

COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT

PROBATE DIVISION  
2018/PROB/Div/00009

IN THE ESTATE OF ALFREDA WHITE, A/K/S ALFREDA PINDER-WHITE LATE OF #12  
HAVEN ROAD OF THE SOUTHERN DISTRICT OF THE ISLAND OF NEW PROVIDENCE  
ONE OF THE ISLANDS OF THE COMMONWEALTH OF THE BAHAMAS, DECEASED

AND

IN THE MATTER OF THE WILLS ACT, 2002 CHAPTER 101

BETWEEN

CAROLINE BURDINE COAKLEY

AND

PHILLIPA JOHNSON

PLAINTIFFS

AND

MERILYN DESHANKS

DEFENDANT

BEFORE: The Hon. Madam Justice G. Diane Stewart

APPEARANCES: Mrs. Hope Strachan for the Plaintiffs  
Ms. Judith Smith appearing along with Ms. Michelle Fox the Defendant

JUDGMENT DATE: 3<sup>rd</sup> February, 2023

JUDGMENT

**Civil – Probate – Revocation Of Will- Undue Influence – Suspicious Circumstances –  
Handwriting Expert**

1. By an Amended Writ of Summons filed 6<sup>th</sup> April 2018 the Plaintiffs, the Intended Executrices of the Will of the late Alfreda White (**the “Deceased”**) executed 10<sup>th</sup> October 2012 (**the “2012 Will”**), sought a Declaration that the 2012 Will was the true last Will of the Deceased, an Order that it be pronounced in the solemn form and a Declaration that the Will dated 27<sup>th</sup> June 2017 (**“2017 Will”**) was invalid and that it should be pronounced against. They also sought an injunction to restrain the Defendant from dealing with the assets of the Deceased’s estate and an accounting of all monies received and disbursed by the Defendant from the Deceased’s estate.

2. By her Defence filed 12<sup>th</sup> February 2019, the Defendant maintained that the Deceased had executed her 2017 Will on 27<sup>th</sup> June 2017 which was witnessed by Delores Rolle, Pandora Thompson and Attorney Charles Mackey.
3. The Plaintiffs relied on the evidence of Phillip White, Dianne Flores, Phillipa Johnson and Caroline Burdine Coakley.
4. The Defendant relied on the evidence of Delores Rolle, Charles Mackey, Pandora Thompson, Marilyn DeShanks, and Helen Pinder.

## **ISSUES**

- i. Whether the Deceased executed the Will of 2017?
- ii. Whether the Deceased had the capacity to give directions as it relates to the Will and if so did she actually do so?
- iii. Whether on a balance of probabilities the purported Will of 2017 was executed in accordance with the S.5 of the Wills Act, 2002?
- iv. If the Plaintiffs prevail in their arguments that the Will was not executed in accordance with the Wills Act 2002 is the Plaintiff entitled to the reliefs sought in the Summons?

## **EVIDENCE**

### **Plaintiffs' Evidence**

#### **Witness Statement of Phillip White filed 17<sup>th</sup> January 2019**

5. Phillip White, the oldest son of the Deceased stated that he was familiar with his mother's signature and that he was convinced that the signature on the 2017 Will was not her signature. The signature of the 2012 Will appeared to be the Deceased's genuine signature. He was skeptical about the 2017 Will as his sister had asked him to sign a document at Charles Mackey & Co, which was for her to receive money for the payment of their sister. When he arrived, Mr. Mackey came out to him for him to sign a document in the space provided.
6. He later realized that the document was a Power of Attorney from his mother to the Defendant. While the signatures of his mother on the said Power of Attorney and the 2017 Will appeared to be the same, they differed from the signature on the 2012 Will.
7. Mr. White died before the trial commenced but the parties agreed to admit his witness statement subject to the weight to be given to the same.

#### **Witness Statement of Dianne Flores filed 22<sup>nd</sup> January 2019**

8. Dianne C. Flores, a Forensic Document Examiner was called as an expert. She stated that she prepared a report in the matter after being engaged to conduct a laboratory examination of ten undisputed documents all of which were signed by the Deceased as well as the 2017 Will, the 2017 Lease Agreement and the 2017 Power of Attorney. She

had concluded that the Deceased did not sign the Power of Attorney dated 26<sup>th</sup> June 2017 and that she probably did not sign the 2017 Will. Her report had attached to it, copies of the various documents which she examined in order to form her opinion.

9. She opined that based on her analysis of the handwriting the Deceased had a low skill level and struggled to write. The Deceased was able to sign, her handwriting was not affluent but consistent. Certain features of her handwriting were consistent and significant.
10. In the 2017 Will, the "f" was lower case but in all of the ten undisputed documents, the Deceased wrote her "F" capitalized. Further the letters "re" in the 2017 Will were not connected but in all of the undisputed documents they are connected.
11. The Deceased consistently signed as Alfreda White in the undisputed documents but in the 2017 Will Pinder is included.
12. There is a similarity between the Deceased and the Defendant's signature in the Lease Agreement document admitted. Ms. Flores opines that the Deceased did not sign the Lease Agreement.
13. She avers that the Deceased did not sign her name on the Will or the Power of Attorney but she could not categorically say that she did not sign them as she did not have any signatures which are contemporaneous with these documents.
14. Under cross-examination she accepted that a person's signature can change through the years but she had reviewed signatures as far back as 2005 and the Deceased's signature was consistent.
15. She is unable to determine the mental capacity of a person from their handwriting. Her comparisons are based on the physical ability of a person to sign their name. Their mental capacity is outside the scope of her expertise.
16. The Deceased's skill level never developed. She writes like a child.
17. The handwriting on the 2017 Power of Attorney and the 2017 Will reflected a better skill level. The person who signed the Lease Agreement did not attempt to imitate the Deceased's signature style.
18. The "A" on the Deceased's driver's licence were formed in the same manner as the undisputed documents.
19. In re-examination Ms. Flores averred that there was evidence of a tremor in the 2016 document but none in the disputed documents. Certain illnesses can cause tremors in a person's signature, as well as certain medicines. Finally she maintained that even if a person loses the ability to sign with their normal writing hand and had to use another, there will still be similarities in the writing.

#### **Witness Statement of Dr. Caroline Burnett Garroway**

20. Dr. Garroway, the medical chief of staff at the Princess Margaret Hospital was subpoenaed to produce the medical records of the Deceased from her hospital visit in July

2017. Her report reflected lesions on the brain, one of the causes of which is brain cancer which could have been a primary or metastatic cancer.

21. The Deceased was admitted to the Princess Margaret Hospital for a period of three weeks, and had pneumonia cerebral odema. Dr. Garraway was unable to locate the balance of the Deceased's documents but opined that the test results could have been caused by renal failure and that there was evidence that the Deceased was suffering from the end stage of the disease. The Deceased's score on the Glasgow Scale was normal when she was discharged from the hospital.
22. Dr. Garraway was recalled to review the autopsy report of the Deceased. Based on the report the Deceased had brain cancer which had progressed from a primary to metastatic cancer.
23. Dr. Garraway opined that brain cancer can affect a person's daily living depending on how long the person suffered from it and where it was located. Confusion is one of the possible symptoms which the Deceased suffered from, but she could not state the time or date that would have occurred.

**Witness Statement of Phillippa Johnson filed 22<sup>nd</sup> January 2019**

24. Phillippa Johnson, the last daughter of the Deceased stated that her mother died on 25<sup>th</sup> August 2017 at the age of eighty-seven from brain cancer.
25. Under cross-examination she averred she noticed a decline in her mother's health in early June 2017 as she was unable to feed herself and unable to speak. The Deceased became incapacitated thereafter and ceased talking. In July 2017 she was hospitalized and diagnosed with brain cancer.
26. Under cross-examination the Plaintiff averred to being approached by the Defendant with a document which offered her \$6,000.00 for reimbursement of the funds spent by her to assist the Deceased to renovate the Deceased's triplex, and on the condition that she was to relinquish any ties to the triplex.
27. She told the Defendant that the signature on the document was not her mother's signature and that it was a fraud. She refused to sign the document and the Defendant refused to allow her to take copy of the same. This happened before the hospital admission in June 2017.
28. When attempts were made by family members to visit the Deceased in the hospital, they were not allowed as the Deceased had purportedly issued a Power of Attorney to the Defendant which prevented her and her other siblings from visiting with her. The Defendant had refused to provide them with a copy of the Power of Attorney. Upon the Deceased being released from the hospital, the Defendant became abusive and insisted that the Deceased come home with her. They made several attempts to visit the Deceased but the Defendant would always cause an uproar and the police seemed not to want to get involved. After the Deceased's death, an autopsy was performed to satisfy her and her siblings that no foul play was involved as the Deceased was totally at the mercy of the Defendant prior to her death.

29. The Defendant had been at odds with the Deceased for almost ten years after they had a dispute over the use of their deceased brother's employment death benefit upon his death in October 2007. The Deceased in 2012 had been forced to take legal action against the Defendant to recover those funds which included a binding over order against her. The Deceased's pursuit however was unsuccessful.
30. On 10<sup>th</sup> October 2012 her mother had issued a Power of Attorney to herself and her sister Carolyn Burdine Coakley and had executed the 2012 Will. She was physically and mentally capable at the time. After the Deceased's death the Defendant continued to be belligerent towards them and had refused to bury the Deceased in the manner that she wanted to be buried. While they were mourning their mother at the graveyard, the Defendant had her other siblings served with a summons to bound them over the peace which summons was eventually dismissed by the Magistrate.
31. Soon after their mother's death the Defendant produced the 2017 Will which named her as the Executrix of the Deceased's estate and gifted her the lion's share of the estate. It differed from what the Deceased had communicated to Carolyn and herself. She was familiar with the Deceased's signature and it was not the same as the signature on the 2017 Will and the 2017 Power of Attorney. At the time the documents were executed the Deceased did not have the physical strength or mental capacity to execute or direct the contents.

**Witness Statement of Carolyn Burdine-Coakley filed 24<sup>th</sup> January 2019**

32. Carolyn Burdine-Coakley, is another daughter of the Deceased and one of the Plaintiffs. She stated that on 16<sup>th</sup> May 2017 she had received a call from her mother while she was at home in Florida, asking her to come immediately. The Deceased wanted to see her in person which led her to return to Nassau. Upon her return, the Deceased informed her that she wished to attend the bank to deposit money but could not find her black bag which contained her bank book, passport and identification documents. She was confused and asked us to call the police. The Defendant then went into her room and retrieved the said bag from behind the bed.
33. It seemed as if the Deceased's deterioration happened over night. She would usually speak to the Deceased on a daily basis up to 24<sup>th</sup> June 2017 before she later learnt of her inability to do anything herself.
34. On 25<sup>th</sup> and 26<sup>th</sup> June she called the Deceased's house but no one answered. On 27<sup>th</sup> June she called her daughter, Carolyn, to assist with locating the Deceased who in turn gave her certain information about the Deceased. When she was finally allowed to speak with the Deceased she explained to her mother that she had been trying to make contact with her for two days after the Deceased had told her that she was upset because she did not hear from her. The Deceased admitted that she had fallen down a few days prior and was unable to walk. She then asked to speak to her brother Phillip and overheard the Defendant telling the Deceased that she should inform her that Phillip was getting dressed and then the call abruptly ended.
35. Phillip had informed her that after being requested by her to check the phone that the phone's ringer had been turned off. The Deceased had contacted BTC as she thought that there was something wrong with her phone service. On 28<sup>th</sup> June 2017 she went to

the Defendant's home to see the Deceased but was initially refused entry by the Defendant who called the police. The police asked her to leave. After some convincing, the police let her into the Defendant's home where she found her mother in a weak condition. The Deceased was able to speak to her initially however, her condition quickly deteriorated in the days after. The Defendant allowed her to see the Deceased but watched her like a hawk and did not let her communicate with the Deceased.

36. Dr. Gray, who had been forwarded the Deceased's bloodwork, after reviewing them, urged them to take her to the emergency room as she was badly dehydrated. She attended the Defendant's home to inform her of the doctor's instructions and to take the Deceased to the hospital but the Defendant refused to allow her to talk to the Deceased and stated that she had taken the Deceased to another doctor who had given her a shot. Five days later, after her persistence, the Defendant took the Deceased along with her to the hospital but not before driving around the island for an hour.
37. When they arrived at the hospital, the Defendant asked her to fetch a wheelchair, which she did, but upon her return with the wheelchair the Defendant had left taking the Deceased. She never saw her or her mother again before she left to return to the United States.
38. Her mother had sold property on the eastern end of the island for \$100,000.00 and gave the Defendant access to those funds to assist with completing the home her brother had been building before his death. The Deceased signed the home over to the Defendant and that was where she now lives. The Deceased had asked the Defendant to provide an accounting of her funds that the Defendant had access to. The Defendant had reluctantly turned over the bank book to the Deceased and it was discovered that there was only \$47.00 remaining. Taxes on the triplex had been unpaid for two years.
39. The Deceased at this time rewrote and executed the 2012 Will. The Deceased and the Defendant had been estranged from 2012 until her illness in 2017. They both lived next door to each other.
40. When the Deceased began communicating with the Defendant again, shortly thereafter she began feeling ill as she began complaining about constipation, being light headed, rapid weight loss and a lack of appetite. When the Deceased was hospitalized in July 2017 the Defendant directed hospital personnel not to allow anyone inside to see the Deceased and placed a new Power of Attorney made in 2017 on file to accomplish this. Upon being discharged the Deceased was released to the Defendant who did not allow her or her siblings to see the Deceased.
41. The Deceased's children had to involve the coroner to obtain the release of the Deceased's body for burial. The Defendant served them with a summons to have them bound over to keep the peace at the funeral. The 2017 Will was then produced which appointed the Defendant as executrix and gifted her the lion's share of the Deceased's estate. The signatures on the 2017 Will and 2017 Power of Attorney were not the Deceased's. Her mother did not execute those 2017 documents because she lacked the physical strength or mental capacity to execute them.
42. Under cross-examination Ms. Coakley stated that Ms. Pandora Thompson was the Defendant's friend and not a friend of the Deceased. She admitted that her mother would

give Ms. Pinder funds for helping her until her mother stopped her from coming to the home in 2015 because she found out that Ms. Pinder had been moving items from the Deceased's home.

43. She provided details of the nature, quality and quantity of her visits from Florida to see her mother.
44. She maintained that her mother and the Defendant were estranged for about 5 years until 2017. Even though the Deceased and Defendant's homes were near each other, the Defendant did not visit until late in 2016/2017.
45. When she visited in 2016/2017 she stayed at her mother's home or the Marriott hotel She discovered around the 25<sup>th</sup> or 26<sup>th</sup> June 2017 that the Defendant had taken their mother to live with her.
46. When she was finally able to see her mother, she was not of her sound mind and was talking out of her head.
47. Her brother, Phillip White, who suffered from sickle cell anemia told her that he was asked to go to Charles Mackey's office to sign something. He said that he understood that some money was to be given to Philippa Johnson. He also told her that the people from Mr. Mackey's office came down to them on the street. They did not go in the office.
48. In re-examination she averred that the 2012 Power of Attorney was executed in the law office of Hope Strachan and only became operative after their mother had been admitted to ICU.
49. The Defendant called the police for her when she was trying to see her mother. The police allowed her in the home. Her mother was disoriented and could not get up off the toilet.
50. The photograph of her mother in the hospital was taken by her and showed her condition after the Will was executed on July 22<sup>nd</sup> 2017.

**Witness Statement of Candese Rolle filed 15<sup>th</sup> January 2020**

51. Ms. Rolle is the daughter of the first named Plaintiff and the granddaughter of the Deceased. She averred in her evidence in chief that she was asked by her mother to go and check on the Deceased on the morning of the 26<sup>th</sup> June 2017 as her mother had been attempting to call the Deceased for two days without success.
52. Upon her arrival at the Deceased's home, she met the Defendant feeding her and then also discovered that the Deceased needed assistance when eating and also could not stand or walk on her own as the Defendant had asked her to help her walk the Deceased to her home.
53. In cross-examination she averred that her grandmother wanted to say something but could not get it out. Usually she would say something to her but she did not answer her at all.
54. Phillip White was present when she arrived and he did not assist the Deceased in going from her house to the Defendant's home.

## Defendant's Evidence

### Witness Statement of Helen Louise Pinder filed 18<sup>th</sup> June 2020

55. Ms. Pinder, by her evidence in chief, averred that she was the cousin of the Plaintiffs and the Defendant through marriage and stated that the Defendant was the tenth of eleven children. She exclaimed that she had had a close relationship with the Deceased, even before she got married to her nephew in 1993. Ms. Pinder averred that the Deceased was a happy person, outspoken and loved to give advice and added that if anyone had a problem, the Deceased would tell them how to resolve it. She and the Deceased had many conversations as they spoke twice a day and that she confided in the Deceased.
56. Ms. Pinder further averred that she would sometimes sleep by the Deceased's home where she and Phillip lived and also at the Defendant's home. . She would help to clean the Deceased's home, wash the dishes and make up the beds. Ms. Pinder added that while it was not a paid job, sometimes the Deceased would give her a few dollars.
57. Ms. Pinder claimed that up until the time of the Deceased's death, she was of sound mind. She added that many times they went driving to Kentucky Fried Chicken, to pay bills or just for a drive. Ms. Pinder explained that the Deceased always drove them around even up until she was hospitalized and that it was not until she could not stand properly that she stopped driving. The Deceased cooked and baked often and also helped with cleaning the yard, planting trees and cutting down bananas and added that they cleaned the yard regularly, including the properties owned by the Plaintiffs.
58. Under cross-examination she denied taking anything out of the Deceased's home when she cleaned it.
59. She averred that she was present in the Deceased's home on the 26<sup>th</sup> and 27<sup>th</sup> June but not on the 28<sup>th</sup> June as she had to work. She averred that during those days she had to clean the Deceased, bathe her and turn her. She stated that the Deceased was not doing well because she was sick. She had to feed the Deceased because she was weak and did not have an appetite.
60. The Deceased was driving up to May 2017 even though she was sick. She never talked out of her mind. As a maid in the Princess Margaret Hospital she had access to see the Deceased all the time.
61. She averred that the Defendant never stopped the children from seeing their mother. The Deceased was only sick for a short period before her death, probably like one year.
62. She averred that the Deceased confided in her and said that "she gave all of the children something."
63. She had no knowledge of any Will made in 2012, or any Power of Attorney or about them seeing a lawyer. She also had no knowledge of the Defendant taking her siblings to court or anything about the Defendant spending the Deceased's money.



**Witness Statement of Marilyn DeShanks filed 18<sup>th</sup> June 2020**

64. The Defendant averred that her mother, the Deceased, moved to her home on Haven Road in Redland Acres ten to fifteen years prior to her death. She and the Deceased enjoyed a close relationship and that the Deceased encouraged her to become self employed by pursuing her love of sewing just as the Deceased had loved sewing and the Deceased had regularly assisted her in her business.
65. The Deceased had acquired the property in Redland Acres and had given most of her siblings a piece of the property. The Defendant stated that the First Plaintiff had lived in the United States for over twenty years. She and the Deceased talked regularly and visited each other's home and they confided and assisted each other.
66. In or about 2012, the Deceased initiated but discontinued legal action against her. She stated that the Deceased had told her that it was the Plaintiffs who had coerced her into taking legal action. Shortly thereafter, the First Plaintiff visited New Providence for a class reunion and told the Deceased to give her two pieces of property, which the Deceased did.
67. While the Deceased was in hospital in June 2017, the Deceased informed her that she wanted to prepare a Will and called attorney Charles Mackey in her presence. A few days later, Mr. Mackey attended her home and took instructions from the Deceased and also advised her to have a power of attorney drafted, to which she agreed. At the time the Deceased appeared strong and mentally competent.
68. Mr. Mackey then returned to her home a day or two later, and had the Deceased sign the power of attorney which her brother Phillip White witnessed. She was present when that happened. She had seen the power of attorney which her mother had signed in 2012 and that it was understandable that she would want to update her Power of Attorney because the First Plaintiff resided in the United States and it would be difficult for her and the Second Plaintiff to act jointly.
69. On the 27<sup>th</sup> June, 2017, she and the Deceased along with Delores Rolle and Pandora Thompson, visited Mr. Mackey's office to execute the Will. Ms. Rolle and Ms. Thompson were old friends of the Deceased and as such, she had selected them to witness the Will. The Defendant recalled that when she executed the Will, they had gone to a doctor's appointment and they were in the area of Mr. Mackey's office.
70. That they all remained in the car as it would have been difficult for the Deceased and her friends to navigate the stairs. Mr. Mackey came to them and gave the Will to the Deceased, who read it and signed it in the presence of Ms. Rolle and Ms. Thompson. At that time, the Deceased appeared to be of sound mind.
71. On the 21<sup>st</sup> July 2017, the Deceased began to feel ill. She took the Deceased to the hospital and she was discharged about twenty four days later. While the Deceased was in the hospital, she was initially housed in an open area and was later moved to the trauma area. She did not prevent her siblings from visiting the Deceased while she was in the hospital. Francita Brice, one of her siblings, however accosted her in the hospital and they got into an argument.

72. The Deceased was discharged on or about the 14<sup>th</sup> August, 2017 and that the Plaintiffs created a scene because they wanted the Deceased to be discharged to their care. The doctor then asked the Deceased who she wanted to take her home and she told them that she wanted her to take care of her. The Deceased made the decision voluntarily and went to live with her. She further explained that despite the Deceased living in the same yard as her, she had to be more vigilant with her care and as she worked from home she was able to do so. The Deceased was still very active, had a valid driver's license, drove herself and was able to walk unaided. The Deceased was able to express herself and that her mind was very sharp.
73. In June 2017 or thereabout, she had a visit from Social Services, which was as a result of information received from another sibling Angie Smith, who claimed that she was neglecting her mother. There were three visits from the social worker who was satisfied that she was taking good care of the Deceased and that she was not being neglected. This was just one of a number of attacks from her siblings.
74. She recalled the Second Plaintiff saying how stupid her brother Phillip was as he had witnessed the power of attorney. She believed that he was harassed and ridiculed by the Plaintiffs which is why he probably prepared a witness statement on behalf of the Plaintiffs. Ms. Helen Pinder was always with the Deceased and that she assisted her tremendously when she needed to be away from the Deceased to run errands or conduct her personal business.
75. The Deceased died on the 25<sup>th</sup> August 2017 due to a mass at the base of her brain. Prior to the Deceased's death, she had taken the Deceased for an MRI on the 16<sup>th</sup> August, 2017. The Deceased died at her home. The police and the coroner came and an autopsy was subsequently performed. The Plaintiffs spread rumors that she had poisoned the Deceased. The Deceased had informed her about her burial wishes however, her siblings wanted to do what they wished and she relented because they were abusive and hostile towards her.
76. She knew the Deceased to sign or write her name in different ways. She explained that her signature on her driver's licence issued the 19<sup>th</sup> December 2016, contained a different signature from that on her Will and Power of Attorney.
77. Under cross-examination the Defendant did not recall the Deceased asking Ms. Pinder to stop working in her home because of stealing. Ms. Pinder sometime worked full days and was consistent in coming to help the Deceased.
78. The Deceased still drove up to May 2017. She would sometimes feel weak in her legs, and sometimes would not have any appetite, but it was not often that she had to feed her mother.
79. She did not recall that Ms, Rolle had to help dress and assist the Deceased to walk over to her home.
80. There were numerous incidents between her siblings and herself. She therefore had them all bound over at the same time. Her siblings fabricated the story of her denying them access to her mother.

81. She admitted that she had an agreement with the Deceased to use the funds on the account and she did provide her with an accounting of the funds used.
82. She denied having the keys for her mother's various properties and Jeep, nor did she collect any rents, despite the letters shown to her by the Plaintiffs. Her mother made up the story about her taking the funds.
83. She responded to the letter dated 27<sup>th</sup> November 2012 and confirmed that all the funds were used to complete the house as instructed by her mother.
84. She was unaware of the Power of Attorney issued in November 2012 in favor of the Plaintiffs. She also was unaware of the existence of the 2012 Will.
85. She was unaware of the exact date that the Deceased called Mr. Mackey, but she and her deceased brother Phillip were present when he came.
86. When referred to her witness statement where she had stated that she had seen a copy of the 2012 Power of Attorney, the Defendant then stated that her mother told her about the Power of Attorney.
87. Mr. Mackey had worked for the Deceased for some time prior to this. He had written a letter for the Deceased when her brother died in 2007/2008 which stated that one of her sisters had taken her brother's funds.
88. She denied speaking to Mr. Mackey about anything to be inserted in the 2017 Power of Attorney or the 2017 Will. She maintained that the Deceased told Mr. Mackey everything she wanted.
89. Both witnesses were friends of her mother. Ms. Thompson was also her friend but not Ms. Rolle.
90. She maintained that the 2017 Power of Attorney was executed at the Deceased's home and not at Mr. Mackey's office as Phillip White averred. She could not explain why he only brought the Power of Attorney to the house and not the Will.
91. She denied telling her brother that if he signed the document he would get \$6,000.00.
92. She denied going up to Mr. Mackey's office and maintained that he came downstairs with a bible. Her mother swore on the bible along with the witnesses. Her mother was in the rear of the car and Mr. Mackey gave her a book to press on along with a pen to sign her name. Ms. Thompson signed after the Deceased and then Ms. Rolle who was sitting in the front of the car with her.
93. She was unable to speak to any of the findings of the handwriting expert as to the inconsistencies in the signatures on the 2017 Will and the 2017 Power of Attorney. She denied signing the 2017 Will on behalf of her mother.
94. She maintained that her brother signed the Power of Attorney at their mother's house and not at Mr. Mackey's office. She denied giving the Second named Plaintiff any document to sign in order to get \$6,000.00.

95. She relied on what the lawyer said about her faculties. She was not aware of her mother being unable to do anything physically or her being unable to deal with her legal affairs.
96. She denied using the Power of Attorney to prevent her siblings from seeing their mother. She also denied that her mother was ill when she signed the Power of Attorney.
97. All of her nine siblings alive at her mother's death were in "cahoots" against her.
98. In re-examination she maintained that the First named Plaintiff and another sister Francita Brice's son knocked on the wrong door and their behavior put her in fear for her life, hence the reason she called the police.
99. Her mother assisted her in completing the construction of the building which had been started by her deceased brother Godfrey McQuay. Her mother sold a piece of property she owned in Yamacraw and the funds were used to complete the house.

**Witness Statement of Delores Rolle filed 12<sup>th</sup> February 2019**

100. Ms. Rolle stated that she knew the Deceased for roughly nineteen years as they were conferees and had developed a close bond. On 27<sup>th</sup> June 2017, she along with the Deceased, attended the office of Charles Mackey & Co. to witness the signing of the Deceased's last Will and testament. The Deceased signed the document in the presence of three other persons and she saw the testator affix her signature at the end of the document. The Deceased appeared to be of a sound and coherent mind and there were at least two attesting witnesses, herself and Mrs. Pandora Thompson.
101. In cross-examination she admitted to being friends with the Defendant and friendly with the Deceased. She did not know the Deceased's other children. She used to visit the Deceased frequently and she knew Helen Pinder. Once she moved from Soldier Road to Dignity Gardens, she saw the Deceased less frequently but would go and see her when the Deceased called her.
102. She maintained that the Deceased was in "good condition" and could walk and talk. She did not notice her having to be helped in any way.
103. She was asked by the Deceased to go with her but she did not know what for. She had been visiting her that day, and the following day the Defendant picked her up with the Deceased in the car.
104. She described her version of the sequence of events surrounding the signing of the Will. The Defendant then took her home.

**Witness Statement of Charles Mackey filed 18<sup>th</sup> March 2019**

105. Mr. Mackey, an Attorney averred that he met the Deceased about twenty or more years ago when she first visited his office to engage his legal services. Since then, he would have been in contact with her from time to time, concerning her legal matters, up to her

death, on or about August 2017. In June 2017, the Deceased had messaged him to say that she wanted to see him and requested that he visit her at her residence.

106. He went to her residence, where she informed him that she wished to have a Will drawn up and that she wanted her daughter, the Defendant, to handle her business in the meantime. He informed her that he would be able to draft the Will and that she would need a power of attorney to allow the Defendant to conduct her business. Consequently, the Deceased instructed him to draft both the power of attorney and the Will. The Defendant and the Deceased's son, Phillip, were present when he visited.
107. The Deceased gave him full and detailed instructions as to her assets and how they should be distributed in her Will. This was done in the presence of the Defendant and Phillip. He subsequently drafted the power of attorney for the Deceased and attended her residence to obtain her signature, which was witnessed by Philip and in the presence of the Defendant. About a day later, the Deceased, the Defendant and Mrs. Thompson visited his office to execute the Will.
108. The ladies arrived in a car driven by the Defendant. However, because his office is located on the second floor of a building, the Deceased was unable to climb the stairs due to her ill health. As a result, he went downstairs to the street. The Deceased, the Defendant, Ms. Rolle and Mrs. Thompson were in the car when the Deceased executed her Will by signing the document in the presence of the two aforementioned witnesses who also signed their names as witnesses.
109. He concluded that, at all time during the instructions and subsequent signing of both the power of attorney and the Will, the Deceased appeared to be quite coherent and able to understand her actions.
110. Under cross-examination, Mr. Mackey admitted to preparing the Will and the Power of Attorney and confirmed that the documents in evidence were those he prepared. He also performed legal services for the Defendant as well.
111. When he performed legal services for the Deceased, they would usually be done in his office. She would come by herself to obtain these services.
112. The message that the Deceased needed to see him was relayed by the Defendant and he was told to come to her home. This was the first time that he would have gone to her home. He did not recall the specific layout of the buildings on the property but maintained that he visited the Deceased there.
113. The Deceased did not tell him that she had an existing Will or that she had an existing Power of Attorney.
114. He noticed that she had become frail, and he did not see her walk while he was there. The visit lasted approximately two hours. She had no documents with her relating to her assets. She never discussed with him having any legal issue with the Defendant.
115. He did recall discussing the issue of reimbursing one of the children \$6,000.00 but does not recall when the discussion took place but knew that both the Defendant and the Deceased were present.

116. He then admitted that he could not recall signing the Power of Attorney in the street in front of his office but his recollection was that it was executed at the house. He accepted that the execution of the Power or Attorney would enable the Defendant to reimburse the second named Plaintiff the monies owed her.

117. When pressed as to the sequence of events relating to the execution of the Will, he indicated that the Will was read to her the day she signed the power but the Will could not be executed because the witnesses were not present. They came the next day. He said that he saw them and he said he did not recall looking down to seeing who was actually signing. Once it was signed by all it was given to him.

### **Witness Statement of Mrs. Pandora Thompson filed 12<sup>th</sup> February 2019**

118. Ms. Thompson averred that she knew the Deceased for approximately twenty years as she has been a loyal customer of the Deceased's business and they became friends. On the 27<sup>th</sup> June 2017, at the request of the Deceased, she attended the office of Charles Mackey & Co., to witness the signing of the Deceased's Will, which she signed in the presence of herself and three other individuals. She confirmed that she was present and saw the testatrix affix her signature at the end of the Will.

119. She further averred that there were at least two attesting witnesses including herself, in addition to Ms. Rolle at the Deceased's request. Ms. Thompson continued that at the time the testator signed the Will, she appeared to be of a sound and coherent mind.

120. Under cross-examination she admitted to not visiting the Deceased for some time but did visit her on two different occasions at the hospital a few months before she signed her 2017 Will.

121. She had not visited the Deceased on the 26<sup>th</sup> June. On the 27<sup>th</sup> June the Defendant and the Deceased came to her job to ask her to go and witness the 2017 Will.

122. In her recounting the sequence of events surrounding the execution of the Will, she recalled having to sign twice.

123. The Defendant did not call her to witness the Will. They just appeared at her job and asked her.

124. She did not know Mr. Mackey but he read the contents of the Will to the Deceased. It took less than five minutes.

## **SUBMISSIONS**

### **Plaintiffs' Submissions**

125. The Plaintiffs contended that where a Will has been executed pursuant to the provisions of the Wills Act, when a question in relation to presumption of irregularity arises there are various rules which establishes who bears the burden of proving the validity of the Will.

126. The burden of proof for testamentary capacity was summarized by Briggs J in **Key & another v Key and others [2010] EWHC 408 (Ch)**: -

“20 As regards mental capacity the burden of proof was summarized by Briggs J in **Key & another v Key and others [2010] EWHC 408 (Ch)** where he said:

“The burden of proof in relation to testamentary capacity is subject to the following rules:

- (i) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then a court will presume capacity.
- (ii) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity.
- (iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity nonetheless.”

127. By the 26<sup>th</sup> June 2017 Power of Attorney, it was stated that the Deceased was unable to deal with certain physical and legal affairs. Such a statement required that Mr. Mackey act in accordance with the golden rule and to call a physician to examine the Deceased in order to determine her true condition or to satisfy himself as to the veracity of what he was reciting in the Power of Attorney which he failed to do. The validity of the 27<sup>th</sup> June Will was called into question. The Power of Attorney was prepared by an attorney who represented both the Deceased and the Defendant at the relevant time.

128. The Plaintiff’s diagnosis a month after executing the 27<sup>th</sup> June Will was something that would have taken time to develop and she probably would have been experiencing symptoms when the Will was executed. In early June 2017, the Plaintiff’s daughter stated that the Deceased was being spoon fed and that her speech was unusual. Her mental and physical health was called into question.

129. In **Cooper Deceased [2005] EWHC 2389 (Ch)** Sonia Proudman QC sitting as a Deputy High Court Judge stated: -

“The first issue I have to decide is, whether Mrs. Cooper had testamentary capacity when she executed the 2001 Will on 11 August, 2001. The Claimants allege that she did not. The Defendants accept that the evidential burden is on them, as the propounders of the 2001 Will to prove affirmatively that she did. To use Cockburn CJ’s classic formulation in **Banks v Goodfellow (1870) LR 5 QB 549 at 565**:

“It is essential...that a testator shall understand the nature of his act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he might give effect”

The Claimants point to Mrs. Cooper’s old age, terminal illness and physical frailty, the fact that Mr. Webster had not previously met Mrs. Cooper and the fact that he took his original detailed instructions from Mr. Emery. In these circumstances, they say in effect that Mr. Webster’s evidence of capacity should be rejected. He should have arranged for the will to be witnessed by a doctor who had made a formal and documented assessment of the capacity and understanding of the Testatrix; the so-called “golden but tactless rule” described by Templeman J in **Kenward v Adams The Times 29 November 1975.**”

130. Formal execution did not prove that the Testatrix knew and approved the contents of a Will and the onus rested on the Defendants to establish such knowledge and approval affirmatively.

131. The Plaintiffs relied on the doctrine of righteousness of the transaction. In **Michael Fuller v Strum [2001] EWCA 1879** Gibson LJ stated: -

“Probate proceedings peculiarly pose problems for the court because the protagonist, the testator, is dead and those who wish to challenge the will are often not able to give evidence of the circumstances of the will. The doctrine of ‘the righteousness of the transaction’ whereby the law places a burden on the propounder of the will, in circumstances where the suspicion of the court is aroused, to prove affirmatively that the deceased knew and approved of the will which he was executing, is a salutary one which enables the court in an appropriate case properly to hold that the burden has not been discharged.

But ‘the righteousness of the transaction’ is perhaps an unfortunate term, suggestive as it is that some moral judgment by the court is required. What is involved is simply the satisfaction of the test of knowledge and approval, but the court insists that, given that suspicion, it must be the more clearly shown that the deceased knew and approved the contents of the will so that the suspicion is dispelled. Suspicion may be aroused in varying degrees, depending on the circumstances, and what is needed to dispel the suspicion will vary accordingly. In the ordinary probate case knowledge and approval are established by the propounder of the will proving the testamentary capacity of the deceased and the due execution of the will, from which the court will infer that knowledge and approval. But in a case where the circumstances are such as to arouse the suspicion of the court the propounder must prove affirmatively that knowledge and approval so as to satisfy the court that the will represents the wishes of the deceased. All the relevant circumstances will be scrutinised by the court which will be ‘vigilant and jealous’ in examining the evidence in support of the will (*Barry v Butlin* (1838) 2 Moo PC 480 at 483, 12 ER 1089 at 1090 per Parke B).”

132. The failure to follow the rule to ask the testator about her previous will in order to consider her new disposition was important to the process of determining whether the Deceased approved of the Will's content. In order to have testamentary capacity a testator must be able to understand the effect of his wishes being carried out at his death, the extent of the property which he was disposing of and the nature of the claims.

133. It is an admission by Mr. Mackey that he knowingly made up a legal document containing falsified information. The court is now tasked with the decision as to whether to ignore the contents of the Power of Attorney and rely on Mr. Mackey's verbal assertions before the court as truth or to trust the contents of the recital paragraph as truthful and Mr. Mackey's assertions in court as being false. In any event the issue goes to his credibility as a witness.

134. The same recital in the Power of Attorney not only calls into question the mental capacity but also the physical capacity of the Deceased when she signed the Will.

135. What was revealed in her autopsy should not be dismissed and in fact is instructive as to the extent of her condition upon the signing of the Power of Attorney and the 2017 Will.



136. She was diagnosed as suffering from a Left occipital lobe lesion with cerebral oedema less than one month after signing the Power of Attorney and the 2017 Will.
137. Her condition was diagnosed as more chronic than acute meaning that it had taken some time to develop rather than an acute case which could develop within twenty-four to forty-eight hours which means that the Testatrix would have had the condition on the day that she signed the Power of Attorney and the 2017 Will and would have more likely that not been suffering the symptoms which Dr. Garraway described as including headaches, nausea, lethargy, inability to do activities of daily living and normal activities.
138. The evidence of the Plaintiff, Caroline Burdine Coakley, Candese Kemp and of Helen Pinder suggests that the Testatrix was experiencing some of the symptoms of her condition on the days that she purportedly executed the Power of Attorney and the 2017 Will. Again, this raises issues of not only her physical ability to execute the documents but also her mental capacity to do so.
139. Based on the testimony of the Plaintiff, Phillippa Johnson when she visited her mother in early June 2017 she was being spoon fed by the Defendant and in the Testatrix responding to her greeting her speech was unusual and she (Phillippa) could not understand what she was saying.
140. Candese Kemp upon visiting the Testatrix on 26<sup>th</sup> June, 2017, stated that her grandmother, the Testatrix had to be fed and physically assisted with walking, while the First named Plaintiff said in her testimony that from December of 2016 she became concerned that her mother was complaining of dizziness.
141. More significantly, she said that when she visited the Testatrix on the 28<sup>th</sup> day of June, 2017 her mother seemed disoriented.
142. The Defendant's witness Delores Rolle said that no less than the Defendant herself during a telephone conversation called her and told her that she had to feed her mother and that the Testatrix used to complain to her that her hand used to hurt her.
143. In all the circumstances it is clear that the physical and mental capacity of the testatrix is in question. As it relates to the evidence of the forensic handwriting examiner the question must be asked as to whether given the health condition of the Testatrix, she was physically capable of executing the Will at all, but more significantly in the strong manner as appears on the face of the Will and demonstrated by the forensic examiner.

### **Defendant's Submissions**

144. The Defendant contended that the evidence presented proved that the 2017 Will complied with the requirements of the Wills Act 2002 as it was duly executed by the testatrix who was of sound mind, and in the presence of two witnesses. There was no duress and nothing to excite the suspicion of the court.
145. In 2017 Ms. White was 87 years old. There is the evidence of

1. Attorney Mr. Charles Mackey who was called to the Bahamas Bar in 1975 and had known Ms. Pinder-White for some 20 years and his observation that Ms. White had all her faculties.
  2. The witnesses to the will, Ms. Pandora Thompson, and Ms. Delores Rolle that on the day they witnessed Ms. White sign the will she appeared and acted normal.
  3. There is no medical evidence that the deceased suffered from any incapacity or illness that would have a deleterious effect on her mental capacity at the time of the execution of the will.
146. The expert witness opined that it was very possible that the Deceased did not sign the 2017 Will. She further opined that more contemporaneous specimen signatures should be submitted before a full elimination opinion can be rendered.
147. The expert also opined "there were insufficient similarities to determine if the Power of Attorney and 2017 Will were written by Marilyn Deshanks." Ms. Flores evidence can thus be summed up:
1. *I am pretty sure that Ms, White did not sign the document*
  2. *I base that on some specimens that were not as recent as I would like*
  3. *I think someone else signed the will but I do not think that person was the Defendant.*
148. The Defendant's evidence is that Ms. White did sign the 2017 Will. She submits that Ms. White signed or wrote her name in different ways. She produced the last two driver's licences in support of this submission, which the expert witness stated that she rarely accepts because of how they are signed electronically.
149. The Defendant also submitted that the evidence of all of the Defendant's witnesses stated that they were present when the Deceased signed the document.
150. The Court's main issue for determination was whether the 2017 Will was validly executed. As held in **The Matter of the Application of Theresa Woodside the Executrix of the Late Bernard Woodside v Woodside [2014] 1 BHS J No. 71** where Barnett CJ (as he then was) relied on **Couser v Courser [1996] 1 WLR 1301** which stated: -

**"Section 9 of the Act of 1837 is clearly, as now slightly redrawn by the substitution of the section, directed in the first place to creating the safeguard that there shall be two witnesses and the further safeguard, and it is a significant safeguard, that the two witnesses must both at the same time see the testator either sign or acknowledge his signature on the will. There must be a point in time, therefore, when all parties to the transaction, the two witnesses and (most importantly) the testator are concerned in it together simultaneously, but the evidencing of their joint activity can be made subsequently and separately.**

**Section 9 seeks, therefore, to avoid formalities and technicalities but nevertheless to preserve the essential safeguard against fraud of two witnesses and of the two witnesses having to function together with the testator albeit that they may subsequently evidence what they have done by each witness acknowledging his or her respective signature.**

Barnett CJ also stated: -

**“20 Halsbury Laws of England (4<sup>th</sup> ed) para 310 summarizing the position states:**

**A testator must either sign his will or acknowledge his signature in the presence of two or more witnesses present at the same time. It is not necessary for a testator to say, “this is my signature”; acknowledgement may be by gesture, it may be made in answer to a question and production of a will with a signature on it and a request that it be witnessed may be sufficient. The witnesses must however see or have an opportunity of seeing the signature of the testator and if what takes place involves an acknowledgement by the testator that the signature is his, that is enough.**

151. The Plaintiffs were bound by their pleadings and did not make any allegation regarding the mental capacity of the Deceased nor any allegations of duress, undue influence or physical infirmity as required by **Order 68 rule 9 (3) of the Rules of the Supreme Court (“RSC”)** which stated: -

**“(3) Without prejudice to Order 18, rule 6, any party who pleads that at the time when a will, the subject of the action, was alleged to have been executed the testator did not know and approve of its contents must specify the nature of the case on which he intends to rely, and no allegation in support of that plea which would be relevant in support of any of the following other pleas, that is to say —**

**(a) that the will was not duly executed;**

**(b) that at the time of the execution of the will the testator was not of sound mind, memory and understanding; and**

**(c) that the execution of the will was obtained by undue influence or fraud, shall be made by that party unless that other plea is also pleaded.”**

152. By **Order 18 rule 12 (1) of the RSC** it was stated: -

**“12. (1) Subject to paragraph (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words —**

**(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and**

**(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention of other condition of mind except knowledge, particulars of the facts on which the party relies.”**

153. In **Sheryl Ferguson v Roosavelt Dawkins SCCivApp No. 38 of 2019**, Evans JA discussed Order 18 rule 12 of the RSC and commended the case as instructive to the Court’s approach to the pleadings: -

**“The respondent/plaintiff’s Statement of Claim, however, did not particularize undue influence as the basis of his claim. Instead he particularized the deceased’s age, memory loss and dementia in addition to her not obtaining independent legal advice. As such, according to the Rules this was all the trial judge could have had regard. Once he determined that the respondent/plaintiff had not satisfied him of the mental incapacity of the deceased he ought to have dismissed the action as there was nothing pleaded or proved which raised the presumption of undue influence thereby shifting the burden to the appellant/defendant to prove that the transactions were not the result of undue influence.”**

154. In **Mona Maria McKenzie-Culmer v William Taylor et al 2016/PRO/cpr/00047** Newton J stated: -

**“the test (according to Lord Wilberforce in *Lucky v Tewari* (1965) 8 WLR) is that the evidence which gives rise to suspicion must create a real doubt whether the testator knew and approved of the contents of the will. The burden lies on the Plaintiff to excite the suspicion of the court.”**

155. In *Rolle v Ferguson* [2013] 2 BHS J No. 12, Adderley JA discussed the burden of proof with respect to mental capacity which was laid out by Briggs J in *Key & another v Key and others* [2010] EWHC 408 (Ch): -

**“20 As regards mental capacity the burden of proof was summarized by Briggs J in *Key & another v Key and others* [2010] EWHC 408 (Ch) where he said:**

**“The burden of proof in relation to testamentary capacity is subject to the following rules:**

- (iv) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then a court will presume capacity.**
- (v) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity.**
- (vi) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity nonetheless.”**

156. There was no medical evidence that the Deceased suffered from any incapacity or illness that would have a deleterious effect on her mental capacity at the time of the execution of the 2017 Will. The forensic document examiner stated that the Deceased probably did not sign the 2017 Will and would not rely on a 2017 expired driver’s licence but had included a 2005 driver’s license as a part of her specimen for her opinion.

157. Mr. Mackey had read the contents of the 2017 Will to the Deceased a day prior to its execution and on the day it was executed he took the document to the car which she and the witnesses were in. She signed in front of the witnesses and then the witnesses signed.

## **DECISION**

158. The Deceased executed a Will in October of 2012 and purportedly another on 27<sup>th</sup> June 2017. The Plaintiffs contend that the latter Will was not executed by the Deceased, that it did not display the true intentions of the Deceased and that it was executed by undue influence and under suspicious circumstances all surrounding the actions of the Defendant.

159. A little over a month after the 2017 Will was executed, the Deceased was determined to have metastatic brain cancer. This finding was made upon an autopsy performed at her death. Further the medical evidence of the tests performed when the Deceased was hospitalized in July of 2017 reflected a brain lesion which Dr. Garraway considered a chronic rather than acute condition.

160. The Defendant submits that the Court is limited to what it can determine based on the Pleadings. She alleges that the Plaintiffs only pleaded that the will was not executed by the Deceased.

161. Upon review of the Statement of Claim the Plaintiffs pleaded:-

1. **“The Plaintiffs are the Intended Executrices of the Will of Alfreda White deceased of #12 Haven Road of the Southern District of the Island of New Providence, made on the 10<sup>th</sup> day of October, A.D., 2012.**
2. **The Defendant is the intended Executrix of a purported Will of Alfreda Pinder White aforesaid made on the 27<sup>th</sup> day of June A.D., 2017.**
3. **The Deceased died on the 25<sup>th</sup> day of August, A.D., 2017.**
4. **The Plaintiff submitted the Will dated 10<sup>th</sup> day of October, A.D., 2012 for a grant of Probate from the Registrar of the Supreme Court.**
5. **The Defendant submitted the purported Will dated 27<sup>th</sup> day of June, A.D., 2017 for a grant of Probate from the Registrar of the Supreme Court sometime thereafter.**
6. **There is a caveat lodged against the alleged 2017 Will and evidence exists which shows that it was not executed by the deceased in that:**
  - i. **The said deceased never gave any instruction for the alleged will and the alleged will was not read over or properly explained to her, nor did she read it herself;**
  - ii. **It was not executed by her or it was executed and she was not aware of its nature and effect;**
  - iii. **She was incapable of comprehending or appreciating its provisions and effect for the reasons pleaded herein.**
7. **No grant was made with respect to the Will dated 10<sup>th</sup> day of October, A.D., 2012 or the purported Will dated 27<sup>th</sup> day of June, A.D., 2017 by the Registrar of the Supreme Court.**
8. **The Defendant has intermeddled with the Estate of the Deceased without any accounting to the Plaintiffs.**
9. **As a result of the actions of the Defendant the Plaintiff have been deprived of their right to a grant of Probate and the beneficiaries have been deprived of their share of the Estates assets.**

162. In the Prayer for Relief the Plaintiffs sought:-

- i. A Declaration that the Will of 10<sup>th</sup> day of October, A.D., 2012 is the true last Will and testament of the Deceased.
- ii. An order that the Will dated 10<sup>th</sup> day of October, A.D., 2012 be pronounced in solemn form and for a grant of probate of the said Will or Letters of Administration thereof be issued to the Plaintiff.
- iii. That the force and validity of the purported Will dated the 27<sup>th</sup> day of June, A.D., 2017 be pronounced against.
- iv. A declaration that the Pretended Will dated 27<sup>th</sup> day of June, A.D., 2017 is invalid and of no effect, was not executed by the Deceased otherwise cannot be enforced.
- v. An injunction to restrain the Defendants and their servants, agents and any other person from dealing with the assets of the estate pending the issuance of a grant of probate or letters of administration by, or further order of the court.
- vi. An accounting of all monies received and disbursed by the Defendant and all assets disposed of by their or under their direction or by their consent, and an accounting of the proceeds thereof.
- vii. An inquiry to determine the assets of the estate.
- viii. Interest
- ix. Costs

x. Further or other relief.

163. Order 68 Rule 9 (3) of the Rules of the Supreme Court states:-

**“(3) Without prejudice to Order 18, rule 6, any party who pleads that at the time when a will, the subject of the action, was alleged to have been executed the testator did not know and approve of its contents must specify the nature of the case on which he intends to rely, and no allegation in support of that plea which he intends to rely, and no allegation in support of that plea which would be relevant in support of any of the following other pleas, that is to say-**

- (a) That the will was not duly executed;**
- (b) That at the time of the execution of the will the testator was not of sound mind, memory and understanding; and**
- (c) That the execution of the will was obtained by undue influence or fraud**

**shall be made by that party unless that other plea is also pleaded.**

164. Order 18 Rule 12 (1) states:

**“(1) Subject to paragraph (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words-**

- (a) Particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and**
- (b) Where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.**

165. Upon a review of the Statement of Claim, I am satisfied that the Plaintiffs had pleaded that

- i. the 2017 Will was not executed by the Deceased
- ii. the Deceased was unaware of its nature and effect
- iii. the Deceased was incapable of comprehending or appreciating the provisions and effects of the 2017 Will.
- iv. The Deceased never gave instructions for the Will nor was it properly explained to her.

These allegations would satisfy Order 68 Rule 9 (a) and (b). There was no pleading which related to undue influence and hence as the Plaintiffs are bound by their pleadings and cannot raise the issue for the court to consider and determine.

166. By Paragraph 7 of the Defence, the Defendant denies the allegations set out in Paragraph 6 of the Statement of Claim and hence the issues were joined.

167. Based on the above I am satisfied that the Plaintiff can lead evidence and submissions as to their allegations as set out in Paragraph 165 above.

168. The Deceased is the mother of both Plaintiffs and the Defendant. She was living with the Defendant when she allegedly executed the 2017 Will. It is disputed that the Defendant alienated the Plaintiffs from their mother. It is accepted that the First named Plaintiff attempted to see her mother after not being able to reach her by telephone and when she

came to Nassau to see her mother there was an altercation between herself and the Defendant where the police was called, but she was allowed eventually to see her mother.

169. The Court, after a review of all the evidence and submissions, must determine whether the Will was executed by the Deceased, and if so, whether the Deceased possessed the testamentary capacity to execute the same and whether the Will was executed under suspicious circumstances.

170. Section 5 of the Wills Act Chapter 115 of the Statute Laws of the Bahamas (Wills Act) sets out what is required for a Will to be validly executed. It provides:-

**“5. (1) Subject to section 6, no will is valid unless it is in writing and signed at the foot or end thereof by the testator or by some other person in his presence and by his direction in accordance with subsection (2).**

**(2) The signature of the testator or other person mentioned in subsection (1) is effective if — (a) so far as its position is concerned it satisfies subsection (3); (b) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and (c) each witness either — (i) attests and signs the will; or (ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness), but no form of attestation is necessary nor is publication of the will necessary.**

**(3) So far as regards the position of the signature of the testator, or of the person signing for him — (a) a will is valid if the signature is so placed at, after, following, under, beside or opposite the end of the will that it is apparent on the face of the will that the testator intended to give effect, by the signature, to the writing signed as his will; (b) no will is affected by the circumstances that — (i) the signature does not follow, or is not immediately after, the foot or end of the will; (ii) a blank space intervenes between the concluding word of the will and the signature; (iii) the signature is placed among the words of the testimonium clause or of the clause of attestation or follows or is after or under the clause of attestation, either with or without a blank space intervening, or follows or is after, under or beside the names or one of the names of the subscribing witnesses; (iv) the signature is on a side page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will is written above the signature; or (v) there appears to be sufficient space to contain the signature on or at the bottom of the preceding side, page or other portion of the same paper on which the will is written, and the enumeration of the circumstances in paragraph (b) does not restrict the generality of this subsection, but no signature under this section operates to give effect to any disposition or direction which is underneath or follows it, nor does it give effect to any disposition or direction inserted after the signature is made.**

**(4) No person is a competent witness to the execution of a will if he attests the will in any manner other than by signing his name in his own handwriting.**

**(5) A guide as to the formalities of a will is set out in the First Schedule.**

171. The 2017 Will was in writing and signed by the Deceased. The Deceased's signature was acknowledged in the presence of two witnesses, Ms. Thompson and Ms. Rolle who both signed as witnesses.

came to Nassau to see her mother there was an altercation between herself and the Defendant where the police was called, but she was allowed eventually to see her mother.

169. The Court, after a review of all the evidence and submissions, must determine whether the Will was executed by the Deceased, and if so, whether the Deceased possessed the testamentary capacity to execute the same and whether the Will was executed under suspicious circumstances.

170. Section 5 of the Wills Act Chapter 115 of the Statute Laws of the Bahamas (Wills Act) sets out what is required for a Will to be validly executed. It provides:-

**“5. (1) Subject to section 6, no will is valid unless it is in writing and signed at the foot or end thereof by the testator or by some other person in his presence and by his direction in accordance with subsection (2).**

**(2) The signature of the testator or other person mentioned in subsection (1) is effective if — (a) so far as its position is concerned it satisfies subsection (3); (b) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and (c) each witness either — (i) attests and signs the will; or (ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness), but no form of attestation is necessary nor is publication of the will necessary.**

**(3) So far as regards the position of the signature of the testator, or of the person signing for him — (a) a will is valid if the signature is so placed at, after, following, under, beside or opposite the end of the will that it is apparent on the face of the will that the testator intended to give effect, by the signature, to the writing signed as his will; (b) no will is affected by the circumstances that — (i) the signature does not follow, or is not immediately after, the foot or end of the will; (ii) a blank space intervenes between the concluding word of the will and the signature; (iii) the signature is placed among the words of the testimonium clause or of the clause of attestation or follows or is after or under the clause of attestation, either with or without a blank space intervening, or follows or is after, under or beside the names or one of the names of the subscribing witnesses; (iv) the signature is on a side page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will is written above the signature; or (v) there appears to be sufficient space to contain the signature on or at the bottom of the preceding side, page or other portion of the same paper on which the will is written, and the enumeration of the circumstances in paragraph (b)**

**does not restrict the generality of this subsection, but no signature under this section operates to give effect to any disposition or direction which is underneath or follows it, nor does it give effect to any disposition or direction inserted after the signature is made.**

**(4) No person is a competent witness to the execution of a will if he attests the will in any manner other than by signing his name in his own handwriting.**

**(5) A guide as to the formalities of a will is set out in the First Schedule.**



171. The 2017 Will was in writing and signed by the Deceased. The Deceased's signature was acknowledged in the presence of two witnesses, Ms. Thompson and Ms. Rolle who both signed as witnesses.
172. The burden of proving the Will lies with the party propounding it. In this case, the Defendant. She must satisfy the Court that the document propounded is the last Will of a free and capable testator. This principle was established in **Barry v. Butlin (1838) 2 Moo 480** and subsequently restated in **Tyrell v. Painton and another (1894) P 151**.
173. In **Tyrell v. Painton** LJ Lindley stated  
"In **Barry v. Butlin Parke, B.**, delivering the opinion of the Judicial Committee, said: "The rules of law according to which cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two: the first, that the onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased." The same principle was laid down and acted upon in **Fulton v. Andrew** and **Brown v. Fisher**. None of these cases turned on the plea of fraud. Thomas Painton wrote the will, and it was in favour of his father. The testatrix had omitted him on November 7: had she by the 9th changed her mind?  
  
The rule in **Barry v. Butlin**, **Fulton v. Andrew**, and **Brown v. Fisher** is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will."
174. The Defendant through the evidence of the various witnesses gave evidence as to the sequence of events leading up to the execution of the document which she maintains is the last Will and testament of the Deceased. The one consistent fact is that in all of the circumstances and events leading up to the execution of the Will she was present and she received the lion's share of the estate.
175. The Deceased messaged Mr. Mackey that she needed to see him, he came to the house, took her instructions for a Will and a Power of Attorney. He returned the next day and read the Will to her but did not have her sign it because there were no witnesses. She signed the Power of Attorney at her house. No evidence was led as to how Mr. Mackey was messaged, but I am certain that the Defendant was aware if not responsible for the message.

176. The following day the Defendant drove the Deceased to Mr. Mackey's office after collecting Ms. Rolle and Ms. Pinder. Mr. Mackey came down to the car because he believed that the Deceased was too frail to climb the stairs to his second floor office.
177. There were varied and inconsistent versions of what transpired next, but the Will was signed and witnessed and returned to him.
178. One of the witnesses said he read the Will to the Deceased, Mr. Mackey said he read the Will to the Deceased the day before the execution and not on the day of execution.
179. The Plaintiffs maintained that the Will was not executed by the Deceased and rely on the opinion of the handwriting expert to support their contention.

#### **WHETHER THE 2017 WILL WAS EXECUTED BY THE DECEASED**

180. The Plaintiffs led evidence of the forensic hand writing expert, Ms. Dianne Flores, who was accepted by this Court as an expert on handwriting analysis. Ms. Flores holds a Master of Science degree in Forensic Sciences Administration and is a Diplomate from the Board of Forensic Documents Examiners and her expertise was not challenged in any way.
181. Her opinion evidence was given after she had reviewed ten undisputed documents signed by the Deceased, the 2017 Will, 2017 Power of Attorney as well as the 2017 Lease Agreement. Based on her review of these documents she opined that the Deceased did not sign the 2017 Power of Attorney and that she very probably did not sign the 2017 Will. Further that the 2017 Lease Agreement was not signed by the Deceased and that there were indications that the Lease Agreement was signed by the Defendant who signed as a witness on the same document.
182. Ms. Flores in her opinion did indicate that more contemporaneous specimen signatures should be submitted before a full elimination opinion can be recorded,  
**“however the very probable opinion, following standards in the industry, means that the examiner is “virtually certain” that the questioned signature on the Will was not written by the specimen writer. She stated that “there is strong evidence to suggest that the questioned “Alfreda Pinder White” signature on item Q3-4 (the Will) is a simulation of the authentic signature style of Ms. White as reflected in her specimens K1-10.”** (My emphasis)
183. She further opined that the 2017 Will was physically signed by the same person who signed the 2017 Power of Attorney.
184. The very cogent evidence of this handwriting expert was not countered by any expert evidence of the Defendant. Despite a valiant attempt at testing her evidence, in the absence of any other expert evidence, I am persuaded by this helpful evidence provided by this expert and accept the same. The detail review of her examination could not be refuted.

185. Even though the attesting witnesses gave evidence as to what they maintain took place, I find that the evidence of the expert is equally important and more persuasive. Handwriting expert opinions can be used to prove the execution of a Will as confirmed by Justice Charles in **Lyle Adderley et al v. Michael Adderley et al CPR 00036 of 2016** which I adopt, even where there is evidence of the attesting witnesses.
186. The evidence of the Defendant, Mr. Mackey and the witnesses as to the sequence of events leading up to the execution of the Will was not consistent. I found the evidence of the two witnesses as to what transpired in the car to differ. Mr. Mackey as a senior attorney initially could not recall who instructed him, he could not recall the exact location of where he went to obtain his instructions. More importantly, the fact that he prepared a Power of Attorney the day before the execution of the 2017 Will, which confirmed that the Deceased was unable to manage her legal and financial affairs begs the question as to why he did not then seek to obtain a medical report as to her fitness to execute the Will which he prepared. I did not find his evidence persuasive as there were important pieces of evidence in the chain of events as related by him which were missing including whether he actually saw the Deceased sign the document. His evidence was not consistent, he stated that he saw her sign and then he was not certain that he saw her sign but believed she did. He said that he read the Will over to the Deceased the day before and not on the day she signed it. One of the witnesses said he read it over to the Deceased in the car.
187. Only one of the attesting witnesses recalled signing the Will in duplicate and more importantly only the disputed signatures contained the surname Pinder and none of the undisputed documents did. I accept that the Deceased did not use a hyphenated surname when signing her documents.
188. The Defendant did not produce any documents other than the disputed 2017 Power of Attorney, 2017 Will and the Lease which contained "the Deceased's" signatures which included the surname Pinder. The differences in the framing of certain letters was also persuasive. The driver's licences produced by them were not signed by the Deceased only her initials were used. Even in these documents, Ms. Flores found similarities in the Deceased's formation of letters used in the undisputed documents, and which were different from the 2017 disputed documents.
189. Ms. Flores also accepted that the handwriting of a person may change over the years but there will always be consistency in the formation of letters. The recent driver's licences proved this and I accept this fact.
190. I accordingly find, after reviewing all of the evidence and submissions, that the 2017 Will was not executed by the Deceased. I need not determine who may have executed the 2017 Will but I am satisfied that it was not the Deceased. As a result of this finding, I need not address the further issues of whether the Deceased lacked testamentary capacity or whether the 2017 was issued in suspicious circumstances as these issues would only arise if I found that the Will was executed by the Deceased.
191. I therefore grant the Plaintiffs the following declarations:
1. The 2017 Will is null and void not having been executed by the Deceased.

2. The October 10<sup>th</sup> 2012 Will of the Deceased is the valid last Will and testament of the Deceased.
3. The October 10<sup>th</sup> 2012 Will is to be pronounced in solemn form and a grant of probate issued.
4. An injunction be issued against the Defendant, her servants or agents from dealing with the assets of the estate pending the issuance of the Grant of Probate proving the 2012 Will.
5. An accounting be provided by the Defendant within 90 days to the Plaintiffs as to the monies received and disbursed from the Deceased's estate as well as a listing of all assets disposed of from 26<sup>th</sup> June 2017 to date.
6. The Defendant to deliver to the Plaintiffs all title deeds, both originals and copies belonging to the Deceased forthwith. Should there be a need for execution of any documents to give effect to any of these orders, the Defendant shall execute same within 14 days of this date of the order, failing which the Registrar of the Supreme Court is empowered to execute the same.

192. The Plaintiffs are entitled to  $\frac{3}{4}$  of their costs of this action to be taxed if not agreed.

**Dated this 3<sup>rd</sup> day of February 2023**



**The Hon. Madam Justice G. Diane Stewart**