[2015] JMSC Civ 208

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

THE CIVIL DIVISION

CLAIM NO. 2011 HCV 04513

INTERPLEADER PROCEEDINGS
IN THE MATTER OF THE ESTATE OF
TIVY AUSTIN NELSON (DECEASED)

BETWEEN	**TIVY AUSTIN NELSON**	**CLAIMANT**
AND	**MELVA EVADNE NELSON**	**DEFENDANT**

IN CHAMBERS

Mr. Raphael Codlin and Ms. Annishka Biggs, Attorneys-at-Law for the Estate of Tivy Austin Nelson (deceased) instructed by Raphael Codlin & Company.

Mr. Ian Davis, Attorney-at-Law for Cynthia Delores Nelson (widow of the deceased), instructed by Richard W. McTyson, Attorney-at-Law.

Mr. Maurice Smith, Attorney-at-Law for Tivy Austin Nelson Jnr. (deceased's son).

Mr. George Clue for Stacey-Ann Nelson Hamilton, Natalya Knight (other children of the deceased) instructed by George Clue and Associates.

Heard: 16th December 2014 and 30th October 2015.

Entitlement to Property – Intestacy – Joint Property – Application seeking Court's Intervention and Direction – Presumption of Death Order – Application to set aside Presumption of Death Order – Whether the Presumption of Death Order is a Final Order or Interlocutory Order – Application seeking Beneficial Interest in Estate – Declaration of Legal Spouse – Entitlement to apply for Grant of Letters of Administration – Application to set aside Presumption of Death Order refused.

CAMPBELL J,

[1] The matter before the court concerns a property registered at Volume 1282 Folio 664 of the Register Book of Titles. The property was registered in the names of Tivy Austin Nelson (Tivy), and Melva Evadne Nelson (Melva), both deceased, as joint tenants. They were married and subsequently divorced in 1999. Thereafter, Tivy married Cynthia Delores Nelson on the 21st May 2000.

[2] Tivy was desirous to sell the said property but he was unable to locate his former wife, Melva for over seven (7) years. Consequently, he applied to the court for a Presumption of Death Order. On 15th September 2006, an Order was obtained from the court presuming Melva dead. The property has been sold and the writer is still in possession of the proceeds of sale.

[3] Since the death of Tivy and the actual death of Melva there has been several claims made by interested persons (i.e. children of the deceased and the surviving spouse of Tivy) in relation to their entitlement to the estate. New evidence has been presented to the court to support the fact that Melva was not dead at the time the Presumption of Death Order was granted. There have been allegations of fraud and this is the main basis on which the Presumption of Death Order is sought to be set aside.

[4] There are several other applications before the court. The interpleader, who is currently in custody of the proceeds of sale, is seeking directions from the court to deal with the sum, in light of the contention. The surviving spouse, Cynthia Delores Nelson is also seeking a declaration to be deemed the legal spouse and apply for a Grant of Letters of Administration.

Application for Direction

[5] For several years, there has been much contention in relation to the proceeds of sale and how it should be distributed. By way of a Fixed Date Claim Form filed 15th July 2011, the Applicant, Raphael Codlin, Attorney-at-Law, on behalf of the estate of the deceased, Tivy Austin Nelson, seeks directives from the court in

these interpleader proceedings in order to determine who among the several persons named should be joined as Defendants against the Estate of Tivy Austin Nelson.

Application to set aside Presumption of Death Order

[6] In challenging the presumption of death Order that was granted by this court in 2006, the Applicants; Natalya Knight, Tivy Austin Nelson, Jnr., and Stacey-Ann Nelson-Hamilton on 11th April 2014 filed an Amended Notice of Application for Court Orders seeking the following Orders;

1. Presumption of death of Melva Evadne Nelson obtained by Tivy Austin Nelson been obtained on the 15th day of September 2006 be set aside.

2. That the Applicants be joined as a party to this action.

3. That the Applicants are beneficially entitled to all the proceeds of sale of the property registered Volume 1282 Folio 664 of the Registered Book of Titles being all that parcel of land part of Curatoe Hill in the parish of Clarendon and which property was sold by Raphael Codlin, Attorney-at-Law on behalf of Tivy Austin Nelson.

4. That Raphael Codlin, Attorney-at-Law of 64 Duke Street, Kingston pay over to the Applicants all money received from the proceeds of sale for the property mentioned at paragraph three (3) above and which were not paid over to Tivy Austin Nelson.

5. Such further or other relief as the court may deem just.

[7] The grounds on which the Applicants are seeking the Orders are as follows;

1. Property registered at Volume 1282 Folio 664 of the Registered Book of Titles was jointly owned by Tivy Austin

Nelson and Melva Evadne Nelson and Tivy Austin Nelson predeceased Melva Evadne Nelson.

2. The Applicants are children of both Tivy Austin Nelson and Melva Evadne Nelson.

3. That the Presumption of Death Order obtained by Tivy Austin Nelson was obtained by fraud in that he knew that Melva Evadne Nelson was alive and that the said Tivy Austin Nelson was in continuous communication with the Applicants up to the time he obtained the Order.

4. That Raphael Codlin knew and was in communication with one of the Applicants herein prior to obtaining the Order for the presumption of death of Melva Evadne Nelson.

5. That Tivy Austin Nelson predeceased Melva Evadne Nelson and the Rule of Survivourship dictates that on the death of Tivy Austin Nelson the property registered at Volume 1282 Folio 664 of the Register Book of Titles pass directly to Melva Evadne Nelson.

Mr. Clue's Submission

[8] Mr. Clue in his oral submission referred to paragraph 6 of the Supplemental Affidavit of Tivy Austin Nelson Jnr. in Support of Application for Court Orders filed 11th April 2014. He pointed out that communication was made with Tivy and it continued through his life time with Melva. Therefore, the deceased knew that Melva was alive when he petitioned the court for an order for the presumption of death of Melva Nelson. The said Affidavit also conveys that in 1996 Melva Nelson and the other siblings migrated to the United States of America and while in the United States of America, Tivy would communicate with his children, especially Stacey-Ann Nelson-Hamilton. Tivy had an intimate relationship with Stacey-Ann Nelson-Hamilton. She exhibited Western Union receipts showing she

would send monies to her father from time to time. There is also a letter exhibited which she received from her father in August 2005. It was strongly argued that it is clear from the evidence, Tivy was well aware that Melva was alive at the material time. Hence, fraudulently misled the court in believing Melva was dead at the time.

[9] Counsel further contended that Tivy, in 1999 petitioned the court for a dissolution of his marriage to Melva Nelson. An order was obtained for substituted service to serve the petition on her brother who then resided in Portmore. However, not everything was put before the court in the application for the presumption of death. The Applicant, Tivy knew that Melva was alive at the time but sought to serve the petition on a brother living in Portmore. As such the court should conclude that the Applicant was not forth-right with the court. In 1999, the documents were served locally on someone else, other than the Respondent; it begs the question; why was that not noted in the application for the Presumption of Death Order?

[10] Based on the foregoing counsel is urging the court to find:

i. The funds held ought properly to come to the Estate of Melva Nelson; she being a joint tenant having survived Tivy Nelson the deceased. It is clear from the death certificate exhibited that the parties died days apart. Thus, Melva survived Tivy. The application was not brought at an earlier date because the Applicants were unaware that Tivy had obtained this Presumption of Death Order.

ii. The matter is not statute barred. It is not a cause of action. It is an Order that is being sought to set aside the Order, dated 15th September 2006 obtained by Tivy Nelson, presuming the death of Melva Nelson. It is important to note that the application to set aside the Order was initially brought on 16th July 2013. Thus a period of seven (7) years has elapsed. Having looked at the **Limitation of Actions Act** it speaks to originating an action. Here an Order was obtained and we are seeking to set it aside and

hence not institute a new action. In addition, the application to set aside the Presumption of Death Order was brought promptly and the application sets out reasonable grounds on which the court may act.

iii. The Order that was obtained was a rebuttable presumption. This means, if an Applicant put forward evidence to suggest on a balance of probability, that the Order was obtained by fraud or irregularity the court must set aside the Order that was made. I acknowledge that fraud must be strictly or specifically pleaded and proved. But in this case the Affidavit of the Applicants speaks for itself. (*See; Paragraphs 6-10 of the Supplemental Affidavits of Tivy Nelson Jnr., Natalya Knight and Stacey-Ann Nelson-Hamilton filed 11th April 2014*).

iv. The funds which are being held by Mr. Codlin, Attorney-at-Law are funds pursuant to the sale of property held as joint tenant between Melva and Tivy. In this instant case, Tivy Nelson predeceased Melva Nelson. The Order obtained by Tivy for the presumption of death of Melva, ought to be set aside. The rule of survivourship dictates that those funds should go to the estate of the surviving children of Melva Nelson.

Mr. Davis's submission

[11] Counsel, Mr. Ian Davis, representing the widow, Mrs. Cynthia Nelson, in opposing the application to set aside the Presumption of Death Order, submitted that the Affidavit filed by Cynthia Nelson on 29th August 2013 speaks of a situation in which Melva and the children moved out of the house without notice leaving Tivy and migrated to the United States of America on the 16th August 1996. At that time there was no communication. Based on the evidence put forward, there was no communication between Tivy and Melva during this time; save and except for allegations put forward by Counsel in an affidavit of one of the children. It was asserted that Tivy is not around to give any testimony as to whether these communications are true. It was mentioned that there were

Western Union receipts, but there is only one receipt from Jamaica National Building Society which was partly obscured.

[12] The essence of the matter is that the submission before the court about communication lacks evidence as there is nothing to substantiate the allegations. A counter Affidavit was filed when Tivy was making the application in 2006. The court was told that Tivy has not seen or heard from Melva for over seven (7) years. This application was unchallenged at the time.

[13] In 2005, there was the last communication between the children and Tivy. This was well after the dissolution of the first marriage as a decree absolute was granted in 1999. There is no evidence as to whether Tivy knew anyone locally that could attest to the fact of whether Melva was still alive. In essence, Melva would have predeceased Tivy, pursuant to the Order granted in 2006. On that basis the court made an Order presuming that Melva was dead and that Tivy remarried legally to Cynthia Nelson. Therefore, it cannot be said that the marriage was a nullity. Cynthia Nelson would have been entitled to the goods or proceeds of the estate.

[14] Further, a decree absolute was granted to dissolve the marriage between Tivy Nelson and Melva Nelson. There was an advertisement to this effect and there was no response to the advertisement. This strengthens the position that the Presumption of Death Order ought to stand and not to be set aside. The parties were divorce even before the Presumption of Death Order was granted. Hence, this has no effect on the joint property.

Mr. Smith's Submission

[15] The issue before the court is the effect setting aside of the Order for the presumption of death would have on the rule of survivourship. That issue strikes at the core of, the Order of September 15, 2006, which also includes an Order dealing with the property that was jointly owned.

[16] The court ought to be mindful of what the Applicant had to satisfy the court when the Order was applied for. The very mechanism to get such Order requires a great deal to be done in order, to give notice, that there are persons seeking to presume that the subject is dead.

[17] In this case, the record shows that notice was given by way of an advertisement in two separate newspapers, one locally and one abroad. What was done to bring this application to the notice of the subject, having regard to the fact that the Order sought to deal with joint property. The subject, Melva slept on her rights. In the **Presumption of Death Act** in Canada, the Act deals with third parties' rights, interests and distribution of property where there is a Presumption of Death Order. It explores where property has been transferred or dealt with where a Presumption of Death Order was wrongly obtained. In those circumstances, the court ought to be mindful of the significant hardship, visited on persons dealing with property in a bona fide manner, which includes persons who sought a Presumption of Death Order for a person, with whom they jointly owned the property.

[18] Where a Presumption of Death Order is set aside, it does not seek to erase or reverse transaction effected during the currency of the Presumption of Death Order. In considering whether to set aside the order, regard must be had to whether it has been done expeditiously. Again, a great deal of hardship and inconvenience is visited on persons who have ordered their business pursuant to the Order the court granted. Seven (7) years have elapsed since the Order was granted and as such the court ought not to set aside the order having regard to the adverse consequences of doing so.

[19] Further, an Order seeking to set aside this presumption of death is statue-barred pursuant to the **Limitation of Actions Act**. The Order was granted in 2006 and this Order to set aside is well out of the stipulated time. This course will cause great injustice to the widow as the estate has whittled down.

Ms Biggs' Submission

[20] The application sought ought to be refused because it is statute-barred. The Presumption of Death Order was granted in 2006 and now the application to set aside is in 2013. The Applicant says this is not a commencing action but we differ; it is a commencing action envisioned under the **Limitation of Actions Act**. The need to make an application promptly cannot be overemphasized. The time between 2009 and 2013 when the application was made is over four (4) years and it shows that the application was not made promptly in any event.

[21] At paragraph 14 of the written submission filed on 24th April 2014, it was submitted that the utility in successfully setting aside the Order is limited to replacing the presumed date of death with Melva Nelson's actual date of death and that such setting aside can only have implications for things done after the Order has been set aside but cannot apply to anything done previously. To do otherwise would have an unjust and retroactive effect.

[22] Melva Nelson was presumed dead on 15th September 2006 by way of a Presumption of Death Order. The death certificate of Melva Nelson indicates the actual date of death on the 22nd July 2007. Melva Nelson was born on August 15, 1949; hence she was fifty-seven (57) at the time of death. However, on July 7, 2007, Tivy Nelson died, so strictly speaking he predeceased Melva Nelson.

[23] Section 9 of the **Matrimonial Causes Act**, 1989 outlines the requirement for one party to a marriage to petition the court for a Presumption of Death Order in relation to the other party. Tivy Austin Nelson, fulfilled those requirements and got an Order presuming Melva dead and when he proved to the satisfaction of the court that Melva Nelson had been continually absent from him for over seven (7) years and that he had no reason to believe that she was living within that time, the court granted the Order.

[24] Advertisements were done in the local newspaper and in the Miami Daily Business Review overseas. The requirement to satisfy the court that the individual is presumed dead, have been continually absent for seven (7) years

and the Applicant had no reason to believe the individual was living at that time was met. The court accepted the evidence of Tivy Austin Nelson.

[25] At this time the Applicants are seeking to show fraud. Mr. Clue, Attorney-at-Law alluded to paragraphs 6-10 of the Applicants' affidavits evidence, where the court is asked to imply fraud. It is contended that the word fraud is not seen, hence not specifically pleaded. The element of fraud is difficult to prove in these circumstances because the appropriate parties are dead and cannot challenge these assertions.

[26] Counsel challenged the existence of an intimate relationship between Tivy Nelson and his children. Reference was made to an email in 2000 in which the callous language used was inconsistent with a harmonious relationship and the receipts of gifts by Tivy. Attention was drawn to the Affidavit of Cynthia Nelson filed 29th August 2013, where she states that she has been married to Tivy since 2000 and has never seen any benefits or gifts or Western Union transfers. There is no recollection of Tivy speaking of his children. There is expressed resentment, of his children as he thought they were ungrateful.

[27] Counsel submitted that the money from the proceeds of sale has not been administered and as custodians they are concerned. Presently, they are unaware of any outstanding debts or liabilities that would affect the value of the estate. Based on all the circumstances, in this case, Mrs. Cynthia Nelson is entitled to apply for a Grant of Letters of Administration. As such, the court is urged to favourably consider that the Letters of Administration be granted to Cynthia Nelson pursuant to the **Intestates' Estates and Property Charges Act**, 1937. It is well settled that where a person dies intestate and leaves a widow, she stands in the head of the line and is difficult to displace.

Application for Grant of Letters of Administration

[28] Counsel for Cynthia Nelson urged the court to hear the Application to apply for a Grant of Letters of Administration. On the 26th May 2008, Cynthia Nelson applied for a Grant of Letters of Administration. Having filed for the said Grant, Cynthia

Nelson was unable to obtain and secure the cooperation and consent of the respective parties to her being appointed as Administrator of her late husband's estate.

[29] By way of a Notice of Application for Court Orders in Respect of Legal/Beneficial Interest in the Estate of Tivy Austin Nelson filed on 25th March 2013, Cynthia Nelson is now seeking the following Orders;

1. A Declaration that the Applicant is entitled to apply for Letters of Administration in the Estate of her husband, the late Tivy Austin Nelson, deceased, Intestate as she is his true widow.
2. An Order that the Applicant be granted Letters of Administration in the Estate of her husband, the late Tivy Austin Nelson, deceased, intestate.
3. A declaration that as the widow of the late Tivy Austin Nelson, deceased, intestate that she has a beneficial interest in and is entitled to a share of the proceeds being held on account of her late husband's estate by Raphael Codlin, Attorney-at-Law of 64 Duke Street in the City and parish of Kingston.
4. A determination of the Applicant's beneficial interest and share in the said proceeds being held on account of her late husband's estate by Raphael Codlin, Attorney-at-Law of 64 Duke Street in the City and parish of Kingston, by virtue of the provisions of the Intestates' Estates and Property Charges Act and the Property (Rights of Spouses) Act.
5. An Order directing that Raphael Codlin, Attorney-at-Law of 64 Duke Street in the City and parish of Kingston pay to the Applicant such share, entitlement and interest in the said proceeds as determined by this Honourable Court.

[30] The grounds for this application are as follows;

i. That the Applicant is the widow and the surviving spouse of the late Tivy Austin Nelson, deceased, intestate who died on July 7th 2007.

ii. That the Applicant was wholly dependent on her husband, the late Tivy Austin Nelson, while he was alive and for the duration of their marriage since 2000.

iii. That without the benefit of the relief being prayed for the Applicant will be left without financial security and impecunious.

iv. That the Applicant has serious financial challenges and does not know how she will manage without the benefit of Orders from the Honourable Court.

v. That the Applicant faces real and genuine financial hardship and distress.

vi. That it would be proper, equitable and just for this Honourable Court to grant the orders and relief being sought herein.

vii. That the Applicant does not have sufficient means to reasonably provide for herself in the manner and standard that she was accustomed to for the duration of the marriage.

viii. That the Applicant is impecunious and is facing dire financial distress unless she is able to secure relief through this Honourable Court.

ix. That the Court's overriding objective will be advanced by the making of the Orders being sought herein.

x. That there is no prejudice to any of the parties herein.

[31] Mr. Codlin challenged the Application at this stage. It was argued that in relation to the Application costs must be costs to the estate. The reason is that the application needs not to be made. The entire interpleader proceedings could have been legally concluded without that application being made. An Order was made by Justice Fraser on the 17th April 2013 requiring each party having a claim on the estate of Tivy Austin Nelson to file and serve Affidavits outlining the nature and basis of that claim by July 17, 2013. However, Tivy Austin Nelson Jnr. was the only Claimant who has complied with the Orders as it regards service of the Affidavit.

[32] Counsel for Cynthia Nelson argued that the application for the Letters of Administration was in 2008, and it was not until three (3) years after the Attorney-

at-Law holding the proceeds failed to have the parties agreeing. There was no other alternative but to resort to the interpleader proceedings.

[33] Mr. Smith, Attorney-at-Law, noted that his client, Mr. Tivy Austin Nelson Jnr. is willing to be a joint administrator if necessary. He asserts that Rule 68.20(1) of the **Civil Procedure Rules** provides for a joinder. He submitted that it would be prudent to join a party from the other side; that is, not a child of Cynthia Nelson. The act of joining the administrator would level the playing field. However, Ms. Biggs, Attorney-at-Law noted that Mrs. Cynthia Nelson, will have discretion to apply for consent from all the children to obtain a Grant of Letters of Administration. Inevitably, there will be the question of why this child. In addition, Mr. Clue, Attorney-at-Law, also argued that it is not prudent to appoint someone else as administrator as the application has already been made.

Discussion

[34] The main ground for setting aside the application for the Presumption of Death Order, is that it was obtained by fraud. An important question then before the court is whether the Applicants have fulfilled the requirements to establish fraud. In the case of **Insurance Company of the West Indies v Michael Campbell**, Supreme Court of Jamaica, Claim No. 2009 HCV 6034, (unreported), delivered on 7th January 2011, Brooks J, as he was then, thoroughly examined the principle of law as it relates to fraud. I have extracted a portion of his judgment which outlines the principle. He said at pages 9 to 10 of the judgment;

> *"It is well settled that actual fraud must be precisely alleged and strictly proved" (paragraph 13 of the Privy Council decision in **Crawford v Financial Institutions Ltd** PCA No 34 of 2004 (delivered 2 November 2005). It has been accepted that allegations of fraud should not be pleaded unless there is clear and sufficient evidence to support it (see **Associated Leisure Ltd. v Associated Newspapers** [1970] 2 All ER 754 at page 758). That was the principle*

under the previous rules of procedure. Section 170 of the ***Judicature (Civil Procedure Code) Law*** *required that pleadings which aver fraud were required to be supported by particulars. In the context of that section, addressing the issue of pleadings concerning fraud, K. Harrison JA stated at page 34 of the judgment in* ***Bastion Holdings Ltd. and another v Jorril Financial Inc*** *SCCA 14/ 2003 (delivered 29 July 2005):*

> ***"The mere averment of fraud in general terms is not sufficient for any practical purpose in the prosecution of a case. It is necessary for particulars of the fraud to be distinctly and carefully pleaded. There must be allegations of definite facts, or specific conduct."***

I have found no similar provision in the ***Civil Procedure Rules (2002)*** *(the CPR), I doubt, however, that the principle stated by K. Harrison JA has been altered by the advent of the CPR. In the* ***Bastion Holdings case*** *complaint was made that where fraud is alleged, the issues ought to have been the subject of pleadings and a trial rather than being contained in affidavits pursuant to an Originating Summons. The Court of Appeal rejected the argument. Cooke JA, at page 13 of the judgment, looked at the substance of the matter. He said:*

> *"The rival positions of the contending parties were put before the court with sufficient precision. The evidence to support those positions was fulsome albeit by way of affidavits. There was opportunity for cross-*

examination. I am at a loss to conceive of any deficiency occasioned by the procedural framework utilized in this case which would have been cured [by pleadings and a trial in open court]."

It seems, therefore, that the important factor, when considering the question of allegations of fraud, is not necessarily the use of the terms "fraud" or "fraudulently", but the particularising of the circumstances which it is alleged amount to fraud**." **[Emphasis added].

[35] The locus classicus on this issue is the speech of Lord Herschell in **Derry v Peek** (1889) 14 App Cas 337 at page 376, in which his Lordship said;

"First, in order to sustain an action in deceit, there must be proof of fraud and nothing short of that will suffice. ***Secondly, fraud is proved when it is shown that a false representation has been made (i) knowingly, (ii) without belief in its truth, or (iii) recklessly, careless whether it be true of false.*** *Although I have treated the second as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."*

The evidence to oppose the claim of Fraud

[36] The deceased in obtaining the Presumption of Death Order, in an Affidavit filed 10th April 2006 stated that in 1995, he was requested by his wife, Melva Nelson, to go to the market and upon his return she moved out. He subsequently began to search for her in the neighbourhood and this effort proved futile. He then went to the police and reported it. The police then, visited the school where she was employed and was advised that she took one (1) year's leave and they do not know where she was.

[37] It was noted that the persons at the school where Melva Nelson worked were unable to say where she was. He also pointed out that he has been searching for Melva Nelson over eleven (11) years and there has not been any communication with her or his children.

[38] The Affidavit of Karen Scott in response to the Court Order filed on 31st October 2013, also challenged the setting aside of the Presumption of Death Order, on the basis of fraud. This was a very through affidavit and I wish to highlight some aspects of it. Counsel noted that in 1999 a decree absolute was granted and by way of substituted service, Melva's brother Rupert Vassell was served with the petition. However, the deceased sought to sell the property but the property was in the joint names of Melva and Tivy; which prevented the completion of sale. Thereafter, a Presumption of Death Order was sought upon the instruction of the deceased.

[39] In the said Affidavit it was highlighted that in August 2006 advertisements were published in both the Jamaica Gleaner and in the Miami Daily Business Review seeking the whereabouts of Melva Nelson. Exhibits of the advertisement were provided. There was no response or communication to indicate that Melva Nelson was alive. The Order was granted and the sale was effected. It was noted that it was not until 2008 by way of a letter that Stacey-Ann Hamilton-Nelson informed the Law Firm of Raphael Codlin & Co, that Melva was alive up to 2007 and enclosed a death certificate.

[40] Miss Scott in her Affidavit challenged the evidence adduced by the Applicants. She argues that the Applicants have not provided any specific date of conversations that the deceased and Melva allegedly had. There is simply no evidence to support their claim. It was also challenged that the Affidavit evidence of the Applicants offend Rule 3.6(3)(b) of the **Civil Procedure Rules** as there was no particulars as to who filed it. As such paragraphs 6 to 10 of the Applicants Affidavit require strict proof. The credibility of Stacey-Ann Nelson-Hamilton was attacked. There is inconsistency in paragraph 9, where it was stated that monies were paid to Raphael Codlin and then in paragraph 12 the monies were paid to Tivy Nelson in 2005.

[41] There were also challenges to the receipts which were being used as evidence to suggest that the deceased and his children were communicating. Miss Scott in her said Affidavit highlighted that the receipts being exhibited are from Money Gram transfers and not from Western Union as stated by the Applicants. Attention was drawn to the fact that only one of the three receipts has agent information. Some of the information on the receipts has been blocked out or otherwise obscured. Also the second receipt has certain information crossed out and replaced with words written in a brighter ink.

[42] The letter dated August 2005, has been challenged. It was asserted that the content suggests that it was not written by the deceased. This is evident by the difference in writing and signature. The signature on the letter is not that of the deceased. Counsel challenge to the signature was based on comparisons made with signatures used on prior transactions such as the agreement for sale and the transfer of land. Therefore, proof is required from the church sister who allegedly wrote the letter. Since Tivy Nelson, is deceased, it is difficult to make a determination. Therefore, no weight ought to be given to authencity of the letter. It was also postulated that it is hard to believe that gifts were being sent to the deceased having regard to the email dated 11th June 2009, where the daughter spoke callously of the deceased.

[43] At this juncture it is important to examine the evidential features of a Presumption of Death Order. What is the law of evidence as it relates to Presumption of Death? Hodge M. Malek, in the book entitled, "**Phipson on Evidence**", 6th Ed. (2007) noted that certain presumptions of fact and law are recognized by the courts. Presumption may be rebuttable or irrebuttable. It is also important to distinguish between presumptions of fact and presumptions of law. At page 70 of **Phipson on Evidence**, the Author highlighted that presumptions of law derive their force from law, while presumptions of fact derive their force from common sense and logic. A presumption of law applies to a class, the conditions of which are fixed and uniform whereas a presumption of facts applies to individual cases, the conditions of which are inconsistent and fluctuating. **Presumptions of law are made by the court, and in the absence of opposing evidence are conclusive for the party whose favour they operate and for the purpose for which they operate**; presumptions of fact result in inferences drawn by the tribunal of fact, who may disregard them, however cogent. **[Emphasis Added]**

[44] Further at page 74 of **Phipson on Evidence**, the Author pointed out that the presumption of death falls within the category of rebuttable presumptions of law. A person who has not been heard of for seven (7) years by those who, if he had been alive, would be likely to have heard of him is presumed to be dead (See; **Bullock v Bullock** [1960] 1 WLR 975). There is no presumption as to the time during the seven (7) years at which he died and the onus of proving death on any particular date rests with the person to whose title that fact is essential. In cases involving probate, death is frequently proved as a matter of fact and not of law before the seven (7) years. (See; **Re Matthew** [1898] P.143).

[45] In further examining the law of evidence governing the presumption of death, the court examined a book entitled, "**The Modern Law of Evidence**" by Adrian Keane. The Author noted at page 664 that where there is no acceptable alternative evidence that a person was alive at some time during a continuous period of seven (7) years or more, on the proof of admission of the basic facts (i) *that there are persons who would be likely to have heard of him over that period,*

(ii) that those persons have not heard of him, and (iii) that all due inquiries have been made appropriate to the circumstances, that person will be presumed dead at some time within that period; (See per Sachs J **in Chard v Chard** [1956] P 259 at 272).

[46] Author, Adrian Keane, in his book continued to note at page 664 that one of the difficulties of this presumption stems from the fact that evidence in rebuttal may be indistinguishable from evidence which negatives one of the basic facts. This was the case in **Prudential Assurance Co v. Edmunds**(1877) 2 App Cas 487, a decision from the House of Lords which suggests that once the party against whom the presumption operates has adduced sufficient evidence for the possibility of the existence of the absent person to be put to the tribunal of fact, the presumption has been rebutted. It would seem that the presumption is of the evidential and persuasive variety. It is clear that from these authorities the court has to be satisfied that the Applicant did all that could be reasonably done to ascertain the whereabouts of him former wife.

[47] Another essential issue in this case, is whether the Presumption of Death Order is a final order or an interlocutory order? In the Court of Appeal decision of ***Bozson v. Altrincham Urban Council*** [1903] 1 K.B. 547, Lord Alverstone C.J. at page 549 of the judgment said;

> *"I agree. It seems to me that the real test for determining this question ought to be this:* ***Does the judgment or order, as made, finally dispose of the rights of the parties?*** *If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."* ***[Emphasis Added]***

Similarly, the test for ascertaining whether an order is final or interlocutory, as laid down by the Court of Appeal in ***Salaman v. Warner*** [1891] 1 Q. B. 734, is that an order is not a final order unless it is one made on such an application or

proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation.

[48] The question then for the court to determine is whether, the Presumption of Death Order finally disposes of the rights of the parties? The purpose as asserted for obtaining the Presumption of Death Order was that the Applicant, Tivy Austin Nelson was desirous to sell the property that was jointly owned with Melva Nelson. The evidence before the court was that he was unaware of the whereabouts of Melva and made several inquires seeking to locate her, but all his efforts were futile.

[49] The effect of the Presumption of Death Order is of critical importance. In that, where the court grants a Presumption of Death Order, the Applicant legally relies on this Order to conduct any subsequent transaction. I am incline to think that, for the court to grant a Presumption of Death Order, it must be satisfied, at a very high level that the person should be presumed dead. The evidence before the court must be very compelling. As such this Order is a final order. It finally disposes of the rights of the parties. In my mind it is not an interlocutory order as there was no pending proceeding to make a final determination of this order.

[50] At this point, the question for the court's determination; is whether a final order can be set aside? In the Jamaican Court of Appeal decision of **Sarah Brown v Alfred Chambers** [2011] JMCA App 16, Harris JA, noted that;

> *"As a general rule, once a judgment or order is perfected it brings litigation to an end. It follows therefore that a court cannot revisit an order which it has previously made. The extent of the court's jurisdiction does not go beyond that which is pronounced in its final order**. Despite this, certain exceptional circumstances may arise which may cause the court to revisit a prior order." [Emphasis added].***

[51] In the Australian case of **Bailey v Marinoff** [1971] HCA 49, Barwick CJ, speaking to the foregoing principles, at page 530 said:

> *"Once an order disposing of a proceeding has been perfected by being drawn up as the record of a court, that proceeding apart from any specific and relevant statutory provision is at an end in that court and is in its substance, in my opinion, beyond recall by that court. It would, in my opinion not promote the due administration of the law or the promotion of justice for a court to have a power to reinstate a proceeding of which it has finally disposed.* ***In my opinion, none of the decided cases lend support to the view that the Supreme Court in this case had any inherent power or jurisdiction to make the order it did make, its earlier order dismissing the appeal having been perfected by the processes of the Court."*** **[Emphasis added].**

At page 539, of the said judgment, Gibbs J said:

> ***"It is a well-settled rule that once an order of a court has been passed and entered or otherwise perfected in a form which correctly expresses the intention with which it was made the court has no jurisdiction to alter it*** *…* ***The rule rests on the obvious principle that it is desirable that there be an end to litigation and on the view that it would be mischievous if there were jurisdiction to rehear a matter decided after a full hearing.*** *However, the rule is not inflexible and there are a number of exceptions to it in addition to those that depend on statutory provisions such as the slip rule found in most rules of court."* **[Emphasis Added]**

[52] In **Gamser v The Nominal Defendant** [1977] HCA 7, in addressing this principle, Barwick C. J said:

> *"I regard it as unfortunate that the inherent power of an appellate court does not extend to varying its own orders when the interests of justice require it.* ***It is of course a most important principle, based on sound grounds of policy, that there should be finality in litigation****.* ***However, exceptional cases may arise in which it clearly appears from further evidence that has become available that a judgment which has been given rested on assumptions that were false and that it would be manifestly unjust if the judgment were allowed to stand****. In my opinion it is desirable that the Court of Appeal should have a discretion – however guardedly it might have to be exercised – to reopen its judgments in cases such as that in which the needs of justice require it. I agree, however, that the decision in* ***Bailey v Marinoff*** *shows that the Court of Appeal lacks that inherent power."*

[53] As it relates to setting aside interlocutory orders, Buckley LJ, in **Chanel Ltd v FW Woolworth & Co Ltd and others** [1981] 1 All ER 745 at page 752, said;

> "*Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter."*

[54] Based on the foregoing authorities, the law has not expressly precluded the courts from looking into the circumstances of a case even where a final order was granted. In **R (on the application of Gacal (Mohamud Muude)) v Secretary Of State For The Home Department** [2015] EWHC 1437 (Admin), it was highlighted that Briggs J, also referred to the case, **Independent Trustee Services Ltd v GP Noble Trustees Ltd** [2010] EWHC 3275 (Ch), in which Peter Smith J, said that the authorities on setting aside final orders would hardly ever

be appropriate to do so, but did not rule it out entirely. A similar view has been expressed in our jurisdiction in the Court of Appeal decision of **Sarah Brown v Alfred Chambers.** The court in that case said that only in exceptional cases, the court may interfere with a final order/ judgment. It has to be clear, with cogent evidence, that if the court does not intervene there will be manifest injustice.

[55] Is this a case, which falls in this exceptional category? Based on a careful examination, I cannot agree. The Applicants seeking to set aside the Presumption of Death Order have not met that very high threshold in order to fall within the exceptional category. The allegations of fraud, I find is unsubstantiated.

[56] The effect of allowing the Presumption of Death Order to stand puts Cynthia Nelson as the surviving spouse of the estate and pursuant to the **Intestates' Estate Property and Charges Act**, is entitled to a share of interest in the said property. There is evidence before the court, that Tivy Nelson on the 29th October 1999 dissolved the marriage between himself and Melva. As such, he lawfully remarried Cynthia Nelson on the 21st May 2000.

[57] In the best interest of all the parties involved and preserving and protecting the proceeds of sale of the property, the court makes the following Orders;

1. That the Orders in the Amended Notice of Application for Court Orders filed on the 11th April 2014 are refused, save and except Order 2.
2. A Declaration that Cynthia Nelson is the legal spouse of the deceased, Tivy Nelson.
3. That Cynthia Nelson is entitled to take out Letters of Administration pursuant to Part 68.18(1)(a) of the Civil Procedure Rules.
4. That the interpleader proceedings be stayed pending the administration of Tivy Nelson's estate.
5. That the interpleader, Mr. Rapeal Codlin be allowed to pay the balance of the proceeds of sale of the property into court.

6. That Orders as per 1, 2 and 3 of the Notice of Application for Court Orders in Respect of Legal/Beneficial in the Estate of Tivy Nelson filed on 25th March 2013 are granted.