notarial will on 1st August 2010 (“the 2010 Will”) before Stephen Mc Namara and Trevor Lee Cozier, Notaries Royal and the claimants are some of the named beneficiaries under that will.
- [6] The claimants claim that in the years following the execution of the 2010 Will, John’s physical health deteriorated and he exhibited clinical signs of sundowning which is characteristic of dementia. His condition progressively worsened to the point where in 2011, he was unable to recognise family members and would ask for his siblings who were dead. They claim that he also suffered from faecal and urinary incontinence.
- [7] The claimants also contend that from 2011 until his death in 2014, John was unable to fully care for himself due to his advanced age and failing health and was under the care of Margaret who exercised control over his finances. They further contend that John reposed trust and confidence in Margaret in relation to his financial affairs and she was aware of this. They claim that Margaret managed to convince John to add her as a signatory to his bank accounts at some point after she came to live with him and that by virtue of this, between 2008 and the date of the claim she withdrew funds from the said bank accounts.
- [8] The claimants allege that the 2013 holograph Will asserted by Margaret in which she is appointed as the sole beneficiary, executrix and trustee of John’s estate is not valid.

The Defendant’s Case

- [9] Margaret has denied the claimants’ claim in its entirety and counterclaims for (i) an order dismissing the claimants’ claim; (ii) an order that the 2010 Will has been validly revoked by the 2013 holograph will; (ii) an order that the 2013 holograph

will is the valid will of John; (iii) a grant of probate of the 2013 holograph will and (iv) costs.

[10] The crux of the defendant's case is that when John executed the 2013 holograph will, it was done in his own handwriting in the morning on 14th July 2013 in the manner that he desired and in the presence of a friend whom he had requested to be present and who witnessed the said will and that at that time, he was not incapacitated or incapable of comprehending what he was doing. The defendant further contends that although John was aging, he was aware of what was happening and was not confused or disturbed such that it would affect his capacity to comprehend. Any signs of sundowning the defendant claims, could not prevent John from executing the 2013 holograph will.

[11] The defendant contends that she exerted no undue influence on John at the time of the writing of the 2013 holograph will or otherwise and instead cared for him as she would for her own father from 2008 when she arrived in Saint Lucia until his death in January 2014 and did this out of her love and affection for him. It is also the defendant's contention that it is only some of the claimants who ever visited John and that generally the claimants did not show care for John.

[12] The defendant's contention as regards the claim for an account of John's estate is that all withdrawals from John's accounts were on his instruction and with his permission and by virtue of a Power of Attorney executed in 2010.

Issues

[13] The issues for determination are whether:

- (i) John was, at the date of execution of the 2013 holograph will, of sound mind, memory and understanding;
- (ii) John's Will dated 14th July 2013 ("the 2013 holograph will") was procured by Margaret's undue influence; and
- (iii) Margaret should be made to account for her dealings with John's estate.

Sound Mind, Memory and Understanding?

Issue (i)-Whether John was, at the date of execution of the 2013 holograph will, of sound mind, memory and understanding

The Law

- [14] The well-known legal principle is that in order for a will to be valid, a testator must possess an animus testandi, meaning that the testator had (a) the mental capacity required to make the will; (b) the intention of making a will and (c) exercised his genuine and free choice of making of the will.
- [15] Each case must be considered on its own facts and it requires the court to hold a balance. The authors of **Mellows: The Law of Succession**¹ state that if the court sets too high a standard, those who are dissatisfied with a will are encouraged to allege mental unsoundness on the part of a testator. On the other hand, they say if the court sets too low a standard, effect will be given to the most absurd wills. All of this must take place against the backdrop of freedom of testamentary disposition.
- [16] The position was summarised by Wigram VC in **Bird v Luckie**² as follows:
- “No man is bound to make a will in such a manner as to deserve approbation from the prudent, the wise, or the good. A testator is permitted to be capricious and improvident, and is moreover at liberty to conceal the circumstances and the motives by which he had been actuated in his dispositions. Many a testamentary provision may be seen to the world as arbitrary, capricious, and eccentric, for which the testator, if he could be heard, might be able to answer most satisfactorily.”
- [17] In **Banks v Goodfellow**³ Cockburn CJ speaking to the test of mental capacity said:

¹Magrave-Jones, Clive V, 5th edition, Butterworths.

² (1850) 8 Hare 301, at 306, 307.

³ (1870) LR 5 QB 549 at 567.

“As to the testator’s capacity, he must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple form.”

[18] In the case of **Perrins v Holland**,⁴ Lewison J made some observations regarding the common law test as to testamentary capacity which are instructive given the fact that **Banks v Goodfellow** is an old authority from 1870 and the way mental capacity is looked at and dealt with has changed since then. Lewison J said the following: (i) since the test is a common law test it is capable of being influenced by contemporary attitudes; (ii) our general understanding of impaired mental capacity in adults has increased since 1870; (iii) we now recognise that an adult with impaired mental capacity is capable of making some decisions for himself, given help; (iv) we recognise that the test of mental capacity is not monolithic but tailored to the task in hand; (v) contemporary attitudes towards adults with impaired capacity are more respectful of adult autonomy; (vi) **the traditional test must be applied in the context of the particular testator and the particular estate.**

[19] The issue of testamentary capacity may be determined by medical evidence as to the medical condition of the testator or testatrix but in many cases will not be and requires the court to apply a commonsense judicial judgment based on the whole of the evidence.⁵

⁴ [2009] EWHC 1945 (Ch).

⁵ Simon v Byford [2014] EWCA Civ 280 at paragraph [17].

- [20] The burden of proof in cases where a question of possible mental incapacity arises rests on the person propounding the will and that person must satisfy the court that the will is valid, that it complies with the formal requirements of the law and that the requisite mental element is present.
- [21] Evidence must be adduced as to the testator's mental state at the time when the will was made, if possible. Where the evidence is available, the court will decide the question accordingly but if not, certain presumptions will be made. If the will is rational on its face, it is presumed that the testator was sane at the time the will was made. Where such a will is being attacked, it is for the party attacking to show that the testator either did not have adequate mental capacity generally or lacked that capacity at the particular time when the will was made.
- [22] If the person attacking the will proves generally that the testator did not have mental capacity, the burden shifts to the propounder to establish that notwithstanding the general incapacity, there was adequate capacity at the particular time the will was made.
- [23] Where the will is irrational on its face, then the presumption is that the testator did not have adequate mental capacity so that the person propounding the will must satisfy the court of the testator's mental capacity at the time of execution of the will.

An Analysis of the relevant Evidence

- [24] The claimants have set out at paragraph 13 of their statement of claim particulars of unsoundness of mind in relation to John as follows:
- "(1) From in or around 2011 the deceased was diagnosed by his doctor as exhibiting signs of sundowning which is characteristic of dementia and his condition worsened over time;
 - (2) Eventually the deceased suffered from hallucinations and would claim to see people and things that were not there;
 - (3) On 11th August 2012, the deceased was unable to recognize his nephew Roger, the fourth claimant, whom he had last visited in Canada in 2006;

- (4) During the several visits made by Roger over a two week period in August 2012 the deceased frequently forgot remarks that he had made moments earlier and frequently repeated himself;
- (5) On numerous occasions during those visits the deceased kept asking Roger who he was and Roger had to repeatedly identify himself;
- (6) During Roger's visit the deceased kept losing his trend of thought and repeating himself;
- (7) During the visit of his nephew Peter, the first claimant, to the deceased in December 2012 the deceased repeatedly asked him for his brother, Reginald who was Peter's father and who was deceased for over seven years."

[25] In order to determine the question of whether John possessed the mental capacity or was of sound mind at the time when he made the 2013 holograph will, all the facts and circumstances must be examined. It also requires a close examination and analysis of the evidence presented in the case.

Annette Du Boulay⁶

[26] Annette was John's niece. Annette's evidence was that prior to 2004, she visited John and his brother Reginald who lived close to each other on occasion. After 2004, she visited more frequently since Reginald had died in July 2004 and she was worried about John being lonely. She then says that between 2011 and 2012 she continued to visit John regularly. Annette says that in 2012, John's memory was fading. She says in her witness statement that on one occasion, Margaret had to get John's neighbour to come over to remind John that he was retired from the bank. She says this is confirmed by an email from Margaret to Janet Bascom dated 14th August 2012 in which Margaret referred to matters that she knew of in relation to John, including "all mental things". That Annette testified referred to the issues being faced with John's diminishing mental capacity.

[27] Annette's evidence is that by late 2012/early 2013, John's memory deteriorated even further to the extent that he could not remember her and would keep asking who she was and would not recognise her even after she told him that she was the

⁶ Witness Statement (WS) of Annette Du Boulay at page 85 of the Trial Bundle (TB).

daughter of his brother Robert Bascom. He would ask for Robert even though he had died since 1980.

- [28] Annette also testified that John would repeat the same questions within five minutes. She says on one occasion when Margaret pointed to her and asked John who she was, he replied that she was his sister and Margaret his mother. Annette says by mid-2013, John hardly spoke and on her regular visits to see him, he was always seated in a chair in the living room in a slumped position with his legs stretched out, his head down and his hands shaking constantly. She says when she greeted him or attempted to speak to him, he would only respond "Uh".
- [29] In cross-examination, Annette agreed that John was generally chatty, witty and loved his gin and tonic and whisky. When asked whether in 2013 she went to see John as often as before she said that she went anytime she got the chance and then said she could not remember but it was maybe once a month or more. She said in cross-examination that she did not ever notice that John was irritable or confused or agitated about anything. He just sat there. Neither did she notice that he was ever upset or anxious about anything.
- [30] Annette's evidence is very vague and does not indicate whether she visited John between 2008 and 2011 and if so, how often. This may very well account for why John may not have recognised her at times. She says she was concerned about him being lonely after Reginald died but the evidence shows that John's sister Muriel was still alive at that point and was regularly with him until she passed in 2008. What was very interesting about Annette's testimony is that there were very many things which when asked about, she herself could not recall. She said she went to see John often yet still was not sure how many times she went. Surely, memory loss is a natural part of getting old which we can all attest to and is certainly not indicative of fading mental capacity.

Janet Bascom⁷

- [31] Janet was John's sister in law and is the mother of Peter and Roger. In relation to this aspect of things, Janet's evidence was that over time she observed John's mental capacity was slipping. She says his mental condition deteriorated for about three years until it reached a stage where he could not even remember his nephews including her sons who he was very fond of. She however does not state when exactly this all happened. She refers to the fact that Margaret had told her that whenever her sons telephoned John, she would have to show him a photo to let him know who he was speaking to.
- [32] Janet says that about 2013 Margaret had told her that John had got up in the middle of the night saying it was time to go to work. She also says that when she went to John's home, he started to stare at her with a blank expression on his face and did not appear to recognise her even after she identified herself as his brother Reginald's wife. Janet says that from her personal observations of what John said and did when she was around, she would say that from late 2012 he had become very forgetful and unable to take part in a conversation. She also mentions that the fact that John did not recognise his nephew Patrick and when he was told that Patrick was the son of his brother Robert, he then asked about Robert although he had died some 30 years ago.
- [33] Janet says that based on her observations about John's speech and his inability to string sentences together she was shocked that he had prepared the 2013 holograph will. She says that from late 2012, John did not converse or speak whole sentences. He did not initiate conversation and when spoken to, he would sometimes not respond at all, or he responded by using single words like "oh" or "oh yes" or he would ask who you were. She says John spent most of the time sitting on a chair and appeared distant and noncommunicative for most of the time. Janet makes very conclusive statements about John's mental state.

⁷ WS of Janet Bascom at page 90 of the TB.

Patrick Bascom⁸

[34] Patrick was one of John's nephews. He resides in Canada. He says that he and John were close. Patrick says he visited Saint Lucia in 2012 and saw John on two occasions. He said on one of his visits with John it appeared to him that John did not know who he was. Janet was present and asked John whether he knew who he was and John said no. When he was told it was Patrick, he replied 'Oh' but according to Patrick, John did not appear to recognise him. Janet then told him that Patrick was his brother Robert's son but he did not appear to recognise the name Robert. Patrick says as he continued chatting with John, John again asked him who he was.

[35] Patrick says before his visit in 2012, he was last in Saint Lucia in 2009 and visited with John. He says John used to visit him in Canada but in cross-examination he admitted that the last time John visited him in Canada was in 2006, three years before he next saw him.

[36] Cross-examination of Patrick revealed that he had not seen John from 2009 to 2012. He did not know how old John was in 2012. Based on this, it is quite probable that John who was 94 years at the time did not recognise Patrick because he was not someone who he saw very often.

Peter Bascom⁹

[37] Peter was the son of Reginald and one of John's nephews and lives in Canada. In his witness statement, he introduced himself as Dr. Peter Bascom but in cross-examination it was clarified that he was not a medical doctor but had a PhD in electrical engineering. This is significant because it confirms that Peter is in no better position than any of his cousins to opine on John's mental capacity.

⁸ WS of Patrick Bascom at page 97 of TB.

⁹ WS of Peter Bascom at page 102 of the TB.

[38] Peter says because he lived outside Saint Lucia he could not visit as often as he wished but he would telephone John at Christmas, his birthdays and intermittently just to say hi. He says John and his brother Reginald used to visit them in Canada and John visited even after Reginald passed away. He says the last time John visited him was in 2006. Peter says he visited Saint Lucia in 2008 and noticed that John's memory was not as sharp as it used to be. Peter does not explain what he meant by that, but then proceeds to say that 'He definitely had his faculties about him in 2008 when I was in Saint Lucia. He was still reading his favourite magazine "The Economist", although he indicated it took him a month to read it from cover to cover.'¹⁰

[39] Peter says that when he called from Canada on several occasions in 2012, he could clearly hear Margaret telling John who he was. He denies that the phone lines were ever bad when he called. He says during the telephone conversations John would become disoriented and forgetful. Peter says when he and his family visited in 2012, John spent most of the time sitting in a chair but according to Peter's own evidence, John had undergone a knee operation sometime before 2008 and as time went by his knee troubled him more and more. He stopped playing golf and suffered a fall in 2012. Small wonder he spent a lot of time sitting in a chair.

[40] In cross-examination, when asked whether he had noticed John's memory failing in 2010, Peter said that he did notice John's memory was failing in 2008 but he could still carry on a decent conversation.

Roger Bascom¹¹

[41] Roger was another one of John's nephews, son of Reginald. He resides in Canada. In his witness statement, he introduced himself as Dr. Roger Bascom but in cross-examination it was clarified that he was not a medical doctor but had a

¹⁰ Para 19 of Witness statement of Peter, Page 104 of the Trial Bundle.

¹¹WS of Roger Bascom at page 109 of TB.

PhD and did medical research. Again, this is significant because it confirms that Roger like Peter is in no better position than any of his cousins to opine on John's mental capacity.

- [42] Roger's evidence is that his last visit to John was in August 2012 and he stayed for two weeks. Roger says he used to telephone John often before Margaret started living with him but less after that because Margaret made him feel uncomfortable. His visit to Saint Lucia in 2012 to see John was prompted as a result of his conversations with John as well as what his mother Janet had relayed to him.
- [43] Roger's only evidence about John's mental state was that John kept asking him who he was and that their talks were superficial because his memory kept failing him. He says John repeated himself often. Roger opines that from what John said and did and his general behaviour it appeared to him that his mental condition had deteriorated considerably since his visit to Canada in 2006.
- [44] When asked how often he spoke to John, Roger responded 'maybe every four months after Margaret came' which would have been in 2008. He said he spoke to him up to 2012 and after that he figured John did not recognise him. Roger admitted in cross-examination that he did not visit Saint Lucia frequently. He also said that before 2012, he had last seen John in 2006 in Canada.

Stephen Mc Namara ("Mr. Mc Namara")¹²

- [45] Stephen Mc Namara was one of the two lawyers before whom John's 2010 notarial will was executed and who would have visited John in August 2013.
- [46] Mr. Mc Namara testified that he visited John's home on more than one occasion but spoke specifically to the visit on 2nd August 2013 when he, accompanied by Mr. Trevor Cozier went to John's house 'for the purpose of receiving instructions for the alteration of his existing notarial will.' Mr. Mc Namara says when they got

¹² WS of Stephen Mc Namara at page 114 of TB.

to the house they spoke with John. Mr. Mc Namara testified that John appeared confused and unclear as to what he wanted to bequeath and to whom. He says as a result he and Mr. Cozier left without taking any instructions for the alteration to John's existing will.

Dr. Alwyn Benjamin ("Dr. Benjamin")¹³

[47] Dr. Alwyn Benjamin is a medical doctor since 2006 and at the relevant time, was employed as an emergency room physician at the Tapion Hospital. His first clinical interaction with John was first on 26th October 2011 when he presented at the hospital with signs and symptoms consistent with decompensated congestive cardiac failure secondary to lower respiratory tract infection. Dr. Benjamin exhibited what he says are the patient notes and a report based on his interaction with John. I note however that the contents of the patient notes and the report are a carbon copy of each other.

[48] In his report, Dr. Benjamin says that at the time of John's admission, he was alert and oriented. However, he says that on his perusal of the admission notes the following day, he observed that a notation had been made by the doctors and nurses that the patient was confused on their evening review. These notes were not exhibited by Dr. Benjamin.

[49] He then says the following:

"In view of the above history, it is my medical opinion that the patient had exhibited clinical signs of sundowning, which is characteristic of dementia. Sundowning is typically experienced in patients with Alzheimer's dementia, where one may notice big changes in how these patients act in the late afternoon or early evening. Patients experiencing sundowning may be: agitated (upset or anxious), restless, irritable, confused, disoriented, demanding, suspicious."

¹³ WS of Dr. Alwyn Benjamin at page 121 of TB.

- [50] Dr. Benjamin ends his report by saying that he must qualify this statement (above quoted) by saying that 'a mental status exam was not conducted by himself to make a definitive diagnosis of dementia.'
- [51] Dr. Benjamin in cross-examination indicated that he was not the one who would have done the evening review on John as he did the day shift so the junior doctor on call would have written the notes. He confirmed that the notation which he referred to in his report would have been made by the doctors and nurses and these notes would be in the medical records at Tapion Hospital.
- [52] Dr. Benjamin confirmed in cross-examination that not every 91-96 year old experiences dementia and that it is not necessarily characteristic of age. He also confirmed that memory lapse is not a factor of age. When asked whether a person's ability to walk or hear affects their soundness of mind, he said no. Dr. Benjamin explained that generally we become forgetful but in dementia, forgetfulness is one of the first signs noticed. Dr. Benjamin thought it was most likely that his interaction with John was in the afternoon and would have been for an hour or more. His interactions with John were on admission and when he reviewed him on the ward but he could not recall how many days John spent in hospital.
- [53] When asked whether John was agitated or upset when he interacted with him, Dr. Benjamin said like any patient there was some anxiety and he was occasionally forgetful in terms of the clinical explanations so that he did not seem to get the explanations and seemed to forget within a short space of time. He says though anxious, John soon settled. He said he was not disoriented. He also said that John asked him to explain everything to the caretaker. Margaret had introduced herself as John's caretaker.

- [54] When asked what he diagnosed John with, he said heart failure with pneumonia. He admitted that there had been no diagnosis of dementia and sundowning in relation to John in his report.

Maria Joseph ("Maria")¹⁴

- [55] Maria was John's housekeeper from September 2003 until he died in January 2014. Maria's evidence is that although John was aging she never saw him 'down and out'. She says he spoke to her up until the day he died. She says that up until he died he spoke well and kept saying he would die and she would not see him again and that Margaret would take care of her if anything happened to him.
- [56] Maria testified that she never saw or heard John appear as if he did not know what he was saying or doing. She says although he was ailing physically in the last few months before he died, his memory was sharp. He always seemed to recall things that happened in the past she said. Maria testified that John had told her that he was doing a will and was leaving everything to Margaret. She said she even joked with him and asked him whether he left anything for her to which he responded and said that Margaret was not greedy and she would take care of her. Maria said she worked everyday at the Bascom residence from Monday to Friday and would work Saturday and Sunday as needed.
- [57] Maria in cross-examination denied that there was ever a time when she spoke to John and he would ask her about the same thing she would have just spoken to him about and she insisted that he still had his memory and denied that he became more forgetful over time. Maria testified that she worked from 8 a.m. but arrived at 7:30 a.m. and left at about 1 or 2 p.m. Maria insisted that John never looked like he did not remember things and that in September 2013, he had written some recommendation for her daughter to be able to obtain work in the United States.

¹⁴ WS of Maria Joseph at page 128 of the TB.

Doretta Francois ("Doretta")¹⁵

- [58] Doretta was a friend of John from 2010 and was present when he wrote the 2013 holograph will. Doretta's evidence is that although John's physical health deteriorated in his final years, she was of the belief that he remained generally alert and in control of his mental faculties. She says she used to visit John regularly at least once a week from 2011 and in his final year, she visited a couple of times a week so she, Margaret and John could have dinner together and spend the evenings talking and watching television.
- [59] Doretta testifies that John had told her that he had made a will leaving his estate to various members of his family but he was concerned about Margaret and specifically where she would live after he passed. She says John told her he wanted to compensate her and wanted her to have his house so she could continue to have a home. She says he indicated that he wanted to change his will. She says she asked him if he wanted to arrange to see a lawyer and he said it was not necessary and instructed her to return a few days later which she did to witness the changes he wanted to make to his will.
- [60] Doretta says that she did return, and it was about mid-morning when John wrote out what she called a note (the 2013 holograph will) which he signed at the end and then asked her to sign as well. She says John took about twenty minutes to complete the note as he wrote slowly and with a lot of concentration. She says John appeared to her to be fully aware of what he was doing and asked her not to disclose what he was doing to Margaret.
- [61] In cross-examination, Doretta said she did not notice that John got more forgetful as time went by. When asked whether she was sure, she responded 'I would say that he grew slower in responding and thinking. She was adamant that she never witnessed John ask any relative who they were. Doretta explained in cross-examination that John had told her that the lawyers were coming about his will and

¹⁵ WS of Doretta Francois at page 133 of the TB.

he wanted her there. Doretta says she was present as requested by John when Mr. Mc Namara and Mr. Trevor Cozier came to the house in August 2013 and by the time she arrived John already had the 2010 will and the 2013 holograph will with him. She says she had reminded him the day before to get them ready.

[62] Doretta's evidence in cross-examination was that John explained that he wished to make changes to his 2010 will and that Mr. Mc Namara insisted that he read the entire will before hearing John as to the changes he wanted. She said John started to fidget and say no in a weary tone. The lawyers then said that it did not appear that John wanted to continue the process. She said John said nothing and she then pushed the 2013 holograph will towards them as it was on the dining table, so they could see what changes John wished to make. Doretta says that she clearly recalls that Trevor Cozier read it and said it was a legal document or words to that effect.

[63] Doretta did not agree that John became less conversational in about mid-2013 or that he spoke in single and double words or that he asked her questions that he had previously asked. She however said she observed that this (asking questions which he had already asked) happened with someone else although she could not remember who. She said in cross-examination that she could only remember this happening once and she had laughed at the time. She had no recollection of John not recognising people.

[64] When she was told that in mid-2013, John was in no position to talk to her or ask her anything, she disagreed. When it was put to her that her insistence that she never observed any forgetfulness on John's part stems from her desire to support Margaret, she responded, 'I disagree vehemently.' She was again asked about her testimony that she had only observed John's forgetfulness once in four years and she responded in the affirmative adding that John could be slow but he was old and she had the patience to deal with him. She insisted that John asking questions about things he had just been told did not happen with her.

Margaret Morgan-Gereghy

- [65] Margaret's evidence is that John was up to just prior to his death still signing Christmas and birthday cards for friends and relatives. She says she never saw John with a blank expression on his face when any family members visited which she says was rare, only a few times a year. She recounts that she had told Janet as well as other family members that John had got up in the middle of the night and said that it was time to go to work but that was the time he had suffered a mini stroke and this was a one off occasion. She admits to showing John photographs of his nephews Peter and Roger but she says it was because John's hearing was not always sharp and the telephone lines were not clear so he had difficulty making out the names of the callers.
- [66] Margaret says she is not aware of any neurological test or report in respect of John and that as far as she knew John was of sound mind at the time he made the 2013 holograph will and appeared to know what he was doing. She says that John was an avid reader of the Economist and television programmes especially BBC, watched golf and local news. She said he read the Economist until his death. Margaret says that John was of sound mind, memory and understanding when he wrote the 2013 holograph will.
- [67] Margaret was questioned about the incident where John had got up in the night insisting that it was time for work and admitted that she had sought the assistance of Mr. Ryan Devaux ("Ryan") to speak to John about the fact that he was retired and did not have to work. When it was suggested that the only reason she had sought the assistance of Ryan was because she was having difficulty, she said she did it because Ryan was into banking and she thought it would be nice for John to have somebody who was in the same field to talk to. When asked whether before she left for New Zealand in August 2012 she noticed any mental issues with John, Margaret said no.

[68] In cross-examination, Margaret accepted that there were times when John appeared not to remember people and said she recalled John's nephews and nieces visiting and John would not appear to remember who they were. When asked about Annette though, Margaret said John always remembered Annette. Margaret could not speak to the time when allegedly John could not recall that his brother Robert had died. She said John's lack of memory did not happen in her presence but agreed that there were times when he would ask the same question which he had just asked and had been answered. Margaret could not speak to whether John was forgetful when he spoke to Peter or Roger as she said she was not around whilst John spoke to them as she would hand him the phone and then leave. Margaret disagreed that from late 2012 John stopped communicating in sentences and started using single or double words.

[69] In cross-examination, Margaret said that in December 2012 when they went to Annette's house, John was mostly seated at the table as it was very difficult for him to walk. She said that he was not as jovial and social as before but he spoke to persons when they came and introduced themselves. Margaret said she could not confirm whether John did not recognise Peter at some point when he visited but she was sure that he recognised Peter when Peter came into the house at first. Margaret confirmed that John usually sat in a chair in the living room or on the deck but disagreed with the suggestion that his posture was that his head was down with his hands shaking uncontrollably. She said unless he was taking nap his head was not down. To the suggestion that John made a basic grunt when spoken to, Margaret said if he did not wish to talk to anyone, he probably would have done that. Margaret said she would have noticed if John became more and more forgetful.

Discussion

[70] It is not disputed that John was an elderly gentleman at the time he is said to have executed the 2013 holograph will. There is also no dispute on the evidence that he suffered from several ailments, among them being blood clots in his legs, a

heart condition, urinary tract infection and towards the end of his days bed sores. He had also suffered two strokes at some point and he also had a fall which further restricted his mobility. Therefore, it is safe to conclude that John was not in the best of health. After all he was in his nineties.

[71] For the purposes of this case, it is necessary to determine whether John was of sound mind, memory and understanding at the time when he made the 2013 holograph will. There is no dispute that John wrote the document referred to as the 2013 holograph will and there is no allegation by the claimants to the contrary. Therefore, it is an accepted fact that John wrote the document.

[72] It is necessary to take a look at the 2010 will and the 2013 holograph will to see whether the later will is rational on its face as that will determine where the burden of proof lies. In the 2010 will, John appointed Margaret as his executrix and trustee and bequeathed all his property to her on trust to sell, call in and convert it into money with power to postpone such sale, calling in or conversion for so long as she in her absolute discretion saw fit. Out of the monies from the sale and after payment of debts, funeral and testamentary expenses, the remaining monies were to be divided 50% to the children of his deceased sister and brothers. (there were fourteen nieces and nephews named, including all the claimants) and 10 % to each of his four stepdaughters including Margaret and step grandson.

[73] In the 2013 holograph will made on 14th July 2013, John revoked the 2010 will and again appointed Margaret as his executrix and trustee and stated that his wishes were 'now that his entire estate be bequeathed to his step-daughter, Margaret'. He used the word now which clearly showed that he acknowledged that it was a different time and he was doing something different from what he had done before. Is there anything irrational about the contents of the 2013 holograph will? I cannot see any reason to conclude that it is anything but rational. The executrix is still the same. The only difference is that John's entire estate is being left to Margaret unlike the 2010 will where although everything was left to her, she was to have

given certain monies to the persons named therein. Having found that the will is rational, according to **Symes v Greene**¹⁶ it is presumed that John was sane at the time when it was made. The burden of proof in such a case lies on the claimants who allege that John was not of sound mind, memory and understanding.

[74] An examination of the particulars of unsound mind alleged by the claimants and the evidence reveals the following:

Dr. Benjamin stated in his report that it was his opinion that John had exhibited clinical signs of sundowning which is characteristic of dementia but no diagnosis of dementia was made. Of importance is that Dr. Benjamin said sundowning is a clinical diagnosis. In other words, his assessment was based on the signs and symptoms which John had exhibited. As he explained everybody's cognition is based on daylight hours. In cross-examination he confirmed that the only diagnosis he made was heart failure with pneumonia. Interestingly, Dr. Benjamin admitted that he had treated John more than once, maybe three times but no details of these other times were provided. One would have thought that that would have been critical given that Dr. Benjamin first saw John in 2011 and according to the claimants he had deteriorated significantly by 2012. Dr. Benjamin also confirmed that young people get sundowning as it is genetic.

[75] Dr. Benjamin did not diagnose John with dementia and he agreed that his notes did not confirm or disclose that John was suffering from dementia. What is clear from Dr. Benjamin's evidence both in cross and re-examination is that a person did not have to exhibit all the signs listed in his report to be diagnosed with dementia and similarly, a person could have only one of the signs and be diagnosed with dementia. In answer to the question whether a person could exhibit any of the signs and not have dementia, Dr. Benjamin said it is possible. From Dr. Benjamin's evidence I understood that it was not always the case that a mental status exam would be conducted on a patient and in John's case he said he did

¹⁶ (1859) 1 Sw & Tr 401.

not present with any physical signs of confusion. Therefore, no mental status exam was conducted.

- [76] To my mind, Dr. Benjamin's evidence does not support the claimants' contention that John was of unsound mind. Dr. Benjamin said sundowning is a symptom and not a disease and is an early evening/late afternoon phenomenon and his evidence is that the notation about John being confused would have been made late evening or late afternoon. The evidence from Doretta and Maria and which is uncontroverted is that when John executed the 2013 holograph will it was mid-morning so it is safe to conclude that John would not have been affected by sundowning at that time.
- [77] The evidence does not disclose any time when John suffered from hallucinations and claimed to see people and things that were not there. Apart from the time when Margaret described that John had got up in the night talking about going to work which appears to have been a one-off occasion, there is no evidence to support the claimants' allegations.
- [78] The evidence does show that John may not have remembered Patrick, Roger and Peter when they visited and asked them who they were even after being told. It is clear that John did not recognise some of his family members especially those whom he did not see often. There was no evidence from Janet that John asked her who she was. In fact, in cross-examination, Janet said that John knew who she was and she used to go there to chat with him. Clearly, John saw her often and knew who she was.
- [79] The evidence also shows that John did not seem to have any difficulty recognising Margaret, Doretta, Maria and Annette. Annette suggested that John did not recognise her at times and he stared at her with a blank face but that was denied by Margaret who said that John knew who Annette was. It is also quite probable that if one does not see someone often that the level of conversation will be less

than with someone with whom you converse with frequently. Could it be that John just did not have much to say to Janet or Annette? Could it be that he was aging and just preferred to sit quietly? These things are not indicative of an unsound mind. If they were, many of us may have to be worried.

[80] It is quite possible that having not seen someone for a few years, that one may not immediately recognise them. Memory is a very interesting phenomenon and it is not as easy as just making a few observations to conclude that someone is of unsound mind. A person may forget certain things or events of the past but be fully cognitive when it comes to current day to day activities. They may not recall things that happened a long time ago but can recall recent events.

[81] In the Court of Appeal decision of **Anne-Marie Mac Leish et al v Avison Albert “Bert” Marryshow**¹⁷ the Court referred to passage from the case of **Den v Joseph Vancleve**¹⁸ which I think is supportive of the analysis at paragraph [80] above. The Court in **Den** said as follows:

"The testator must, in the language of the law, be possessed of sound and disposing mind and memory. He must have a memory;... But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons or the families of those with whom he has been intimately acquainted...and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigour of intellect to make and to digest all parts of a contract, and yet be competent to direct the distribution of his property by will...."

[82] Without a conclusive medical diagnosis what we have is the claimants' basically opining on John's mental status. Dementia is clinically diagnosed as stated by Dr. Benjamin and cannot be conclusively diagnosed by mere observation. The fact that John would repeat things does not necessarily mean that he was of unsound mind. The claimants have not provided any evidence which supports their

¹⁷ GDAHCVAP2010/0012, delivered 14th May 2012 at paragraph 6.

¹⁸ (1819) 2 Southard 589.

allegations that John was of unsound mind at the time when he executed the 2013 holograph will or he did not understand what he was doing.

[83] From the evidence of Doretta, John appeared to be very sure of what he was doing and was even able to use the 2010 will to write the 2013 holograph will. There is absolutely no evidence to suggest that John's cognitive ability in terms of understanding what he was doing or being able to write was in any way affected by his frail health or by his lapses in memory particularly of some of his relatives. If John were of unsound mind, it is highly unlikely that he would have been able to write out the 2013 holograph will as he did, be able to recognise errors made and correct them or that the document itself would have been rational.

[84] What is quite interesting is that despite all the claimants' claims of concern that John's memory was failing, no one ever said that when he spoke he appeared not to be coherent. No one it would appear was alarmed enough to suggest that a mental exam be conducted on John to assess his mental well-being.

[85] Having outlined all the evidence, I am unable to find that the claimants have proven on a balance of probabilities that John was of unsound mind, memory and understanding when he executed the 2013 holograph will. The will is therefore a valid will.

Undue Influence?

[86] The claimants have pleaded in the alternative that should the Court find as it has that John was of sound mind, memory and understanding when he executed the 2013 holograph will, that that will was procured by the actual undue influence of Margaret.

Issue 2-Whether John's Will dated 14th July 2013 ("the 2013 holograph will") was procured by Margaret's undue influence

The Law

[87] In **Wingrove v Wingrove**¹⁹ Sir James Hannen defines undue influence in the following manner:

“...to be undue influence in the eye of the law there must be – to sum it up in one word – coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or she make a Will in a particular person’s favour, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced in to doing that which he or she does not desire to do that it is undue influence.”²⁰

[88] As to the extent of actions which may amount to undue influence, Sir J. P. Wilde in the case of **Hall v Hall**²¹ said the following:

“Even a reprehensible placing of pressure on a testator will not always be undue influence so as to avoid the will: ‘To make a good Will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affection or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like – these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid Will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping distress of mind or social discomfort, these, if carried to a degree in which the freeplay of the testator’s judgment, discretion or wishes is overborne will constitute undue influence, though no force is either used or threatened. In a word a testator may be led but not driven and his Will must be the off-spring of his own volition and not the record of someone else’s.”

[89] In **Killick v Pountney and Another**,²² which was cited in the Eastern Caribbean case of **Johnston v Eno and Rooth**²³ the Court stated:

"I can readily accept that if there is evidence showing the exertion of improper pressure in relation to the execution of a Will, it will be easier

¹⁹ (1885) 11 P.D. 81.

²⁰ At page 82.

²¹ [1868] LR 1 P&D 481.

²² [1999] Lexis Citation 2547.

²³ High Court Civil Claim No. 199A of 2002 (St. Vincent and the Grenadines) at paragraph 68.

and sometimes very much easier where the testator is enfeebled in body or mind and all the more so if he is enfeebled in both body and mind, to find that such influence was in all the circumstances undue and to adopt Viscount Haldane's words, that it was by means of the exercise of that influence that the Will was obtained. This is because ... a lesser degree of pressure or inducement may suffice to produce the desired result where the testator is feeble in body or mind than would be required were he in vigorous health. **But no amount of evidence of bodily or mental infirmity will of itself establish undue influence in the absence of some independent evidence tending to show the exercise of an improper influence.**" (my emphasis)

[90] Regarding the burden of proof to be met, the Court in **La Tanya Hughes v Clement Hughes**²⁴ had this to say:

"The burden of proof is not on the propounder to disprove the allegation of undue influence. It is on the person alleging undue influence. Any challenge to a will based on undue influence must be alleged and proved. The burden is not discharged by showing merely that the beneficiary had the power unduly to overbear the Testator's will; it must be shown that in the particular case the power has been exercised and that it was by means of the exercise of that power that the will was obtained..."²⁵ (my emphasis)

and:

"There is no presumption of undue influence; what is required is positive proof of coercion."²⁶ (my emphasis)

[91] The claimants have pleaded actual and presumed undue influence in relation to the 2013 holograph will in their statement of claim and both counsel make similar reference in their pre-trial memoranda. The learned authors of **Mellows: The Law of Succession** state that unlike contract cases, 'there is never a presumption that a will is made under undue influence because there is a relationship between the testator and beneficiary: it must always be proved.'²⁷ They cite the reason for the difference as being 'that many of the usual relationships which in contract give rise to the presumption, such as parent and child, husband and wife, solicitor and client, are just those relationships which would naturally give rise to the testator's

²⁴ Claim No. ANUHCv2010/0455.

²⁵ At paragraph 65.

²⁶ At paragraph 67.

²⁷ Margrave-Jones, Clive V, Butterworths, 5th ed., at para 5.46.

bounty. It must be noted that although undue influence will not be presumed from the existence of a relationship between the testator and beneficiary, the circumstances surrounding the making of the will can give rise to such a presumption.²⁸

[92] In **Craig v Lamourex**²⁹ it was said:

"...in order to set aside the Will of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis."³⁰

[93] The decision in **Edwards v Edwards**³¹ is instructive and is worth being examined in more detail. In **Edwards**, the deceased had initially executed a will leaving her residuary estate in equal shares to her three sons. The deceased had a close relationship with two of her sons, yet shortly before her death she made a new will leaving her entire estate to her third son, despite an obviously strained relationship with him. At the same time, she also started making false allegations against the son to whom she was closest, accusing him of stealing things. The Court, on the evidence before it, found that there was no other reasonable explanation for the deceased's behaviour other than her mind had been deliberately poisoned by her third son. On that basis the Court held that the deceased's purported last Will had been affected by her third son's undue influence.

[94] The Court set out the relevant principles for proving undue influence:

- " i) **In a case of a testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence;**
- ii) Whether undue influence has procured the execution of a will is therefore a question of fact;
- iii) The burden of proving it lies on the person who asserts it. It is not enough to prove that the facts are consistent with the hypothesis of

²⁸ Mellows at para. 5.47.

²⁹ [1920] AC 349.

³⁰ At page 357.

³¹ [2007] All ER (D) 46 (May).

undue influence. What must be shown is that the facts are inconsistent with any other hypothesis. In the modern law this is, perhaps no more than a reminder of the high burden, even on the civil standard, that a claimant bears in proving undue influence as vitiating a testamentary disposition;

- iv) In this context undue influence means influence exercised either in the sense that the testator's will must be overborne, or by fraud.
- v) Coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment, discretion or wishes, is enough to amount to coercion in this sense;
- vi) The physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will. The will of a weak and ill person may be more easily overborne than that of a hale and hearty one. As was said in one case simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be induced for quietness' sake to do anything. A "drip drip" approach may be highly effective in sapping the will;
- ...
- ix) The question is not whether the court considers that the testator's testamentary disposition is fair because, subject to statutory powers of intervention, a testator may dispose of his estate as he wishes. The question, in the end, is whether in making his dispositions, the testator has acted as a free agent."³² (my emphasis)

Analysis

- [95] The burden of proof lies with the claimants to prove that the 2013 holograph will was made by John as a result of the undue influence of Margaret. It has already been established that Margaret was John's stepdaughter. According to Margaret's evidence, her mother Erika married John in 1976. She died in 2000. It is also not disputed that Margaret's son Mark lived with John and Erika in Saint Lucia from age seven until 1994 when he returned to be with Margaret. Mark spent

³² At paragraph 47.

approximately seven years with John and Erika. Margaret as the evidence reveals and which is uncontroverted is a citizen of Australia and a widow, her husband having died in May 2007.

[96] The claimants have set out their particulars of undue influence in the statement of claim.³³ They allege that from around 2011 until his death in January 2014, John was unable to fully care for himself because of his failing health and advanced age and was under Margaret's care.

[97] It is not disputed that Margaret came to Saint Lucia in 2008. She says that she initially came to Saint Lucia to visit John and that John had advised her that since Erika's death, he had been living alone, was lonely and ageing and so John asked her to remain in Saint Lucia with him. She says at the time she was a widow and decided to stay with John in Saint Lucia. In 2008, John would have been about 91 years old. By then his brother Reginald whom he was very close to had died and his sister Muriel died not long after Reginald. All of the claimants confirmed in cross-examination that John was very close to his brother and sister and having lost his wife some years prior, he would have been lonely. Therefore, I do not find it hard to accept that John may have expressed that he was lonely.

Margaret's initial visit to Saint Lucia

[98] Annette's evidence confirms that Margaret did not initially come to stay in Saint Lucia when she says in her evidence³⁴ that when Margaret first came to Saint Lucia she had told her that her visit was for 4 months but then she later decided to stay indefinitely. In fact, when Annette was asked in cross-examination whether she had asked John why Margaret was there she said no she did not. Janet's evidence in cross-examination was that Margaret had come for only 3 weeks. In cross-examination, Margaret said she initially intended to stay for six months.

Care of John

³³ Pages 13-14 of the Trial Bundle.

³⁴ Para 5 of Witness Statement of Annette Du Boulay at page 86 of TB.

- [99] Margaret's evidence is that when she came to Saint Lucia and decided to stay with John, she took over his grocery shopping. At John's request and with his full knowledge, she says she was responsible for shopping and paying utility bills. Before this, Bobby, the gardener assisted him and from Maria's evidence she cooked for him as she worked as his helper every day except Saturdays and Sundays. Margaret's evidence is that when she came to Saint Lucia she cared for John to some degree but he was never entirely helpless. She said she did this because no other relative of his cared to. They never volunteered to do anything for him neither did they enquire about his health. Margaret also washed for John. She says John always fed himself up to the date of his death.
- [100] In July 2012, John fell and hurt himself but up until then, Margaret says he dressed himself and performed his hygiene functions without any problem. However, after the fall, Margaret says she assisted him with shaving, bathing and dressing.
- [101] Margaret's evidence as to her care of John is uncontroverted. In cross-examination this is what was revealed. Janet agreed that before Margaret came John used to do his own cooking. She agreed that when Margaret came, she did the cooking, she took John for drives, she did the shopping, she took him to restaurants and socialized together with him. She agreed that over the years, Margaret was a good caretaker to John and whenever she went to his house, he was always clean and fed. When asked whether John talked about Margaret as his daughter, Janet said 'John was very fond of Margaret and was glad for what she was doing.' She agreed that John was pleased that Margaret had come to take care of him. She agreed that Margaret was a suitable caregiver for John and said that from her observations, John trusted Margaret.
- [102] Roger on the other hand, in cross-examination says John did not speak about Margaret to him. When asked whether John mentioned that Margaret cared for him, Roger responded that John did not really mention it. Roger said Margaret was a nurse so he assumed she looked after him. Roger said he was not aware

of John's cellulitis but Margaret was a registered nurse and would have been 'the best person to take care of this'. When asked whether on his visit in 2012, he helped care for John, he said no one asked him to and Tracy and Maria were there.

[103] Peter in cross-examination said that John had told him that he missed his brother Reginald. He said John never told him he was lonely. He said that prior to Margaret coming, John prepared his meals and he did so even after she came which confirmed Margaret's evidence that John was not totally helpless when she came. Peter was adamant that Margaret had told him that she had come to visit John because he had forgotten to call her son Mark for his birthday which is something he did regularly. Margaret denies ever telling Peter this. Peter agreed that John lived by himself at the time Margaret came.

[104] When asked whether any of the relatives offered to stay with John, he appeared not to be sure and said he knew that there had been some discussion about live-in help. And when told that no one came, his answer was 'at the time he was 91.' That could only mean that there was no need to have anyone live with John at the time.

[105] Peter agreed with counsel in cross-examination that Margaret looked after, helped, cooked for John and cleaned and dressed him. He agreed that when he saw John on his visits he was always bathed, fed and well dressed. When asked whether he had discussed getting a nurse to care for John when he visited in 2012, he said Margaret did not want help. When asked again whether any family offered to stay with John, Peter responded that 'John had quite a bit of money and we thought he would need a nurse but when Margaret offered to come over, it was felt that she was a nurse.' That I understand to mean that having Margaret was sufficient and there was no need to have any family member stay with John.

- [106] Annette lives in Saint Lucia. Maria's testimony was that whenever Annette came to the house she just simply sat on a chair and hardly any conversation took place. Maria also said she never saw Annette help John up or assist him to the bathroom or clean him. In response, Annette said she never got the opportunity to assist as there was never a time when she visited and John soiled himself and needed assistance. However, she said if it had happened, she would have assisted. Annette denied that she visited John out of duty. She said it was only when John's mind was deteriorating that there was hardly a conversation and so it would appear the visits were a bit difficult. Annette said John did not tell her Margaret was coming.
- [107] When asked whether she was happy that Margaret was there in 2008 when John had lost his brother, Annette said yes because she did not have time. At the time she was working and had to see about her grandchildren. She confirmed that Margaret was doing a good job taking care of John. When asked whether John fed himself towards the end of his life, she could not say definitely but said she did not think so. When asked who fed John, she said she guessed it was Margaret or Maria. She agreed that Margaret looked after John well. She said she never cooked or cleaned for John and that she did not have occasion to help Margaret bath or dress him because he was always well dressed when she went to the house.
- [108] Annette says she visited John often but could not recall when he stopped using the walker. She said she suggested to Margaret that she should hire a nurse but she refused. She later on said she guessed it was because Margaret could handle things. She admitted that she was happy with the way Margaret cared for John. She agreed that she was satisfied that when Margaret took over caring for John as, she did a good job.
- [109] Annette when asked in cross-examination whether John lived alone when Margaret came to Saint Lucia, said she thought so. She was not sure despite

having said that she visited John often. Annette's position was that if she had to stay with John or help him she would but it was never necessary. When Margaret went to New Zealand, Annette says she went to see John often but could not say how many times. She said Margaret made all the arrangements and then informed the family so again there was nothing to assist with.

[110] Certainly, from the claimants' evidence, they appeared to be satisfied with Margaret's care of John. They attempt to show that Margaret was in control of John but what the evidence reveals is that Margaret cared for John's physical needs and seemed to do a good job.

[111] Margaret in her evidence says that there was little involvement by the claimants with John. Although the majority of them lived out of Saint Lucia, most of them never bothered to visit or call. She says Annette visited from time to time but never made an effort to converse with John and simply sat there. Patrick visited once in 2012 but did not call or send cards. Patrick in cross-examination said he was not one to send cards although he acknowledged that John did like to send cards to family members. Desmond, Margaret said visited Saint Lucia twice in five years the last visit being in 2013 but never bothered to visit John. Annette in her evidence says that she and Desmond met Margaret in Sans Souci in 2013 and when Desmond told her he wanted to visit John, Margaret said he would have to make an appointment. Margaret denied this and said she never stopped anyone from coming to see John.

[112] Roselyn visited once or twice a year says Margaret but never called or sent cards. Marcia, Margaret says never contacted John. That evidence is uncontroverted. Roger visited in 2012 and this was confirmed. Margaret says it was only Peter who made an effort to call John on a regular basis. This is confirmed by Peter's own evidence. Of course, Janet seemed to always be around and attended John's birthday parties from his 91st to 95th birthday.

[113] It is clear from the evidence that Margaret took good care of John. As she said she cared for John like she would for her own father. It is clear that the claimants were happy with that arrangement and content to visit as they wished with no need to worry about John's care.

[114] As most of them testified, there was nothing to do when they visited John as he was always well dressed and fed. But no one ever attempted take John out for a drive. John's care as far as I see it was left to Margaret. It would appear that even before Margaret came, John was mostly on his own. None of the claimants gave any evidence that any family member ever went to assist John or cooked for him even if he was capable of doing so himself. After all, he was 91 in 2008 and lived alone. There was no evidence of any of the claimants who resided in Saint Lucia taking him for Sunday lunch.

John's finances

[115] The claimants allege that Margaret exercised control over John's finances. John reposed trust and confidence in Margaret and she was aware of this. They allege that after she came to live in Saint Lucia in 2008, she managed to persuade John to add her as a signatory to his bank accounts and between 2008 and the date of filing of the claim, she withdrew funds from the accounts.

[116] The claimants also allege that Margaret told Janet that when John died, they would have a small service she would take her to New Zealand with John's money. They allege that Margaret after John's sister, Muriel's death had said "one down and another one to go" and when asked to explain simply said "I am a nurse, aren't I?" They claim that John would question Margaret in Janet's presence about the money she was spending and would remind Margaret that she was not a blood relative. They allege that John stopped being able to write cheques and so Margaret took charge of his finances and started to write cheques on John's account. This is denied by Margaret.

- [117] The claimants also allege that Margaret had told Janet that John's money was going so fast that his family in Canada would get nothing. Margaret, they allege spent money lavishly and seemed to have access to a lot of money although she had told Janet that when she arrived in Saint Lucia she had been low on funds. They say Margaret's only source of funds was John's bank accounts and other assets.
- [118] Annette in describing John in cross-examination said that John did not want anyone to interfere in his personal business and never disclosed his personal business to them. Margaret's evidence is that because of her care and concern for John he trusted her with his finances. She says in 2008 she became aware of John's account at FirstCaribbean since he asked her to accompany him to the bank to withdraw some money.
- [119] The evidence reveals that in November of 2010, John executed a power of attorney ("PA") in favour of Margaret to allow her to make withdrawals from his accounts to take care of household expenses and for their care. Margaret's evidence was that it was only in 2010 that John disclosed the accounts when the PA was executed. She said it was John who decided to give her PA because he could not be bothered to visit the bank each time he needed to make a withdrawal. Margaret in her witness statement says, as far as she knows, since John's death, the accounts have been frozen. She also, in cross-examination, indicated that she had advised the bank of John's death and she did not have access to the accounts.
- [120] The claimants evidence surrounding Margaret's control of John's finances is very speculative and not founded on any real evidence. Janet's evidence that John would every now and then question Margaret in her presence about the money she was spending and who she was spending it on is somewhat difficult to believe given Annette's evidence that John was a private person and did not disclose his business to them.

- [121] Janet admitted that she had seen Margaret sign cheques but Margaret never explained to her how she managed to do so. Janet in cross-examination said she understood there was a PA and when she told her sons Roger and Patrick they were shocked she did not know about it. But she says they did not show any concern that John had done a PA.
- [122] Peter in his evidences says that at some point after he came to Saint Lucia, Margaret managed to persuade John to make the PA but that is quite interesting as according to Janet she was the one who told her sons about the PA and so it is safe to assume that anything that Peter says about this is what Janet told him. When he was asked in cross-examination who had told him that he did not answer directly but said that Margaret was the one paying the bills and looking after John's finances. He was asked again and this time he said that John was very frugal and he would not just do something like that easily. He was asked whether he thought that Mr. Cozier, the lawyer would allow John to sign if he thought he did not know what he was doing to which he responded that he did 'not say John did not know what he was doing but knowing John he just would not do that'. He was adamant that John would not easily give up the reigns of his finances.
- [123] Peter admitted that he had no proof that Margaret had withdrawn money from John's account for her personal use and when told that he was assuming he said when she came to Saint Lucia she had no money. When asked whether he had proof of this, he responded, 'but she had to borrow money'. When asked whether he knew who paid for the funeral, he said he assumed it was John's money. He clearly was just speculating and relying on what he had been told.
- [124] Roger mentions nothing of the PA in his evidence except in cross examination when it was put to him that he never really cared enough to come down and care for John. His response was that Mc Namara (the lawyer) had said that Margaret had PA and she could do whatever she wanted. This was said for the first time in

cross-examination and there was no opportunity to question Mr. Mc Namara on this so I will not place any heavy reliance on it. Janet said something similar in cross-examination to the effect that Mc Namara said Margaret had everything under her control.

[125] Clearly, Roger and Peter seemed to have got their information from their mother Janet as their evidence in relation to the finances bears a striking resemblance to hers. The claimants have not proven that Margaret persuaded John to execute the PA in her favour. Any withdrawals made from John's accounts could only have been done by Margaret alone from 2010 as before that John would have had to authorize or sanction any withdrawals. There is also no evidence to suggest that the monies were spent for Margaret's personal use.

[126] Margaret's evidence in cross-examination was that she was a practicing nurse until 1994 and when she left nursing she was in the IT industry and banking. She said she was retrenched in 2007 from the IT industry and then went to New Zealand and worked there for six months. Margaret in her evidence says that she lost her Australian pension because she stayed in Saint Lucia.³⁵ She explained that she had however received a superannuation benefit from the Government in Australia and got a lump sum of \$150,000.00 Australian dollars a couple of months after she was retrenched in 2007. \$150,000.00 Australian dollars based on a historical exchange rate table would have amounted to USD\$126,000.00 in 2007 which is equivalent to approximately XCD\$327,600.00.³⁶ That does not seem to support the evidence of Janet that Margaret told her when she came to Saint Lucia she was low on funds. Indeed, Margaret denies saying that to Janet.

Firing of Bobby the gardener

³⁵ Paragraph 22 of witness statement at page 145 of TB.

³⁶ Conversion rate for Australian dollars to USD obtained from <https://www.macrotrends.net/2551/australian-us-dollar-exchange-rate-historical-chart>.

- [127] The claimants allege that less than a week after Margaret arrived she fired John's gardener who had worked with John for many years assisting him with grocery shopping and meals. Margaret denies this.
- [128] This allegation is supported by Janet's evidence in her witness statement. Margaret in her evidence says that it was John who fired Bobby (Augustine Nnabue) because he constantly turned up late to work or failed to arrive at all and failed to do the gardening as required. She says that Bobby was paid \$3,000.00 for vacation and notice pay and Bobby signed receiving this money. She exhibits a document signed by John, Bobby and a Labour Officer from the Ministry of Labour Relations. The document is dated 15th May 2009. That evidence is uncontroverted. Margaret says after Bobby was fired, John hired Amazon Gardening Services owned by Stephen Devaux to do his gardening. Maria, the housekeeper said in cross-examination that she did not know Ryan Devaux but it may be that she just did not know his name. In any event, whether there was another gardener or not is not highly relevant as the allegation was in relation to the firing of Bobby.
- [129] Peter said he did not know who fired Bobby but the suggestion in his witness statement is that Margaret had something to do with it as he said that shortly after her arrival, Bobby was fired. He did not know anything about Bobby being paid by John and was not aware of the document which evidenced the payment. He had no idea. In cross-examination, Janet said she did not know that it was John who fired Bobby.
- [130] At the time Margaret came in 2008 according to Roger's evidence John was still very sharp. It would seem to me that John was fully capable of making a decision to fire Bobby. Margaret testified that John was very strong willed and firm in his views and this was supported by Annette's testimony.

[131] Annette in cross-examination said John never told her about letting Bobby go but Margaret had mentioned letting Maria go and she had said no. From all that the claimants have said it would not surprise me that John did not disclose anything regarding Bobby's firing. Given the picture of control which the claimants have attempted to portray in relation to Margaret, it should not have been hard for Margaret to fire Maria too and not pay any regard to what Annette had said. I find it difficult to believe Annette's evidence on this.

Paying hospital bills and purchase of car

[132] The claimants allege that Margaret paid hospital bills for her friends in the sum of \$6,000.00 and paid half of the purchase price of a car for another friend.

[133] Janet in her evidence says that Margaret told her that she paid about two or three hospital bills of her friends and each was in the sum of \$2,000.00 and one of the bills was in relation to Tracy Betts. This was Tracy Betts who had assisted and stayed with John during the time Margaret travelled to New Zealand. Margaret's evidence confirms that hospital bills were paid for Tracy Betts in 2013 each of almost \$2000.00 but she says it was on John's instructions. John was aware that Tracy had cancer and wanted to help. Margaret also testified that in 2011, when Maria's mother died, John paid the funeral expenses in full as a way of helping his housekeeper and her family. In cross-examination, Maria confirmed that John had given her money when her mother died. I note that Maria did not say Margaret but said it was John. This is significant as it supports Margaret's evidence that John wanted to help Maria and also lends support to him wanting to help Tracy.

[134] Margaret denies ever giving any money to any person for or towards the purchase of a vehicle. Commenting on Janet's evidence that she used John's money to purchase a vehicle for her friend, Scozy Bristol, Margaret said 'as for the car that came out of my personal funds.' Apart from this one comment, Margaret was not cross-examined further on this. Janet insisted in cross-examination that Margaret

had told her she gave a car to someone and that she had told her that it was given to Scozy Bristol and that Scozy Bristol was Margaret's and not John's friend. It is a matter of whom the Court believes. It is clear that if Margaret told Janet she bought a car for a friend, Janet merely assumed that she had used John's money but there is no evidence to support this.

Lavish parties

- [135] The claimants allege that Margaret held several lavish parties at John's house and invited people who were strangers to John. They allege that Margaret would intoxicate John with alcohol to make sure that he was asleep before the parties started although she knew it was against his doctor's orders for him to drink alcohol.
- [136] Janet's evidence is that she attended some of those parties. She says that Margaret told her that she spent more than \$2000.00 on alcohol for each of the parties.
- [137] Margaret's evidence was that although from time to time she did organise parties at John's home they were always at his request and were usually to celebrate a special occasion such as his birthday, Christmas or when family visited from overseas. She testifies that he and Erika, his wife always entertained many times a year. She says the majority of the guests were known to him and he had told her to invite some of her personal friends. Margaret says John insisted that decent wine and premium beverages and food be served. The cost would exceed \$2000.00 but she says John approved. Margaret denied Janet's evidence that she gave John alcohol to drink so that he would sleep before the parties started. She further stated that there were no doctor's orders that John could not have alcohol. Doretta confirmed that she attended parties at John for his birthday in 2010 and 2011 but was not present in 2012 and she also gave evidence that Jane, Annette, Tony Du Boulay and Patsy Johnson were among the persons present.

- [138] So who was this man John? John was a retired bank manager having worked with Barclays Bank for several years in Saint Lucia and elsewhere. Let us look at the evidence provided by the witnesses about John. Patrick speaks of the time he visited John in Barbados when he worked there and how he was accommodated by having John's chauffeur at his disposal for his stay.³⁷
- [139] Peter says John owned a house in one of the most affluent neighbourhoods on island and he was the holder of several bank accounts and he was able to live comfortably off his pension and his assets. He says John always spoke about the fact that he was the last bank manager to receive a full salary adjusted to inflation as a pension.³⁸
- [140] Roger describes John as being very close to him when he was growing up and as being frugal. Maria describes John as a very nice gentleman, always polite and who always chatted with her. She also says that John liked dark whiskey and drank it quite often. She describes him as being very close to his brother Reginald and his sister Muriel who came by often. Janet in cross-examination said John was a man of good standing. Doretta describes John as a tall man with a dignified gait. She said she enjoyed his company especially his wealth of knowledge, his stories and anecdotes and his sense of humour.
- [141] Margaret says John loved and frequently drank gin and tonic at lunch. He also had red wine and in the evening he had a scotch and water. He also loved and drank champagne. She says John was a man of routine, an avid reader.
- [142] All of the claimants' witnesses agreed in cross-examination that John was gregarious and loved his drink especially gin and tonic. He loved a good time and loved partying. Janet said she thought that John took Erika to parties with him

³⁷ Paragraph 6 of WS at page 98 of TB.

³⁸ Paragraph 3 of WS at page 103 of TB.

when she was alive. He loved sending greeting cards to his family. Annette agreed that John was chatty and witty.

- [143] It is apparent that John loved a good time and loved his drinks. It also appears that he had good taste and the evidence does support the fact that parties were held at his house even before Margaret came to Saint Lucia. John was a bank manager who would certainly have been exposed to a good life and at a certain standard.

No independent legal advice

- [144] The claimants allege that John was never afforded the opportunity to consult an independent legal adviser. The claimants also plead in the alternative that the 2013 holograph will was procured by the presumed undue influence of Margaret over her elderly and ailing step-father, John.
- [145] John executed a holograph will which by its very nature is a will in the testator's own handwriting and is permissible under the **Civil Code** of Saint Lucia. I do not quite understand this allegation as Margaret has testified that she was not present when John wrote his will. Also, when Doretta witnessed what she referred as the note, she says she did suggest to John that he get the lawyers to come so he could make the changes to his will. I can find no merit in this allegation.

Analysis and Conclusion

- [146] The law is that in order to establish the presence of undue influence, it is not enough to establish that a person has the power to overbear the will of the testator. It must be shown that the will was a result of the exercise of that power.³⁹ The influence must amount to coercion destroying free agency. Even procuring the execution of a will by wheedling one's way, even by reprehensible means, into

³⁹ Larina Jacobs-Lamothe v Janet Hendricks and others Claim No. BVIHCV 2015/0169 at paragraph 88.

the affections of a vulnerable testator, does not necessarily amount to coercion sufficient to set aside a will.⁴⁰

[147] Although Margaret in her evidence in chief said that John's relatives did not care for him, in cross-examination she said it was not that she thought they did not care about him but they did show that care. She testified that John had told her that his relatives were deceitful. In cross-examination, Margaret said she did not ask John to elaborate when he made these remarks, nor did she dissuade him from making them. She said it was none of her business.

[148] It could not have been that Margaret was attempting to prevent the claimants from caring for John. In fact, Annette says in her evidence that whenever John was taken to hospital, Margaret would call her and she would immediately meet them there. Margaret confirmed this in her own evidence and the fact that Annette would visit him twice a day. This does not sound like a person who desired to oust John's family from his life. Of interest is the fact that Janet was the one who cut John's hair for several years. She claims she did it until his death but there seems to be some doubt as to whether she actually did. More than this though is the fact that John paid Janet to cut his hair. This was confirmed by Maria. No reason is given as to why John paid Janet to cut his hair but it seems very odd to me. Given that Janet says when she visited John he was always well taken care of and there was nothing to do, I would think that she would have done this for John as her contribution to his care especially as he aged.

[149] Annette never in her evidence said that she had to call before going to visit John but it was Roger in cross-examination who said that there were restrictions to Annette visiting John. Patrick in cross-examination said that Annette had told him that she could not visit John whenever she wanted. When questioned about this, he agreed that Annette did go very often but he guessed once she made an

⁴⁰ Larina Jacobs at paragraphs 90-91.

appointment. That is not Annette's evidence at all, not even when she was asked in cross-examination about the frequency of her visits to John.

[150] Interestingly in cross-examination, Peter said that when he came for John's funeral, Margaret was going to bury John in a short pants and a dirty shirt and he had to buy a suit to bury John. When asked why he had not said this in his witness statement he said he did not think it was relevant. He says John did not have a suit in his wardrobe as they were thrown out. I find this so hard to believe. All the evidence is that Margaret took excellent care of John. Why would she allow him to be buried in some old clothes when from all accounts John was always well dressed?

[151] There are several pieces of evidence which are very telling and suggest to me that some of the claimants did not really show as much care about John as they say they did. For instance, when cross-examined about the email sent by Margaret to Janet on 12th August 2012 in which she suggests to Janet what Roger could do with John when he visited to spend quality time with John and whether there was anything wrong with this, Patrick simply said that this would mean that Roger would have to lift John and he was not capable of doing that. When he was asked who then used to lift John, he said he guessed it was Margaret and that she probably got help.

[152] The email from Margaret dated 12th August 2012 it would appear sought to indicate to Roger what John liked doing. Roger was not a frequent visitor so he would not have been familiar with John's routine which Margaret details in her evidence. Clearly the claimants were offended by the fact that Margaret, a non-Bascom would tell them what to do in relation to John.

[153] Roger in relation to the 12th August email said in cross-examination that he never saw the email while in Saint Lucia and only read it when he returned to Canada, but he understood through his mother that he was to visit at a certain time. When

asked whether it was unreasonable to ask him to make breakfast for John, Roger said no but he was not a cook. Roger said he thought the email was sarcastic.

[154] It would appear that Peter and his wife had a decent relationship with Margaret. Judging from the tone of the emails which they exchanged, there did not seem to be any issues. Peter and his wife had sent the walker for John and medication for his legs and Margaret informed them by email of how John was using the walker and the impact of the medication. Again, this evidence does not speak to someone who wished to keep John from his family or who controlled things. Getting the walker for John was Peter's idea and Margaret accepted it and John used it.

[155] Maria says in her evidence that John told her that all he had was Margaret. He had told her when Margaret was coming although the claimants say he never told them but that is not so far fetched as Maria was with him every day and as she said they chatted. Maria also says that John told her that his family did not care and they wanted his property and that they had no love for him. She also says that he said that Erika stood by his side and worked with him. He had told her that he knew Margaret loved him because she resigned her job to come and take care of him. She says he told her it was Margaret he wanted to get his things. She said she told him it was his property and he could give it to whomever he wished.

[156] The evidence certainly suggests that the claimants may have cared about John but did not show that care in tangible ways except for a few occasions. What is worthy of note is that the majority of them described John in terms of his status and assets. That is very telling as it suggests to me what was of importance to them. It is apparent that the claimants found it odd that John would leave his property to someone who was not a Bascom as they say he was proud of the Bascom name.

[157] In order to establish undue influence, the claimants must show that at the time of execution of the will, Margaret overpowered John's will and but for this, John

would not have made the 2013 holograph will. The evidence as to what transpired in August 2013 when Stephen Mc Namara visited for the purpose of obtaining instructions from John to alter the 2010 will is irrelevant as that would have occurred after the execution of the 2013 holograph will which is the subject of this claim.

[158] The evidence is that when John executed the 2013 holograph will, he invited Doretta to be with him. Margaret says she was in the house when he was with Doretta but she was upstairs. Doretta says Margaret was in the house but not with them and was elsewhere in the house. She did not know where. Maria says Margaret had put something on the stove but she was upstairs when Doretta was with John. In Doretta's evidence, she explains that they were seated on the threshold of the living room and the will was written on a small table where John's meals were served. She says she sat next to John whilst he wrote. She also testified that she did not tell Margaret that John had asked her to witness a will as he had told her not to and she respected his wishes.

[159] Maria was also present at the house the day the 2013 holograph will was executed. She says she could see that he was writing but did not know what he wrote. She had said in her witness statement that John and Doretta were sitting at the dining table but in cross-examination she said they were seated at the small table where John used to have his meals. I am of the view that that slight inconsistency is not sufficient to make Maria's evidence as a whole unreliable or not credible.

[160] Counsel for the claimants, Ms. Sueanna Frederick ("Ms. Frederick") submitted in closing arguments that Margaret was in a position to exert undue influence on John by virtue of being his main caregiver. She argued further that although John employed a caretaker, Maria was only present for half day. I do not see any significance to this as Maria was the housekeeper and not John's caregiver so it is not strange that she worked for six hours only. She submitted that John knew that Margaret lost her pension when she decided to come to reside in Saint Lucia and

that this was one of the factors which Margaret used to exert pressure on John and which resulted in the dispositions made in the will.

[161] I have to disagree because Maria's testimony was that before Margaret came to Saint Lucia, John told her that his daughter from Australia would be coming to stay with him. She was asked in cross-examination at what point did John tell her that Margaret lost her pension and she responded, 'He told me his daughter is going to resign her job and come to take care of him.' That response did not speak of losing pension but is consistent with what Maria says in her witness statement at paragraph 7.

[162] Even if one were to accept the submission, it is still not conceivable, as from the evidence John would have known that Margaret was no longer working and had come to Saint Lucia yet when he made his will in 2010, he did not give her all of his property but he put it in her care and indicated how the proceeds of its sale should be distributed.

[163] Ms. Frederick's submission that John was by and large left in the sole and unmonitored care of John for the majority of the day and evening is again very interesting. She was John's primary caregiver. All the claimants agreed that she took care of John and they allowed her to. They never attempted to create any other circumstances other than John being in Margaret's sole and unmonitored care because they trusted her to take care of him.

[164] Ms. Frederick further submitted that Margaret made no further attempts when she found out about the 2013 holograph will in August 2013 to have the lawyers take further instructions from John and that she failed to mention the holograph will in her subsequent communication with John's relatives. This is quite an interesting submission. Margaret was under no obligation to tell anyone about the 2013 holograph will and any attempts by her to get John to do anything as regards the said will would have created to my mind great suspicion.

- [165] Ms. Frederick asks this Court to place little weight on the evidence of Doretta in light of her relationship with Margaret and the benefit which she de facto received as a result of the holograph will, to wit, the use of John's car. I totally reject that submission as firstly, having observed Doretta in cross-examination, I have no reason to disbelieve her testimony. She was forthright and consistent with her testimony. The fact that she drives John's car is no reason for me to disbelieve her.
- [166] Ms. Frederick submitted further that the evidence adduced indicates that the only possible hypothesis which arises is that Margaret exerted undue influence on John which caused him to sign the 2013 holograph will and to make dispositions which were beneficial to her solely.
- [167] However, I disagree. Based on all the evidence, it is clear that John had a lot of regard for Margaret. He had no children of his own and it is clear that he appreciated the fact that she was taking care of him. There is no evidence to suggest that Margaret controlled John's thinking. Certainly, she was in control of taking care of him and ensuring that he was well-taken care of. How else would she have taken care of him if she were not in some degree of control? No one else did what she did for John. Even when help was suggested it was to hire a nurse.
- [168] The 2010 will gave Margaret all the property with full power to sell and then to distribute to not only John's relatives but also to Margaret's sisters and her son. Nobody has complained about that will as the claimants and their other cousins stood to benefit. The 2013 holograph will did not purport to add Margaret as executrix. She already was. All it did was remove all the other beneficiaries including Margaret's relatives. As submitted by counsel for the defendant, Mrs. Veronica Barnard ("Mrs. Barnard") in her closing submissions with which I agree,

there is absolutely no suspicion surrounding the making of the 2013 holograph will that the claimants have pointed to.

[169] There was a suggestion by Peter in his evidence that after Reginald died, Muriel was made executrix of John's will and he says that this is the 2010 will executed in April 2010 and he claims he saw it.⁴¹ When he was asked in cross-examination who had told him this, he said it was John but he did not see anything written. When he was asked whether it would surprise him to know that Margaret was the executrix, he responded that there were a number of different wills so he did not know. He insisted he was told that Muriel would be the executor. I conclude that Peter did not see the 2010 will as he said he had as he would have been clear that Margaret was the executor named in the 2010 will.

[170] Roger when asked in cross-examination whether he had seen the 2010 will and who the beneficiaries were, he replied that Janet, his mother told him it was 'half half'. Janet said in her evidence that the claimants were named as beneficiaries in the 2010 will and when asked how she knew that, she said John had told her that he would leave his things for most of his family. This is the same John who has been described as someone who did not 'disclose his personal business to them' by Annette.

[171] The making of the 2013 holograph will could simply have been John's way of ensuring that he recognised the invaluable contribution of Margaret in taking care of him which is clear from what he said to Maria and Doretta and also from the evidence of the claimants themselves that John seemed happy that Margaret was taking care of him. Certainly, he is allowed to do this given the concept of freedom of testamentary disposition. This hypothesis displaces Ms. Frederick's submission that the facts of this case are inconsistent with any other hypothesis other than that the 2013 holograph will was procured by the undue influence of Margaret.

⁴¹ Paragraph 25-26 of WS at page 105.

- [172] This Court does not accept the claimants' allegations against Margaret of control over John and his finances designed to influence him to leave his entire estate to her and not to the claimants as he had originally done in the 2010 will. This Court accepts the defendant's evidence that the claimants did not show the care which John required or may have longed for. This Court finds that John being the gregarious, jovial character craved his family as he grew older but saw them sparingly even the claimants who reside in Saint Lucia. This Court has found that John was of sound mind, memory and understanding when he made the 2013 holograph will. Although the evidence is clear that he was physically weak there is no evidence that he was enfeebled in his mind. The Court accepts that Margaret was not present at the execution of the will although she was present in the house and that it was Doretta who was present.
- [173] I agree with the submissions of Mrs. Barnard and I adopt them, that 'there is no evidence of any unfair conduct, overreaching, cheating, no act of persuasion which overcame John's free will, no flattery, trickery or deception on the part of Margaret towards John.
- [174] Therefore, this Court is of the view that there is no sufficient evidence before the Court that suggests that John was coerced, or otherwise induced to make dispositions he did not wish or intend to make. On the evidence presented, the Court finds that the claimants have failed to discharge the burden of proof. There is no cogent evidence of any actual undue influence exerted by Margaret over John in relation to the making of holograph will dated 14th July 2013. There is therefore no need to deal with an account of John's estate or bank accounts.
- [175] I therefore find that the holograph will executed by John Richard Bascom on 14th July 2013 is a valid will according to the laws of Saint Lucia. I find that this being the last will and testament of John Richard Bascom, it revoked the last will and testament executed by John Richard Bascom on 1st April 2010.

[176] This therefore means that the claimants claim must be dismissed with costs to the defendant. Based on the findings above, the defendant is therefore entitled to the relief sought on her counterclaim except for a grant of probate of the 2013 holograph will.

[177] The Court cannot grant probate of the will on the counterclaim as application will have to be made to the High Court pursuant to the relevant rules and legislation for a grant to be issued. However, the Court will make an order that in light of the claimants' failure to prove their case, that Margaret is therefore entitled to proceed with an application for Grant of Probate as duly appointed Executrix under the 2013 holograph will. I therefore award prescribed costs to the defendant on the counterclaim discounted by 25% to reflect her partial success.

[178] I end with this quotation from the judgment of Belle J in **Ingrid Skerret et al v Ernest Valmont**⁴² at paragraph [43] which I think is apt:

“...courts will examine the facts closely before finding that a transaction has been tainted by undue influence. **Mere suspicion, surmise or conjecture of overreaching is insufficient. The law permits loved ones and confidants to advise and comfort those in need of their support without fear of litigation.** Courts are also aware that the doctrine of undue influence can be used as a sword by the vindictive and avaricious who seek to invalidate a perfectly legal transaction for personal gain.” (my emphasis)

Conclusion

[179] Based on the foregoing the Court makes the following orders and declarations:

1. The claimants' claim is dismissed with prescribed costs to the defendant on the claim in the sum of \$7,500.00 pursuant to CPR 65.5.
2. The Holograph Will of John Richard Bascom dated 14th July 2013 is declared valid and is the last will and testament of the said John Richard Bascom.
3. The Last Will and Testament of John Richard Bascom dated 1st April 2010 was revoked by the Holograph Will dated 14th July 2013.

⁴² SLUHCv2012/0816, delivered 13th November 2014, unreported.

4. The claimants are not entitled to any account of the estate of John Richard Bascom or of any of his bank accounts or repayment of any sums as claimed.
5. Margaret Rose Morgan-Gereghy, as the duly appointed Executrix of the Holograph Will of the late John Richard Bascom dated 14th July 2013, is at liberty to proceed with an application for a Grant of Probate of the said will subject to the requirements under the relevant rules and legislation.
6. The claimants shall pay prescribed costs to the defendant on the counterclaim in the sum of \$5,625.00 being 75% of \$7,500.00.

[180] I wish to thank counsel and the witnesses especially the claimants in Canada and the defendant in Australia for their assistance and willingness to embrace technology to have this trial take place after several attempts to do so had failed due to the defendant's inability to travel from Australia.

**Kimberly Cenac-Phulgence
High Court Judge**

By the Court

Registrar