COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT OF THE BAHAMAS

2016/PRO/cpr/FP/0001

IN THE MATTER of the unsigned Will of Sherese Shannon Simms of #109 Bedford Apartment, Fortune Hills in the City of Freeport on the Island of Grand Bahama Commonwealth of The Bahamas bearing the date 15th day of May 2012, Deceased

AND IN THE MATTER of an application on the part of the Applicant Linda Rolle-McCoy as the Executrix of the said Will of the said Sherese Shannon Simms, deceased for leave to apply for Grant of Probate of the said Will by using the unsigned copy thereof.

BEFORE:	The Honourable Justice Petra M. Hanna-Adderley
APPEARANCES:	Ms. Pleasant Bridgewater for the Applicant
	Mrs. Ingrid Tynes for Basil Simms
	Mr. Brian Dorsett for Kawanda Stuart
TRIAL DATES:	September 27, 2016; July 7, 2017

JUDGMENT

Hanna-Adderley, J

I must begin by apologizing profusely for the delay in my delivery of this Judgment.

Introduction

1. The Applicant, Linda Rolle-McCoy, applies in this action to the Court for an order granting leave to apply to the Supreme Court on its Probate Side for a grant of Probate of the unsigned Will of Sherese Shannon Simms ("**the deceased**") by using the copy of the said unsigned Will. This application is commenced by the Applicant by way of an Originating Summons filed on March 3, 2016 and supported by the Affidavit of the Applicant filed on the same date, the Affidavit of Nickesha Lightbourn and the Affidavit of Shekera Strachan filed on the same date. The Applicant also relies on her two Supplemental Affidavits filed on March 13, 2017 in response to the Affidavits filed on behalf of Mr. Basil Simms and Ms. Kawanda Stuart.
2. A Notice of Appointment of Attorney was filed on December 14, 2016 on behalf of Mr. Basil Simms, the father of the deceased and who relies on his Affidavits filed February 20,

May 25 and August 30, 2017 in support of his claim that he is the heir-at-law of the estate of the deceased.

3. A Notice of Appointment of Attorney was filed on February 20, 2017 on behalf of Ms. Kawanda Stuart, the sister of the deceased and who relies on her Affidavit filed herein on the same date.
4. The issues to be determined in this action are:-
    a. Whether the unsigned copy of the purported Will of the deceased should be admitted to probate;
    b. Alternatively, whether Basil Simms or Kawanda Stuart is the deceased's heir-at-law for the purposes of administering her estate.

The Applicant's Evidence

5. The Applicant's evidence, in part, is that she was a friend and confidant of the deceased, had known her since 2002 and that they had a mother/daughter relationship. That the deceased died on January 4, 2016 at the Rand Memorial Hospital and that in May 2012 the deceased told her she was diagnosed with cancer, had prepared and executed her Will at McDonald & Co. Law Chambers and informed her that she was named the Executrix of the Will. That after the death of the deceased she went to McDonald & Co. to obtain the Will but was informed that the deceased did not leave the Will with McDonald & Co. That she was informed that Shekera Strachan and Nickesha Lightbourn witnessed the Will and that at the time of the deceased preparing and executing the Will they were employees of McDonald & Co. That she was informed by Shekera Strachan and she believes her that McDonald & Co. only had a copy of the deceased's unexecuted Will and was handed a copy of the same.
6. That on December 30, 2015 the deceased went into a coma and she along with the deceased's sister, Kawanda Stuart went to the deceased's residence because the deceased's sister felt the need to be there. That while there at the residence they sat and talked hoping for the best for the deceased however the deceased's father, Basil Simms came and informed them that after receiving legal advice that the deceased's mother is dead he is the legal heir of her estate and that he will be changing the locks on the residence. That she always had a key to the deceased's residence and likewise she had a key to her residence however after the deceased's father changed the locks although she never returned after that day, she no longer had access to the deceased's residence. That

she has shown and provided Mr. Simms with a copy of the said Will and requested that he check where she knew the deceased kept her original Will. That Mr. Simms never got back to her however she was aware that her attorney was in contact with him and was advised by her attorney that Mr. Simms told her that there was no Will. That she was aware that the deceased had a Will up to the time for her death because she spoke to her about her Will on several occasions and most recently in 2015 after she became gravely ill.

7. The Applicant filed an Affidavit in response to the Affidavit of Basil Simms and states, in part, that the deceased informed her that at the age of 18 she moved to Freeport to be with her father Basil Simms and that the deceased told her and she believed that the deceased and Basil Simms did not have a relationship before moving to Freeport. That this was also confirmed and verified by Basil Simms in the presence of her attorney when he confirmed that the first time he saw the deceased was when she was 6 months and again when she was 18. That there were times when the deceased discussed her father with her and she mostly listened and was very cautious in her response and only did so according to the subject that was being discussed because that was her father and she did her best to stay out of blood relatives problems. That she believed what hurt the deceased the most was that during the time she was going through chemotherapy treatment she was then living with her male companion and Mr. Simms very crudely and without compassion insisted that she needed to get rid of him and she called her in tears and that she told her she was coming to be with her so she could talk. That she believed that what Mr. Simms said hurt the deceased not because of what was said but the tone in which he spoke and that she had never seen the deceased so upset and broken and that they talked for more than three hours and she only left when the deceased had calmed down and was feeling better.
8. That Mr. Simms states in his Affidavit that he had a good father and daughter relationship with the deceased and that can be seen by her Will where the deceased was generous to him therefore there was some kind of relationship between them. Ms. Rolle McCoy stated that she was aware and does know from what the deceased told her that since the execution of her Will in 2012 the deceased was very disappointed that Mr. Simms did not visit her when she had major surgery in Nassau and he instead remained in Freeport and only travelled to Nassau after the deceased was released from hospital to attend a funeral.

That this bothered the deceased because again she felt that she was again not given thought like when she was a child and had no communication with him until she was eighteen years old.

9. That Mr. Simms had received information from her via a relative of his who was introduced to her by the deceased and that from time to time both the deceased and her would visit this relative's house and the relative would visit her house so they were not strangers to each other. That during the last few weeks of the deceased's life she started making frequent visits to the hospital but she was not telling them how ill she was as she always had a reason for her frequent visits to the Emergency Room. That after the relative kept saying on more than three occasions that Mr. Simms knew nothing about the deceased's affairs, she finally decided to inform the relative that the deceased told her that the deceased had a Will at McDonald & Co. but she never disclosed to her that she was the Executrix. That the deceased never told her that she had taken the Will from McDonald & Co. or that she had kept it and as far as she was aware, it was Mr. Simms' relative who informed him that the deceased had a Will and where it was. That the deceased informed her of the Will just before she was to begin her first session of chemotherapy.
10. That it was a Saturday when the deceased went to her home (as she usually did) after going out for a ride with Mrs. Marie Simms, the wife of Mr. Simms and not wanting to go home and that the deceased informed her of the Will. That at that time Mrs. Simms took the deceased by Taino Beach and they talked for a while and according to the deceased she was questioned by Mrs. Simms and Mrs. Simms told her that the family did not know much about her affairs and in the event anything happened someone needed to know. That the deceased replied to Mrs. Simms that there were persons in her life who are not family but they are closer than family and if there was anything they needed to know about the deceased they could ask Linda, meaning her.
11. That it was during this time the deceased informed her about the Will being at McDonald & Co. and she responded that she thought McIntosh & Co. was her place of business and the deceased explained that she felt comfortable with Miss Strachan who prepared the Will because at one time they were close friends who would go out on weekends together. That a day after the deceased's death she called McDonald & Co. and asked for Miss Strachan but was told that she was off for a few days and she then identified herself as Linda McCoy and that the deceased had passed away and that the deceased informed her

that she was the Executrix of her Will. That the office personnel said they could not provide her with any information because Miss McDonald was in court at the time and she left her work telephone number. That she was contacted the next day and told that they were trying to reach her to inform her that there was a Will prepared for the deceased and confirmed that she was the Executrix but she had to wait until the following week to receive it because Miss Strachan was on vacation. That she was also informed that they had received a call from a Kawanda Stuart inquiring about the Will and informing her that Basil Simms is not the deceased's father. That her response was that she did not plan to get into those issues because the deceased had told her that he was her father and she further said to her that the deceased left him fixed.

12. The evidence of Nickesha Lightbourn in her Affidavit is that between 2005 to 2014 she was employed as a legal secretary at McDonald & Co. Law Chambers and that she is one of the subscribing witnesses to the deceased's Will and herself and Shekera Strachan were both present when the deceased signed as Tesator of the Will which was prepared by Shekera Strachan and that they both signed as attesting witnesses. That the deceased executed the Will on May 15, 2012 and took the original copy of the Will because she did not want McDonald & Co. to keep the original.
13. The evidence of Shekera Strachan in her Affidavit is that she is a legal secretary and has been employed as one at McDonald & Co. since 1997. She stated that she prepared the Will for the deceased which consisted of three pages not including the back page and two other pages for the Affidavit of the attesting witnesses. That she is one of the subscribing witnesses to the said Will and the other witness who was employed at McDonald & Co. at the time was Nikesha Lightbourn and that the deceased as Testator signed in front of the both of them and they signed as attesting witnesses. That the deceased executed the said Will on May 15, 2012 and took the original copy of the said Will because she did not want McDonald & Co. to keep the original and a copy of the fully executed Will was not kept.
14. The evidence of Basil Simms is found in his Affidavits filed February 20, May 25 and August 30, 2017 respectively. His evidence is that he is the father of the deceased who was born on April 7, 1974 out of wedlock to her mother Inez Emerald Dean and himself. That throughout her life the deceased carried his surname and has always been known as Sherese Simms and that the deceased was born in Nassau and spent her early childhood in Nassau with her mother. That sometime after high school around 1991 the deceased

came to Grand Bahama to live with himself and his wife Enith and her siblings and that they had a good father and daughter relationship. That sometime before the deceased's death Shekera Strachan, an employee of McDonald & Co. told him that the deceased had asked her to show her how to draft a will and that Ms. Strachan had done so and that the deceased left with the draft will and never returned. However, Ms. Strachan never said that the deceased had signed a will and it is only since the death of the deceased Ms. Strachan and Ms. Nickesha Lightbourne say that the deceased signed a will. That he was asked to collect a copy of an unsigned will purportedly made by the deceased from Bridgewater & Co and later he received a copy of the same document from Shekera Strachan. However, a signed will has never been shown to him and he is also aware that the deceased was in denial and did not accept that she was dying.

15. That the deceased died without a spouse or children and the deceased's mother predeceased her on March 15, 1999. That on March 3, 2004 his wife Marie Simms and himself swore an Affidavit of Birth at the deceased's request but he does not recall why she needed it at that time. That when the deceased moved from his home and went to live on her own she gave him a key to her new residence. That after the deceased slipped into a coma her sister came to Grand Bahama to visit and he gave her the deceased's car and handed her the entire bunch of keys. That he later went to the apartment and found that Sherese's sister, Clarence Carter and Linda McCoy were in the apartment and were obviously searching through the deceased's belongings; that he told them that the deceased was still alive and they should not be searching through her personal belongings. That he informed them that he was changing the locks as a result of their action and when they were leaving the apartment Clarence Carter was carrying a plastic bag to which he asked him what was in the bag and his response was garbage.

16. In response to the Affidavit of Kawanda Stuart, Mr. Simms' evidence is that the deceased is survived by himself, four sisters and one brother and Kawanda Stuart is the only sibling of the deceased through her mother. That he and his remaining four children always treated the deceased as their sibling. That for some time before her diagnosis the deceased and Ms. Stuart were not on speaking terms because of Ms. Stuart's failure to live up to a commitment she made but he persuaded the deceased to forgive the debt since Ms. Stuart was her sister. That as a result of the strained relationship Ms. Stuart had not visited and hardly spoke to the deceased since the deceased's diagnosis in 2012. That

after the deceased's illness worsened it was his daughter Tanya Henfield and not Clarence Carter who informed Ms. Stuart and she contacted the deceased.

17. That he knew Ms. Linda Rolle-McCoy was a friend of the deceased but the relationship never appeared to be that of a mother and daughter as alleged and that because of the way Ms. Stuart and Ms. McCoy behaved after he trusted Ms. Stuart with the keys to the deceased's vehicle and bunch of keys he was not inclined to treat Ms. McCoy as a close friend of the deceased. That in December 2015 the deceased came to live with him as he had to collect and transport her every time she had an attack or seizure which was becoming more frequent. That Ms. Stuart arrived in Freeport around December 28, 2015 and the deceased went into a coma on December 31, 2015 and Ms. Stuart left the next morning. That he was recognized as next of kin by the Rand Memorial Hospital and was performing in that capacity when the deceased went into a coma. That he changed the locks to the deceased's apartment when he realized the deceased's tablet, cell phone, purse and other items were missing and subsequently made a report to the Police Department. That Ms. Stuart has already received what the deceased intended for her to have by naming her as the beneficiary of one of her life insurance policies. That the deceased was in denial about her death being imminent and never told him that she had made a Will and her not having made a Will seems consistent with her state of mind concerning her illness and possible death. That while the deceased was in a coma Ms. Rolle-McCoy had told him that there was a Will at McDonald & Co and that he spoke to Shekera Strachan an employee of McDonald & Co. who informed him that there was no Will. That after the deceased's death he spoke with Shekera Strachan again to find out if the deceased had made a Will and he was told she had not. That he informed Ms. Rolle-McCoy of what he learnt and Ms. Rolle-McCoy indicated that if the Will was not at McDonald & Co it would be at McIntosh & Co. That he went to McIntosh & Co. to inquire about the Will of the deceased and was told by an employee that they did not have one.

18. He also states that he has acknowledged the deceased as his daughter all his life and from birth the deceased used his surname Simms and never used any other surname. That he was never required to give written consent for the use of his name as there was never any dispute over the same. That he has sworn two Affidavits confirming that the deceased is his daughter; one on May 16, 1992 and the second on March 3, 2004. The Affidavit dated March 3, 2004 was sworn by himself and his wife Marie Simms before an Attorney

and Notary Public and recorded in the Registry of Records of the Commonwealth of the Bahamas in Volume 9224 at page 509. The Affidavit dated May 16, 1992 was signed and sworn by Inez Dean, now deceased and himself as mother and father respectively of their child, the deceased, before a Justice of the Peace about to be recorded in the Registry of Records of the Commonwealth of The Bahamas. That he maintained a father/daughter relationship with the deceased to the best of his ability while she lived in Nassau with her mother and he lived in Freeport.

19. The evidence of Ms. Kawanda Stuart, the sister of the deceased is that prior to relocating to Nassau in 2012 she lived in Freeport, Grand Bahama at divers locations for a period of 18 years. The deceased was the first child of their mother Inez Dean who died on or about March 8, 1999. That prior to the deceased's death they spent a considerable amount of time together in particular towards the end of her life and they would speak for hours each night on the phone until either one of them fell asleep. That on or about December 28, 2015 she traveled to Freeport, Grand Bahama to Nassau because she received information from Clarence Carter, a friend of the deceased that she was not doing well and that she should come to Freeport. That upon her arrival to Freeport she found the deceased at the residence of Basil Simms in bed and was embraced by the deceased and the deceased told her that she was very afraid. That the deceased returned to the Rand Memorial Hospital on December 29, 2015 and slipped into a coma on or about December 31, 2015 from which she never recovered.
20. That prior to the deceased's funeral, herself, Linda Rolle-McCoy and Chicquanie Whylly went to the offices of McDonald & Co. because Mrs. Rolle-McCoy said that the deceased had a Will because she had taken the deceased to McDonald & Co. to have it done. That upon their arrival at McDonald & Co. an employee of the firm told them that she was the person who drafted the Will however the draft was taken by the deceased but not signed. That following this they went to Ms. Pleasant Bridgewater who provided advice on the way forward in light of the fact that there was no duly executed will.
21. That the deceased was buried on or about January 17, 2016 and shortly after her death she retained Counsel in Nassau who made application to the Supreme Court in Nassau for a grant of letters of administration however her attorney Mr. Brian D. Dorsett of W.E. Olander & Co. received correspondence from the Probate Registry in Nassau advising that the father of the deceased needed to be cleared. That my attorney inquired as to whom

the deceased's father was and whether or not there was a birth certificate of the deceased and she informed him that there was no record of the deceased's birth but there was an affidavit which she provided. She also informed her attorney that the deceased and herself did not have the same father but as far as she was aware a man by the name of Basil Simms was purporting to be her father but there was no record of this. That there was communications via letters between Mrs. Ingrid Tynes of Tynes & Tynes in Freeport, Grand Bahama advising my attorney that she acted on behalf of Mr. Basil Simms. That during the time she spent with the deceased leading up to her death she never indicated to her that she had executed a Will.

Admittance of Copy Will to Probate

22. Counsel for the Applicant, Miss Pleasant Bridgewater submits that since the original Will cannot be found, that means that the Applicant must establish that the will was duly executed and was not destroyed by the Testator "animo revocandi" and refers the Court to Section 16 (d) of the Wills Act and Atkin's Encyclopedia of Court Forms in Civil Proceeding 2nd Edition, Vol. 32, page 154.

23. Ms. Bridgewater submits that the law is clear in that if the original Will is last known to be in the Will maker's possession and cannot be found after death after an extensive search then the law presumes that the testator destroyed the will in order to revoke the will. She states that this presumption can be rebutted by written or oral evidence and the Court have held that it is a heavy burden to rebut. She referred the Court to several cases in support of this submission. **See Re Wipperman, decd. Wissler v Wipperman and other** (1955) L.R.P. & D. 59; **Polischuk Estate v Perry** 2014 BCSC 1089; **Haider v Kalugin**, 2008 BCSC 930; **Sugden v. Lord St. Leonards** (1876), 1 P.D. 154 (Eng. C.A); **Lefebvre v. Major** (1930) S.C.R. 253; **Unwin v Unwin** (1914) 6 W.W.R. 1186; Brown v Woolley (1959) 29 W.W.R. 425; **In the Matter of the Estate of Fredrick Ross, Supreme Court Action** PRO/npr/No.00027 of 2014. It is her submission that the details and sequence of events leading up to the loss of the original Will are set out in the Affidavit of the Applicant and that there is no evidence that the Testator burned, tore or otherwise destroyed the Will. Therefore she submits that the facts of the case and the law are sufficient to rebut the presumption that the Testator had destroyed her Will with the intention of revoking it. Moreover, Ms. Bridgewater submits that there is sufficient evidence that proves there was in fact a Will prepared and fully executed by the Testator.

24. Counsel for Mr. Basil Simms, Mrs. Ingrid Tynes submits in part that the provisions of the Wills Act, in particular Section 5(1) states that no will is valid unless it is in writing and signed at the foot by the Testator. She submits that the clear intention of the Legislature was to permit the unwritten wishes of a deceased person to be ignored and to prevent the written wishes of a deceased person being entertained unless the writing was signed by the Testator at the foot and in the presence of two or more witnesses present at the same time and each witness either attested and signed the will or acknowledged his signature in the presence of the testator.
25. Mrs. Tynes also refers the Court to Section 16 of the Wills Act whereby she submits that provision presumes the existence of a signed document that being a duly executed Will and as such establishing the existence of a duly executed Will presents no difficulty if the original can be shown to have been in existence after his death. She further states that if this cannot be established, there is a presumption that a Will in the testator's possession or control was destroyed by him deliberately. See Atkins Encyclopedia of Court Forms in Civil Proceedings.
26. Mrs. Tynes submits that upon review of the Affidavit evidence of the two persons who say they saw the deceased sign a Will, Nickesha Lightbourne never says in her evidence that the copy produced is a copy of the document to which the deceased signed and as such the question arises as to whether the unexecuted copy produced is a copy of the "duly executed" Will which was purportedly signed. Further she submits the evidence of Ms. Stuart is that her information was that the Will was never signed which contradicts the evidence of the witnesses of the Applicants and that no evidence has been produced to rebut the presumption that if there was a Will the deceased destroyed it with the intention of revoking it.
27. Mrs. Tynes also submits that there is no dispute that an application can be made when an original Will has been lost, however it cannot be argued that there was an original signed but fail to produce a copy of the same and hope to rely upon an unsigned draft instead. It is Mrs. Tynes submission that the Applicant cannot rely on the case of **Sudgen and others (supra)** as in that case the presumption was rebutted based on the strength and credibility of the witnesses and the character of the custody which the testator had over the Will but in the instant case no such evidence exists. Moreover, she submits the Applicant has failed to prove the existence of an unsigned Will either before or after the

death of the deceased and the document being sought to be admitted to Probate does not qualify to be admitted.

28. Counsel for Ms. Kawanda Stuart, Mr. Brian Dorsett submits in part that Section 5 of the Wills Act is clear in that for a Will to be valid it must be signed by the Testator in the presence of two witnesses. He submits that there is no document existing that bears the signature of the deceased with the two witnesses. Moreover, he submits that the only evidence of the existence of a Will is found in the Affidavits of Shekera Strachan and Nickesha Lightbourn and states that the acceptance of their evidence is difficult in that it is unusual that the firm that drafted the Will and executed the same did not photocopy the Will and that even if the Will was duly executed the witnesses are not in a position to state whether the Testator may have revoked the Will by destroying it. He refers the Court to Section 16 of the Wills Act and submits that the evidence of the attesting witnesses are contradictory to the evidence of Ms. Stuart as the attesting witnesses gave evidence that the Testator took the original signed Will but the evidence of Ms. Stuart was that she was advised that the deceased took the unsigned Will.
29. It is his submission that the burden of proof falls on the Applicant to prove not only that a Will was duly executed but also that if a Will was executed it was not destroyed by the Testator prior to her death. He refers the Court to **Phillip's Estate** [1982] BHS J. No. 42 in support of his submission that the Court in the instant case should have the Will proven in solemn form as in **Phillip's Estate (supra)** because of the conflicting evidence.
30. A Notice to Cross-Examine the Affiants in the instant case was filed on behalf of Ms. Stuart on May 24, 2017 however, during the hearing on October 5, 2017 Mr. Dorsett withdrew intention to cross-examine.

Analysis

The Law

31. On an application for a grant of probate the applicant must file in support of the application numerous documents, in particular (a) the original will and two Photostat copies; (b) where required, an order of the Court admitting to proof the will as contained in a Photostat copy or a reconstruction of the will, pursuant to Section 6 (2) (a) and (b) of the Probate and Administration of Estates, Rules 2011 ("**PAE Rules**"). I am of the view that the reference in Section 6 to a Photostat includes a copy of a completed draft Will.

32. The Probate and Administration of Estates Act ("**PAEA**") and the PAE Rules are silent with respect to completed drafts and the test to be applied when seeking to admit a photostat or draft will to Probate. However, where our Act and Rules are silent we may refer to the English Act and Rules and Section 54 (3)(a) and (c) of the Non-Contentious Probate Rules, 1987 (as amended) provides as follows:-

"54. (1) Subject to paragraph (2) below, an application for an order admitting to proof a nuncupative will, or a will contained in a copy or reconstruction thereof where the original is not available, shall be made to a registrar.

2...

(3) An application under paragraph (1) above shall be supported by an affidavit setting out the grounds of the application, and by such evidence on affidavit as the applicant can adduce as to—

(a)the will's existence after the death of the testator or, where there is no such evidence, the facts on which the applicant relies to rebut the presumption that the will has been revoked by destruction;

(b)....

(c) in respect of a reconstruction of a will, the accuracy of that reconstruction."

33. I am also guided by the text "Non-Contentious Probate Practice in the English Speaking Caribbean, authored by Karen Nunez-Tesheira, 1998, pages 269-271"; and "Tristram and Cootes Probate Practice, 23rd Edition, authored by J.E.N. Russell, W.J. Pickering, G.F. Dawe, 1970, pages 560-561; 1118-1119". The authors discuss the issues of "Lost Will Grants", in England and the English speaking Caribbean including The Bahamas, and state that an application for a "lost" will grant is necessary when the original will/codicil of the testator has been lost, misplaced or accidentally destroyed so that the original testamentary papers cannot be admitted to probate. This is precisely the circumstances in the instant case, as opposed to determining the validity of the purported Will as submitted by Mrs. Tynes and Mr. Dorsett. The authors go on to opine that a Will may have to be proved in solemn form where there is serious opposition to the application to be made or if the missing or lost will was last known to be in the possession of the testator, in order to rebut the presumption of destruction animo revocandi. On an application to admit to proof a Will contained in a copy, completed draft or reconstruction, the Applicant's

Affidavit in support must be made by the applicant for the grant, one of the attesting witnesses if available, the person who examined the original with the draft/copy thereof and the person who can swear the circumstances of its loss or destruction and the efforts made to find it. The evidence of the affidavits should seek to establish several factors, inter alia:-

a. the existence of the will after the testator's death and if no such evidence is available, the facts upon which the applicant relies to rebut the presumption that the will was destroyed by the testator animo revocandi;
b. the efforts made to find the will; that is, if any advertisements have been published the page clipping from the newspapers (showing the date thereof) should be exhibited and annexed thereto;
c. due execution of the original will by an affidavit of one of the attesting witnesses if possible;
d. the fact where applicable that the draft copy of the will was examined with the original and found to be complete and accurate. In such instances an affidavit of some person who can verify its contents such as the attorney-at-law who was responsible for its preparation should also be filed;
e. the persons who are prejudiced by the admission of the documents sought to be established.

34. While the Court does indeed have the power and jurisdiction on an application for leave to admit to proof a will contained in a copy, completed draft or reconstruction, I find that in the instant case, the evidence provided by the Applicant in support falls short of what is required by the Court. The difficulty with the Applicant's evidence in particular is that the attesting witnesses in their Affidavits fail to state that the draft that is exhibited to the Applicant's Affidavit is identical to the original and is therefore an accurate copy or evidence to that effect. Both Affiants state that the deceased executed the Will in their presence, at the same time. However, Ms. Strachan deposes to the fact that she prepared the Will and yet she only refers to the date upon which it was purportedly executed and to the fact that Ms. Lightbourne witnessed the execution of the Will as well. Neither Affiant leads any evidence as to the contents of the Will. Further, there were inconsistencies in the evidence of the Applicant, Mr. Simms and Ms. Stuart as to what was told to them by Ms. Lightbourne and Ms. Strachan as to the whereabouts of the will (**See page 2-3,**

paragraphs 5-6, page 4, paragraphs 9 and 11, pages 5-6, paragraphs 11-14, page 7, paragraph 17, page 8, paragraph 20.) The evidence of the Affiants was unchallenged as Mr. Simms and Ms. Stuart chose not to cross-examine them perhaps for good reason. The Applicant has failed to adduce any evidence of the existence of the Will **after** the testator's death. The Applicant states that the deceased mentioned the Will to her in 2012 and that they spoke of it several times in 2015 when she was diagnosed with cancer. I am of the view that this evidence does not amount to proof that the will was in existence **after** the passing of the deceased. Therefore, the presumption that the Will was destroyed by the testator has not been rebutted by the Applicant and so I accept the submissions advanced by Mrs. Tynes in this regard.

35. The Court must also consider any persons who would be prejudiced by the grant being sought by the Applicant. Should such persons consent in writing or in person to the grant then the Court would have no difficulty in admitting a draft of the will to probate. However, in this instance the individual who would be most prejudiced by the grant is Mr. Simms and he does not consent to the grant being made.
36. Therefore, for the reasons stated the Applicant's application is refused and dismissed.

Paternity of Basil Simms

37. Counsel for Mr. Simms, Mrs. Tynes relies on her Submissions herein and states in part that a determination as to how the residuary estate of the deceased is to be dealt with depends on whether Mr. Simms is recognized as the father of the deceased. She submits that if his paternity is established then he would be the proper person to apply for a Grant of Letters of Administration and if he fails to establish his paternity then the brothers and sisters of the deceased share the deceased's estate equally. (See Section 4(1)(b)(iv) and (v) of the Inheritance Act.)
38. She also submits that the provisions of the Status of Children Act ("**SCA**") provides for the equal shares of children and while it severely undermines the legality of marriage as an institution, it was never intended to deprive a parent of his children but rather to recognize a relationship between unmarried men and their offspring. Moreover, she submits that at common law and prior to this Act a child born out of wedlock was nullusfilius (the child of no one), whereas by virtue of the SCA every child is parented by both a mother and father.

Mrs. Tynes relies on the provisions of Section 7 of the SCA as she submits it sets out the circumstances in which there is a presumption of paternity unless the contrary is proven.

39. Mrs. Tynes submits that Mr. Simms has on several occasions on oath admitted paternity and the evidence of such has been contained in two Affidavits recorded with the Registrar General. Mrs. Tynes states that the earliest Affidavit signed by both parents was never recorded and recent attempts to have it recorded have failed because of its poor physical state otherwise the presumption under Section 7(1)(h) of the SCA would be satisfied. It is also her submission that the presumption under Section 7(1)(j) would be satisfied by Mr. Simms' conduct in having permitting the use of his surname thereby implicitly and consistently acknowledged that he was the father as the deceased enjoyed the use of the surname from birth until her death.

40. Mrs. Tynes submits that at the time of the deceased's birth the requirements for written consent for the use of the name and questions of registration of the birth as now enacted under the Birth and Deaths Registration Act did not arise. Additionally, at the time of the deceased's birth (1974) Mr. Simms would not have been able to register the birth without the mother even if he wanted to do so and there are obvious reasons why both parents may have been reluctant to do so. She refers the Court to Section 14 of the Registration of Records Act in that she submits it makes provisions for the registration of a child born out of wedlock and it is noted that the requirements were different from those for all other children where certain categories of persons were under a duty to register and in particular that unlike other births there was no requirement for a father of such a child to give information of such a birth. Mrs. Tynes further submits that prior to 2002 both parents could have together registered the birth and in this case while an Affidavit was sworn it was never recorded however after 2002 under Section 14(b) of the Births and Deaths Registrations Act a joint request was needed for that birth to entered in the register by which time the mother of the deceased had died. She submits that no evidence has been produced to contradict Mr. Simms' assertion of paternity and as such a presumption exists in his favour under Section 7(1)(j) of the SCA.

41. Mr. Brian Dorsett, Counsel for Ms. Stuart relies upon his Submissions and Supplemental Submissions filed herein on May 24, 2017 and October 2, 2017 respectively. He submits in part that it is trite law that he who asserts must prove states that the document exhibited to Mr. Simms' Affidavit filed February 20, 2017 is in poor condition and is not

recorded and as such the Court must be satisfied of its authenticity. He refers the Court to Section 7 of the SCA and submits that this provision provides clear guidance on how paternity is to be established. He submits that Sections 7(1)(a-e) of the SCA are not applicable to the instant case and while the deceased at the time of her death was using the surname of Simms there is no evidence that Mr. Simms gave written consent for such as required by Section 7(1)(i) of the SCA. He also submits that there is no independent corroborative evidence adduced by Mr. Simms to satisfy this Court that he either is the father or have been known or recognized as the father and while paternity can be implied it has to be done consistently.

42. Mr. Dorsett refers the Court to Mr. Simms' evidence in his Affidavit filed August 30, 2017 and submits that Mr. Simms statement that he was never required to give written consent for the use of his name as there was never any dispute over the same is in direct contravention of Section 7(1)(i) of the SCA. He submits that this case cannot turn on the simple fact that the deceased at the time of her death was known as Simms as the SCA requires more. He also submits that the Affidavit dated May 16, 1992 relied upon by Mr. Simms is in breach of Section 7(1)(f) of the SCA as it was never lodged for recording and it cannot be verified as the alleged second deponent is now deceased.

43. Mr. Dorsett further submits that the Affidavit sworn on March 3, 2004 cannot be relied upon as it does not comply with Section 7(1) of the SCA and Mr. Simms' wife cannot give evidence with respect to the paternity of the deceased as she is not the deceased's mother. It is his submission that if Mr. Simms was aware of the March 16, 1992 Affidavit what would be the need to swear the March 3, 2004 Affidavit and as such it cannot be relied upon as it is not compliant with the SCA. Mr. Dorsett also submits that the 1992 Affidavit appears to have been tampered with as liquid paper appears on the document and the Notary Public or Justice of Peace cannot be recognized and the submission by Counsel for Mr. Simms to attempt to now record the document cannot move this Court to recognize Mr. Simms as the father as the law is not applied retrospectively. He further submits that there is no independent evidence from any person other than Mr. Simms wife alleging that Mr. Simms was the father of the deceased. It is his submission that Section 9 of the SCA provides that an application can be made for a declaration of paternity however there is no evidence before this Court that any such application was made prior to these

proceedings and if such application is being made now it must fail because of Mr. Simms' failure to produce independent evidence that can verify or confirm his paternity.

Analysis

The Law

44. Section 7 of the SCA states:-

> "7. (1) Unless the contrary is proven on a balance of probabilities, there is a presumption that a male person is, and shall be recognised in law to be, the father of a child in any one of the following circumstances —
>
> (a) the person was married to the mother of the child at the time of its birth;
>
> (b) the person was married to the mother of the child and that marriage was terminated by death or judgment of nullity within 280 days before the birth of the child, or by divorce where the decree nisi was granted within 280 days before the birth of the child;
>
> (c) the person marries the mother of the child after the birth of the child and acknowledges that he is the natural father;
>
> (d) the person was cohabiting with the mother of the child in a relationship of some permanence at the time of the birth of the child, or the child is born within 280 days after they ceased to cohabit;
>
> (e) the person has been adjudged or recognised in his lifetime by a court of competent jurisdiction to be the father of the child;
>
> (f) the person has, by affidavit sworn before a justice of the peace or a notary public or by other document duly attested and sealed, together with a declaration by the mother of the child contained in the same instrument confirming that the person is the father of the child, admitted paternity, but such affidavit or other document shall be of no effect unless it has been recorded with the Registrar General;
>
> (g) the person has acknowledged in proceedings for registration of the child, in accordance with the law relating to the registration of births, that he is the father of the child;
>
> (h) the mother of the child and a person acknowledging that he is the father of the child have signed and executed a deed to this effect in the

presence of a counsel and attorney, but such a deed shall be of no effect unless it is notarised and recorded with the Registrar General prior to the death of the person acknowledging himself to be the father;

(i) a person who is alleged to be the father of the child has given written consent to that child adopting his name in accordance with the law relating to the change of name; or

(j) a person who is alleged to be the father of the child has by his conduct implicitly and consistently acknowledged that he is the father of the child.

(2) Where circumstances exist that give rise to presumptions of paternity in respect of more than one father, no presumption shall be made as to paternity."

And Section 9 states:

"9. (1) Any person who —

(a) ...;

(b)...;

(c) being a person having a proper interest in the result, wishes to have it determined whether the relationship of father and child exists between two named persons, may apply in such other manner as may be prescribed by rules of court to the court for a declaration of paternity, and if it is proved to the satisfaction of the court that the relationship exists the court may make a declaration of paternity whether or not the father or the child or both of them are living or dead."

45. Section 4 of the Inheritance Act provides:

"4. (1) The residuary estate of an intestate shall be distributed in the manner mentioned in this section, namely —

(a)...;

(b) if the intestate —

(i)...;

(A)...;

(B)...;

(iv) leaves no husband or wife, no children or no grandchildren, the residuary estate shall be distributed between his mother and father in

equal shares if both survive the intestate, but, if only one survives the intestate, the survivor shall take the whole residuary estate;"

46. The purpose for the enactment of the SCA was to reform the law relating to children by providing for their equal status, in particular, the SCA set out the test for establishing paternity.

47. I accept that during the time of the birth of the deceased the law pertaining to children born out of wedlock (as was the circumstances of the deceased) was different than it is now. To my mind, the preparation of the Affidavit of May 16, 1992 was done as a means to "record" the birth of the deceased as the previous law did not make any provision for such. This Affidavit was executed some 28 years ago. While I recognize that the failure to have the document recorded for the purposes of complying with Section 7(1)(f) of the SCA, I find that the evidence adduced in support of determining Mr. Simms' paternity goes beyond the subject Affidavit of Birth.

48. I am satisfied by the evidence contained in the Affidavits filed in this action that Mr. Simms by virtue of his conduct, implicitly and consistently acknowledged his paternity in relation to the deceased. His evidence is that sometime in 1991 the deceased moved to Freeport and lived with Mr. Simms for a period of time and sometime thereafter moved into her own residence; that sometime in December, 2015 the deceased lived with Mr. Simms prior to her death. Moreover, there are two recorded Affidavits, one exhibited to the Affidavit of Basil Simms filed August 30, 2017, whereby Mr. Simms and his wife deposed that they are the father and step-mother of the deceased and that the purpose of the Affidavit was to establish the name, date and place of birth and identity of the deceased and the same is lodged for recording in the Registry of Records of the Commonwealth of The Bahamas in Volume 9224 beginning at page 509 (the backing sheet was not included). That the Affidavit is dated March 3, 2004, long before the death of the deceased and according to Mr. Simms, prepared and executed at her request. The second Affidavit is exhibited to the Affidavit of Ms. Stuart whereby Judymae Stuart and Kendal Strachan depose that the deceased is a female child born to Inez Dean and Basil Simms, out of wedlock and the purpose of the Affidavit is to establish and record the full name and birth of the deceased. That Affidavit is dated March 11, 2016. It is unclear as to why such an Affidavit was made several months after the deceased's death, however, it is not lost on me that this Affidavit was made by two individuals who are not the father **or** mother of the deceased but

deposed to the paternity of Mr. Simms. As a result I find that there has been no evidence adduced before the Court to rebut the presumption that Mr. Simms is the father of the deceased.

49. Section 7(1) of the SCA provides that there is a presumption of paternity in any "one" of the circumstances set out in the section from (a) to (j). I am of the view that Section 7(1)(j) of the SCA is applicable in presuming the paternity of Mr. Simms. The provision itself has two key words that I believe must be considered, namely, "implicitly" and "consistently". The word "implicit" as defined by Merriam-Webster in this context means "as being without a doubt or reserve". Further the word "consistent" as defined by Merriam-Webster in this context means "marked by harmony, regularity or steady, continuity, free from variation or contradiction; marked by agreement; showing steady conformity to character, profession, belief or custom."
50. Considering the above provision and the ordinary meaning of the word "implicit" and "consistency" aforesaid in my view to establish paternity under the said provision Mr. Simms had to be unwavering (without a doubt or reserve), unchanging (steady, showing steady conformity to...belief) in his conduct as it related to the deceased and by his conduct he must have continuously acknowledged, cared for and was present for the child, to which he now seeks to establish paternity. There is no evidence before the Court that has shown that by his conduct Mr. Simms failed to acknowledge the deceased as his daughter. She carried his surname from her birth to her death with no complaint or objection by Mr. Simms. I find it difficult to believe that a man would allow a person who he does not believe to be his child to live with him for an extended period of time, and during one of these periods to provide her with homecare in a time of illness. As a result I find that there has been no evidence adduced before the Court, on a balance of probabilities to rebut the presumption that Mr. Simms is the father of the deceased.
51. Therefore, taking all of the evidence before me and the other party's failure to rebut the presumption by way of additional evidence or by way of cross-examination I find that Mr. Simms has established his paternity to the deceased and as such is the heir at law of the deceased and that Section 4(1)(b)(iv) of the Inheritance Act determines his entitlement as the heir-at-law under the Law of Succession on Intestacy. I find Ms. Stuart's application to be without merit and the same is hereby dismissed.

52. As the Applicant's application was dismissed, the Applicant is to pay costs to the Defendants, Basil Simms and Kawanda Stuart to be taxed if not agreed. As the Defendant Kawanda Stuart was not successful, she is to pay the Defendant, Basil Simms' costs to be taxed if not agreed.

Dated this 8th day of January, A.D. 2021

Petra M. Hanna-Adderley
Justice