**COMMONWEALTH OF THE BAHAMAS** **2019**
**IN THE SUPREME COURT** **PRO/NPR/CPR/00035**

**Probate Side**

**IN THE ESTATE** of John Henry Wilson late of Joe Farrington Road in the Eastern District of the Island of New Providence in the Commonwealth of The Bahamas, Deceased.

**BETWEEN**

**JOVAN H. WILSON**

**Plaintiff**

**AND**

**ARLENE WILSON**

**Defendant**

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|---|---|
| **Before:** | **The Hon. Madam Justice G. Diane Stewart** |
| **Appearances:** | **Mr. K. Miles Parker for the Plaintiff** |
| | **Mr. Keod Smith for the Defendant** |
| **Ruling Date:** | **28th April, 2023** |

## REASONS

1. The Court gave its oral judgment and now provides expanded reasons for the same.

2. By a Re-Amended Writ of Summons filed the 6th January 2019, Jovan Wilson, ("the Plaintiff") sought the dismissal of Arlene Wilson's, ("the Defendant") application for Letters of Administration with a Will annexed. The Plaintiff claimed that the Will in question was not the valid Will of Henry Wilson, ("the Deceased").

3. The Plaintiff is the eldest son of the Defendant and the Deceased who died on 4th January 2000. The Defendant is the widow of the Deceased.

4. The Deceased died on 4th January 2000. The Defendant was subsequently granted Letters of Administration on the 20th March 2001 in the estate of the Deceased on the basis that Deceased did not possess a Will at the time of his death. Upon this basis, the Court acceded to her application and granted her Letters of Administration and deemed her to be the Administratrix of the Deceased's estate.

5. The Deceased's estate was comprised inter alia of real property, which included Lot No. 11 of Block 12 Shirley Heights, New Providence and a portion of lot No. 10 of Block 12 Shirley Heights, New Providence and Lot No. 16 of Block Number 49 of Englerston Subdivision. Two (2) commercial plazas were situate on the Shirley Heights Lots and the Englerston Subdivision Lot. These plazas were held in the name of Wilson Real Estate Development Company Ltd of which the Deceased was the beneficial owner.

6. After receiving the grant of Letters of Administration, the Defendant executed various conveyances, transfers, and managed the Deceased's estate under the authority of the Grant.

7. On 7th March 2017, the Defendant applied for a grant of Letters of Administration with a Will annexed, on the grounds that she had found a copy the Will of the Deceased. The Defendant asserted that the Will in question had been previously misplaced, misfiled or lost by the Deceased's Attorney, Mr. Terrance Green. The purported Will in question was dated 4th September 1999, 4 months prior to the death of the Deceased. ("the Will") asserted that the Defendant was the sole beneficiary of the Deceased's estate.

8. On the 7th March 2017 the Defendant commenced an action by Originating Summons seeking an order as the sole beneficiary of the Deceased's estate that the court grant her leave to make an application for letters of administration with the will annexed and to use a copy of the purported Will for the same. On 6th June 2017, the Court ordered that a copy of the Will could be used in the Defendant's application for a grant of Letters of Administration with the Will annexed. In or about April 2019, the application for Letters of Administration with a Will annexed was filed in the court. The Plaintiff is challenging this Will.

9. The Plaintiff claimed that he nor his siblings had any knowledge of the said Will and maintained that it never existed and seeks orders revoking the previous grant and damages for inter alia fraud, breach of fiduciary duty,

breach of trust and orders for an accounting as well as payments over of monies as well as transfer of the properties of the Deceased

10. The parties agreed by an amended Notice of Motion filed on the 6th November 2020 to have the hearing of a preliminary issue heard which would resolve the issues between the parties. The Re-amended Notice of Motion filed by the Defendant seeks an order determining that the will of the Deceased does exist and is valid.

11. There was also an unsuccessful attempt at mediation of this matter.

## PLAINTIFF'S EVIDENCE

12. The Plaintiff averred that prior to the Defendant's application for a grant of Letters of Administration with the Will annexed, he had no knowledge of the existence of this alleged Will, and further asserted that the Will does not exist.

13. Since his father's death there had only been 2 family meetings held with himself, the Defendant and various other family members, to discuss the Deceased's estate. During these meetings the Defendant had maintained that the Deceased did not leave a Will.

14. He declared that the Deceased could not have drafted and executed a Will in the months prior to his death due to the fact that he had suffered from diabetes for several years preceding his death, which had led to the gradual loss of his eyesight.

15. Further due to the loss of the Deceased's eyesight, he had travelled to Jackson Memorial Hospital in Miami in 1998 to seek medical treatment for his failing eyesight. During this trip he suffered a brain aneurysm and thereafter his sight and physical mobility had deteriorated rapidly. While in the hospital after the aneurysm the Deceased was only able to recognize family members by their voices when they would visit him in the hospital.

16. When the Deceased returned home, he was bedridden and once again was only able to recognize family members and other visitors by their voices. From this time due to the loss of vision and physical mobility, the Plaintiff contended that he read the newspaper to the Deceased, took him for walks, and while on these walks he would have to guide his father's steps. He also had to count the Deceased's money as a result of his blindness.

17. During cross-examination the Plaintiff denied that the signature on the Will was his father's and confirmed that the first time that he became aware of the existence of and had sight of the copy of the Will was in this action. He further maintained that the Deceased could not see after suffering the brain aneurysm in Miami and in re-examination he confirmed that the Deceased's eyesight was failing him prior to the Miami trip in 1998, and that he travelled there to have eye surgery but his eyesight further deteriorated and the Deceased could not see when he returned home.

18. The Plaintiff also asserted that the Deceased would not have made the Defendant the sole beneficiary of all of his estate given that the Deceased had named two (2) of his commercial plazas after himself and his brother. The Plaintiff stated that the commercial plazas are named Jovan's Plaza, after himself, and Jemere's Plaza, after his brother.

19. The Plaintiff also maintained that the Deceased could not have signed or created a Will on 20th September 1999, from months prior to his death given that he had lost his vision and did not possess the requisite testamentary capacity.

20. The Plaintiff asserted that during cross-examination of the Defendant, she stated that she was aware of and did in fact have knowledge of the alleged Will prior to the death of the Deceased but had stated under oath that there was no will.

21. The Defendant further conceded under cross examination that under the original Letters of Administration she exercised her power as Administratix to pay the bills of the estate. However, she later stated that she had forgotten about the original Grant of Letters of Administration, when she applied for the second one, with the Will annexed.

*Rochelle Knowles*

22. Ms. Rochelle Knowles is a daughter of the Deceased and the Defendant. She lived in the same house with the Deceased and the Defendant up to his death. During this time Ms. Knowles maintained that the Deceased was in fact blind. She clearly recalled the date that the Deceased suffered the brain aneurysm. She further stated that upon the Deceased's return home in 1998 he no longer slept in the matrimonial bedroom instead slept in a downstairs guest bedroom as it was more accessible due to his physical impairment.

23. From the day that he returned from Miami in 1998, the Deceased was bedridden, and unable to move on his own. As a result he had to be bathed, fed, and have his medicine administered to him.

24. Ms. Knowles also asserted that her sister, Zoie Wilson was well aware of the Deceased's blindness prior to his death as she also resided in the home with them and also worked for the Deceased in his business office situate on Robinson Road.

25. Family members including her aunts Mrs. Kim Moultrie, Mrs. Joyann Thurston, and Mrs. Bernadette Moss would visit the Deceased regularly at the home after he had suffered the brain aneurysm, and they would have had to introduce themselves as he could not see who they were.

26. Since the Deceased's death, there had been two family meetings held at Kim Moultrie's home. During these meetings the Defendant stated that the Deceased did not leave a Will.

27. During cross examination Ms. Knowles reaffirmed that the Deceased returned from Miami blind. She also stated that if you were to hand the Deceased any item, he would not be able to ascertain what the item was or where it came from. The Deceased did not leave a Will, and that the signature attached to the Will in question was not that of the Deceased. She stated that she is able to recognize the signature of the Deceased because over the years he signed many reports cards on her behalf. Additionally, she could accurately identify the Deceased's signature because it was on the documentation for her property. Ms. Knowles was also of the view that the Deceased would not leave all of his property to one person as he loved his children very much.

*Ms. Bernadette Moss*

28. Mrs. Bernadette Moss in her evidence in chief affirmed that Mrs. Arlene Wilson was her blood sister and also that she first became acquainted with the Deceased, John Wilson as a friend of Arlene Wilson and that she knew the Deceased practically as long as Mrs. Wilson had known him.

29. She confirmed that the Deceased operated a few businesses for a living. She frequently visited the Deceased in Florida while he was in the hospital and that he died shortly afterwards, however she was unable to recall the exact date and year. She informed the Court that she didn't really investigate why he was in hospital but she did know that he was not well. Mrs. Moss stated that she visited the Deceased a couple of weeks prior to his death. She was unable to observe what the Deceased ailments were. Mrs. Moss stated that

as far as she could recall the Deceased was able to see and was aware that she was visiting him. Mrs. Moss said that she is certain that the Deceased was aware because he said "I am glad to see you," and "It is so good to see you, Bernie."

30. Mrs. Moss said that she did not communicate with the Deceased after he returned from Florida. She also stated that she was unsure whether the Deceased lost his eyesight prior to his death. She did recall that the Deceased had a tracheotomy and that she noticed indications of this condition when she visited him in the hospital in Florida. She said that the Deceased was able to speak a few words with the tracheotomy, but he did not hold a long conversation. The Deceased only said that he was happy to see her and thanked her for coming. She was unsure of whether the deceased had high blood pressure or diabetes. She believed that the Deceased visit to Florida was to better service his health challenges.

31. Upon being questioned by the Court as to whether the Deceased went to the hospital voluntarily, Ms. Moss stated that she was unsure as to the exact reason why he went to the hospital. She only learned of the Deceased medical situation when Arlene Wilson advised her that he was not doing well and that he was feeling sick and had to be hospitalized. She also stated that while visiting the Deceased in Florida, the Defendant advised her that the Deceased had suffered a brain aneurysm. She further stated that to her knowledge the Deceased had been hospitalized in Florida for a couple of weeks prior to her visit and that she did not remember his coming home after she visited him in Florida. She confirmed that the next time she heard about the Deceased condition it was regarding his death.

*Joyann Thurston*

32. Mrs. Joyann Thurston stated that she recalled the deceased having a tracheotomy. She stated that the Defendant had to deal with the Deceased's ailment as she had to take the tracheotomy tube out and clean it. She did not know what caused the Deceased to require a tracheotomy but only that he had to have it.

33. Mrs. Thurston did not recall whether the Deceased had a tube in his throat when she visited him in Florida. She knew that Arlene Wilson had to clean the tracheotomy tube because Arlene explained the process to her and at times when she went to visit their home Arlene would say she just finished cleaning the tube. She believed that cleaning the tube had something to do with removing mucus from the tube, but that she never saw her actually clean the

tube.

34. When she visited the Deceased he was able to talk by pressing something against his neck and throat. She confirmed that the Deceased was able to see during this time. The Deceased would call her by her name when she entered the room. When she entered the room she would say "This Joy" and he would respond "I know. I know". When she visited the Deceased with her husband, he did not have to introduce himself to the Deceased because he just knew who they were.

35. Mrs. Thurston recalled having a family meeting at her sister Kim Moultrie's house to discuss Mr. Wilson's estate after his death. Mrs. Bernadette Moss, Arlene Wilson and her children except for Zoe Wilson were all present at the family meeting. The purpose of the meeting was to settle any confusion concerning the Deceased estate as they thought that it would be easier to bring everyone together to see how best to deal with the situation. She did not recall whether the Deceased had a Will and that a Will was not discussed at the family meeting.

36. She stated that is was the Defendant who should be in charge of the estate as she was the Deceased's wife and she states that sometimes there are children who want more than others and confirmed that the Deceased did not discuss a Will in either her or her husband's presence.. Mrs. Thurston did not recall the Deceased ever being hospitalized in Nassau after Florida and she did not know the name of the Deceased businesses. She was also unsure of whether the Deceased was the sole owner of these businesses or jointly with his wife Arlene Wilson. She stated that Arlene Wilson's profession prior to the death of the Deceased was a fulltime housewife and her responsibilities included cooking and picking up the children from school. Mrs. Thurston could not recall whether the Deceased had a maid or helper to assist with the Deceased's care while he was ill.

37. Under cross examination she confirmed that her husband would cook for the Deceased and further stated that he had a good appetite and did not have any difficulty eating any of foods. Mrs. Thurston also confirmed that the Deceased, once he returned from Florida was doing much better health wise.

## DEFENDANT'S EVIDENCE

38. The Defendant asserted that from the start of their marriage until the Deceased's death, they each contributed to the various businesses, investments, and purchases of real estate, as respective owners.

39. She maintained that the Will of the Deceased was drafted by the late Terrance Green who was the Attorney of both the Deceased and herself. However, following the drafting of the Will and execution by the Deceased Mr. Green, misplaced, misfiled or lost it, and also after having searched exhaustively for the Will, he was unsuccessful in locating the same.

40. In 2014 after receiving the first grant of Letters of Administration and after the death of Mr. Terrance Green she discovered a copy of the Will among Mr. Green's files. She stated that she always knew of the nature and contents of the Will.

41. Both the Plaintiff and his siblings were aware of the fact that the Deceased had left a will, but they simply never knew the nature and contents of it. She also asserted that she had been entitled to her own properties acquired by her and to her interest in the property of the Deceased as devised under his Will.

42. In response to the Plaintiff's allegations the Defendant averred that the Will was valid and denied that the Deceased died intestate. She further denied that she knowingly or wrongfully or fraudulently deceived the court. She admitted that the Deceased was the owner of the shares which owned the land as outlined in the Plaintiff's Re-Amended Statement of Claim. She also denied that the Plaintiff is or was the sole owner of the estate of the Deceased, or that was she bound to transfer the Deceased's estate over to the Plaintiff or that she committed any breach of trust, breach of fiduciary duty or fraud.

43. The Defendant maintained that the Deceased did in fact possess the mental capacity to create the alleged Will.

*Stephanie Bowleg- McKenzie*

44. Ms. McKenzie an attorney by profession asserted that she was one of the attesting witnesses to the last will and testament of the Deceased. She also maintained that the Deceased did execute the alleged Will by signing his name at the foot of the will, in the presence of both herself and the late Mr. Terrence Green. She did not prepare the will but happened to be in the office when the will was executed. She denied being the lawyer for the Deceased.

45. She asserted that the Deceased did in fact sign the Will. He did not appear to have any issues with his vision. He appeared to have a problem with his

throat as he had to press something in order to speak.

46. She was not directly involved in the application for the grant of the letters of administration with the Will annexed, as the application was prepared by Alton McKenzie in her office. She was never the lawyer for the Defendant in the matter of the Will.

*Ms. Zoie Thompson*

47. Ms. Zoie Thompson, the daughter of the Deceased denied that her father was blind before he died. She maintained that he was able to write and had no difficulty explaining himself. He was not able to walk but if held he could walk with difficulty. She did not recall the Plaintiff having to lead the Deceased.

48. Under cross-examination she admitted that her father had difficulty with his vision. After the Deceased had his aneurysm, she visited him three times. He was unable to speak the first two times but on the third time he was able to speak. She confirmed that he had a tracheostomy to assist his breathing, which required cleaning and changing.

49. He came home from the hospital with a patch over one eye, but he had one clear eye. She recalled having to count his money for him as he claimed it was a blur.

50. She and her father talked a lot but he never told her about a will, or asked her to take him to make a will.

51. Terrance Green and the Deceased were close friends. Their offices were next to each other.

52. She was aware of meetings held with the family but she was not invited to one of the meetings and the second meeting did not go well so she left.

53. As far as she was concerned, her father did not have a will.

## ISSUES

54. By the Amended Notice of Motion, the preliminary issues to be determined were:-
    a. Whether the Will was a valid Will and
    b. Whether the Deceased possessed the relevant testamentary capacity to create a Will in September 1999?

c. Can the Grant of Letters of Administration issued to the Defendant be revoked?

## REASONS

55. By oral decision given on the 28th April, 2023, I determined that the Defendant had not satisfied the burden of proof that the will in question was a valid will. The evidence concerning the signature and the legal principle of animus revocandi have not been rebutted or distinguished.

*Validity of the Will*

56.. The Plaintiff asserted that the will was not a valid will.

57. The starting point, as provided in ***Tristam and Coote's Probate Practice 25th edition, page 732*** is:-

> **"At the hearing the court will have to be satisfied by the party propounding the will that it was duly executed, that the testator was of testamentary capacity, and that he knew and approved the contents of the will. For this purpose an affidavit by one of the attesting witnesses will usually be sufficient."**

58. **Barry v Butlin 1838 II Moore P.C. ER 1008** supports the position that the onus is on the party propounding the Will. He must "*satisfy the conscience of the court that the instrument so propounded is the last will and testament of a free and capable testator.*" Parker B provided:-

> **"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. The rules are two: the first that the onus probandi lies in every case upon the party propounding the Will; and he must first satisfy the conscience of the Court that the instrument so propounded is the 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 on it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."**

59. The rule in **Barry v Butlin** applies to all cases where circumstances arises which excite the Court's suspicion. However, where fraud is alleged it must be proven by the party alleging it (***Tyrell v Painton* [1894] P 151, page 156**). Therefore, given that the Defendant is asserting that copy of the Will is valid,

she must prove to and satisfy the Court on a balance of probabilities that the Deceased did in fact create and execute the Will and that he had the testamentary capacity at the time to do so.

60. As the Plaintiff has alleged fraud and forgery over the Will and the signature contained thereon, he must satisfy the Court on a balance of probabilities that these allegations are true.

61. **Section 5** of the Wills Act sets out the prerequisites for determining the validity of a Will- They are:-

   i. **"It must be in writing;**
   ii. **It must be signed by the testator or by some other person in his presence and under his direction;**
   iii. **It must appear that the testator by his signature intended to give effect to the will;**
   iv. **The signature must be made or acknowledged in the presence of two or more witnesses present at the same time, and**
   v. **Each witness must either attest and sign the will, or acknowledge his signature in the presence of the testator, but not necessarily in the presence of any other witness."**

62. The Defendant has been unable to produce the original of the alleged Will of the Deceased, but since the Defendant did receive an order stating that a copy of the Will could be used for her application for Letters of Administration with a Will annexed, the copy of the Will shall be examined. The alleged Will does satisfy the requirement of being in writing as there was a printed copy provided to the court.

*The Will must be signed by the Testator or by some other person in his presence and under his direction.*

63. Lord Campbell LC in **Hindmarsh v Charlton (1861) 8 HL Cas 160 (at p. 167)** stated that ***"...there must either be the name or some mark which is intended to represent the name."***

This requirement has been interpreted to mean that the testator must put on the document a mark which is intended to be his signature. For example, the testator's initials, his personal rubber stamp, his inked thumb mark or any mark made by him, even when guided by another person, or a representation of his name, will suffice.

64. In addition to this **The Evidence Act Section 55 and 56 (1)** provides:-

***"55. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document***

***as is alleged to be in that person's handwriting must be proved to be his handwriting.***

***56. (1) In order to ascertain whether any signature or writing is that of the person by whom it purports to have been written any signature or writing, admitted or proved to the satisfaction of the court to have been written by that person, may be compared by a witness, or by the court, or the jury, with the one which is to be proved, although that signature or writing has not been produced or proved for any other purpose."***

65. The copy of the Will as provided by the Defendant has a signature affixed at the end. The Defendant has continued to maintain that as the widow of the Deceased, she was aware of the Deceased's signature and affirms that the signature on the Will is that of the Deceased. The Plaintiff however denies that it is the Deceased's signature.

66. **Section 5(3) (a)** of the Wills Act requires that for a Will to be valid the signature must be placed "*after, following, under, beside or opposite the end of the will*". The Will as presented does possess a signature which complies with this requirement It can be reasonably accepted that the signature if it is the Deceased's as it is positioned at the end of the Will is in compliance with this section of the Wills Act.

67. The Plaintiff however claims that the signature affixed to the Will is not that of the Deceased as he was blind and physically immobile at the date when the Will was purportedly executed. This evidence was supported by his sister.

68. There must be a determination however as to whether the signature is in fact the Deceased's signature in order to determine the validity of the Will. The burden to prove this still lies with the Defendant as the propounder of the Will.

69. **Section 56(1) of the Evidence Act** enables the Defendant, as the propounder of the Will, to provide comparative evidence to the court proving that this was in fact the signature of the Deceased in the absence of an expert witness opining that the signature was the Deceased's. There was no expert evidence led by the Defendant.

70. Section 56(1) provides:-

    **"(1) In order to ascertain whether any signature or writing is that of the person by whom it purports to have been written any signature or writing, admitted or proved to the satisfaction of the court to have been written by that person, may be compared by a witness, or by the court, or the jury, with the one which is to be proved, although that signature or writing has not been produced or proved for any other purpose."**

No comparative documents were produced or relied on to confirm the signature.

*The Testator intended by his signature to give effect to the Will*

71. This requirement means that the testator intended, by writing his name on the Will and complying with the other formalities, to give effect to the Will.

*The Testator's Signature must be made or acknowledged in the presence of Two or more witnesses present at the same time.*

72. **Sections 5(2) (b) and (c) of the Wills Act** require that the Testator's signature be "*made or acknowledged by the testator in the presence of two or more witnesses present at the same time 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),*".

73. In **Brown v Skirrow [1902]** it was held that the court must determine whether the witnesses, in whose presence the signature was made, were both mentally and physically present during the signing and knew what was taking place at the time of executing the Will.

74. The Defendant provided the Court with affidavit evidence averring that the Will was properly executed with witnesses. However, Ms. Stephanie Bowleg averred that the other signature **"may have been executed"** by the attorney at the time, Terrance Greene.' There is no affidavit provided to confirm the name of the second witness attesting the Will and Ms. Stephanie Bowleg appeared uncertain as to the who the second witness is or whether he was in fact present at the same time to witness the execution of the will.

*The Witnesses must sign*

75. **Section 5(4) of the Wills Act** states that "*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.*"

76. Since there are two signatures are present on the Will in question it can be reasonably assumed that the two persons signed as witnesses. However, there is no definite irrefutable evidence as to the identity of the second witness. The Attorney who allegedly prepared the Will may have been an attesting witness to the Will of the Deceased but the evidence of the other witness is ambivalent at best.

77. It cannot be categorically stated however that the second witness was Terrance Green. In addition to there being no affidavit of the attesting witness, there is no evidence from Mr. Green (now deceased) to confirm the sequence of events leading to the execution of the will and to confirm that there was a will prepared by him which was either lost or misfiled and which was attested to by himself. This would have been expected at the time of the application for the initial grant of letters of administration. There is also no evidence to explain why the initial grant was applied for attesting that there was no will of the Deceased when the Defendant in her evidence stated that she always knew of the existence of the will.

78. Although the majority of the requirements for a valid will appear to have been met, the main requirement whether it was in fact signed by the Deceased was disputed and the Defendant has not produced any documentary evidence or expert evidence to confirm that the signature was in fact that of the Deceased. It must also be noted that the Plaintiff did not produce any expert evidence to confirm that it was not his father's signature.

79. No expert evidence was led by any of the parties to validate the signature of the Deceased. As stated in **Re Denning Harnett v Elliot (1958) 2AER1** if on the face of the will it appears to be duly executed the presumption is in favor of due execution applying the principle of omnia praesumuntur rite esse acta . Further in **Sherrington and others v Sherrington [2005] EWC326** the principle was established that when a will contains the signature of the deceased the witnesses and the attestation clause the presumption of due execution will prevail unless there is strong evidence to rebut it.

80. As there was evidence by the Plaintiff ;and his sister disputing the signature, and more importantly the uncertainty of the other attesting witness and further in the absence of any expert or comparative documentary evidence, I am not satisfied that the propounde of the will has discharged her burden of proving by extrinsic evidence that the signature was in fact that of the Deceased. An expert would have been the natural solution to the issue, or production of undisputed signatures of the deceased as required under the Evidence Act. She did not provide either.

*Testamentary Capacity*

81. The purported Will must also comply with **Section 4 of the Wills Act**. **Section 4** requires that the testator must be of "18 years of age and of sound disposing mind". Sound disposing mind has been interpreted as meaning that the Deceased must have had testamentary capacity when executing the will.

82. The test to be applied when determining this as held in **Estate of Parks [1953] 2 ALL ER 1411** is whether a person possessing a sound disposing mind was capable of understanding the nature of the Will and the disposition of assets, free from influence and delusions.

83. In **Hoff v Atherton [2005] WTLR 99** the court held:-

> **"...A testator cannot be said to know and approve the contents of his will unless he is able to, and does, understand what he is doing and its effect. It is not enough that he knows what is written in the document which he signs. But if testamentary capacity—the ability to understand what is being done and its effect—is established, then it is open to the court to infer that a testator who does know what is written in the document which he signs does, in fact, understand what he is doing."**

84. The test of testamentary capacity was established by Cockburn C.J. in **Banks v Goodfellow (1870) LR 5 QB 549 at p. 565** where he stated:-

> ***" It is essential...that a testator shall understand the nature of the 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 ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or pervert the exercise of natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.***
>
> ***Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence - in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand."***

85. The test set out in **Banks v. Goodfellow** (supra) was relied on in **Sharp and another v Adam and others [2006] EWCA Civ 449** and, In **Re Key, and another v Key and others [2010] 1 WLR 2020**, where the court stated that:-

> **"7 The substance of the golden rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings: ......**
>
> **8 Compliance with the golden rule does not, of course, operate as a touchstone of the validity of a will, nor does non-compliance demonstrate its invalidity. Its**

**purpose, as has repeatedly been emphasised, is to assist in the avoidance of disputes, or at least in the minimisation of their scope. As the expert evidence in the present case confirms, persons with failing or impaired mental faculties may, for perfectly understandable reasons, seek to conceal what they regard as their embarrassing shortcomings from persons with whom they deal, so that a friend or professional person such as a solicitor may fail to detect defects in mental capacity which would be or become apparent to a trained and experienced medical examiner, to whom a proper description of the legal test for testamentary capacity had first been provided."**

86. In **Key & another v. Key and others [2010] EWHC 408** Briggs J discussed the burden of proof at para. 97 of his judgment:-

> **"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."**

An important issue in this matter is whether the will was duly executed by the Deceased. The Plaintiff denies that the will was executed by the Deceased whereas the Defendant claims that it was. There is no proof that the second witness was in fact Mr. Green or that he was in fact present when the Deceased signed the will.

87. The test for determining testamentary capacity is not a medical test but a matter for the court. The authorities have held that it could arise from the opinion of the solicitors who drafted the will or lay witnesses.

In **Guy v McGregor and others (supra)** the Court stated:-

> **"The test for testamentary capacity set out in Banks v Goodfellow is not a medical test although the court will pay particular attention to and will generally be greatly assisted in most cases by expert medical opinion. The court will however also take into account and give weight to the evidence of drafting solicitors and lay witnesses who knew the testator."** [Emphasis Added]
> **"in determining whether a testator has capacity the court must consider the evidence of all the witnesses including the medical experts, the drafting solicitor and the other lay witnesses. The weight to be given to each type of evidence will depend upon a number of factors, including the witness's expertise, knowledge, experience and independence. In some cases the assessment of a medical expert may be limited by the fact he has never met nor examined the testator and there are limited medical notes and records available to him, for example in respect of the severity of the testator's speech problems or memory loss as of the date of execution of the will. In such cases the weight to be attached to the medical evidence may be significantly less than that attached to the evidence of an experienced solicitor who knew the testator well or who carried out a specific assessment of capacity at the date of execution of the will. In other cases the nature of the medical evidence may be such that it outweighs the evidence of even an experienced solicitor. In general the weight to be attached to the view**

**expressed by a solicitor as to capacity will depend on that solicitor's experience, his knowledge of the testator, and the nature of any assessment carried out by him in respect of capacity. The weight to be attached to the evidence of lay witnesses will generally depend on their independence, experience and knowledge of the testator. In cases where there is a divergence in the views of the expert medical witnesses or where there is a paucity of medical notes and records, the evidence of lay witnesses who can give detailed evidence of the testator's behaviour, demeanour and activities around the time of the execution of the will, by reference to conversations they had with the testator or in respect of activities conducted by the testator at the relevant date, will be of much assistance and will be given great weight".**
**"Accordingly, I consider that there is no hierarchy of witnesses. Each case will be fact specific. In some cases the medical evidence will be the weightiest factor. In other cases the evidence of the solicitor will be of magnetic importance and in yet other cases the evidence of the lay witnesses will be decisive".**

In this action the drafting solicitor is deceased, there is no evidence by him before his demise attesting to the capacity of the testator. The witness who gave evidence only spoke to the execution of the will and not to the capacity of the testator. She did not act for the testator and only happened to be in the office doing some work for the solicitor. There is no medical evidence as to capacity. There is medical evidence of the testator having suffered a brain aneurysm. There is evidence of his greatly diminished eyesight, his ability to recognize family members by voice only and limited mobility. The Plaintiff claimed that he had to count the Deceased's money because he could not. The will is dated 4 months prior to his death and there is no evidence of any improvement in his health subsequent to his return from Miami. On the other hand the Defendant while acknowledging his impairment denies that any of the symptoms prevented the Deceased from creating or executing a will.

88. I am of the opinion that independent medical advice should have been requested and obtained prior to the execution of the alleged will. There is no evidence of his conducting his business or performing transactions which he used to do after he had suffered the aneurysm which could support the submission of the Defendant that the Deceased possessed the necessary testamentary capacity and was in fact able to see and execute a will.

89. Both parties averred that the Deceased had suffered a brain aneurysm which is accepted by the Court. This of itself is evidence of a brain injury. Both parties confirmed that he was impaired by this incident. Therefore it is reasonable for a Court to infer that the Deceased may have been impaired at the time the will was executed and evidence would have been required to prove that he was competent to make the will being propounded at the time that the will was dated. .

90. The Plaintiff's evidence is that the Deceased's complete vision failure, was brought on by his diabetic condition, and his lack of physical mobility/ dexterity, were all caused by the brain aneurysm/stroke. As such he maintains that it is questionable that the Deceased could have executed a Will in the short months prior to his death. The Defendant contends that although the Deceased did have the stroke which was caused by a brain aneurysm, the ailment did not have a major effect on the Deceased's life.

91. I adopt the dicta in **Vadakathu v George [2009] SGHC 79, 12 ITELR 101**, where Chan Sek Keong CJ of the Singapore High Court held,

> **A presumption of continuance of testamentary incapacity did not arise merely because the testator had a serious mental illness; it had to be shown that the illness was sufficient to have caused lack of testamentary capacity on the earlier date. Faced with an allegation of serious mental illness, the propounder of the will had either to show that the illness was not such as to have caused lack of testamentary capacity or that the testator had executed the will during a lucid period. There was no evidence as to when the testator might have ceased to have testamentary capacity and evidence that he had been lucid at the time of execution of the will...."**
>
> **"64 In a case of this nature, the function of the court is to decide whether the testator has testamentary capacity at the relevant time. This involves making a finding of fact by applying the law to the evidence. In matters involving specialised knowledge, such as schizophrenia, the court has to rely on the opinion of medical experts, but it does not have to accept any medical opinion if it is not supported by the objective evidence. An expert opinion should have at the least a substratum of facts."**

92.. The Court also notes that the original of the will has not been produced. While another court had already allowed a copy to be used for administration purposes the fact is that it is being challenged on the basis that it is not the Deceased's document as he did not sign it and that he lacked the capacity to make the same, the absence of the original does not assist the Defendant. The original would have allowed the court to examine the same and assist in arriving at a resolution of the issue. The Defendant never told her children of the discovery of the will. Terrance Green acted for her in the first application and did not as an officer of the court advise that there was a will which had been misplaced or lost.

93. After a review of all the evidence and submissions of the parties, it is accepted by this Court that the Deceased was gravely visually impaired when he returned home from Miami and it was questionable whether he could execute a will without having to execute as a handicapped person. The Defendant has failed to provide this court with any substantial evidence refuting the same.

94. The court also notes that the Defendant swore under oath that there was no will in her first application to administer the estate of the Deceased, but in her evidence she stated that she always knew of the existence of the will. This contradiction does not assist her. Further she did not recall the first grant. I also question why she did not recall the first grant, or further why she did not list all of the Deceased's property in the second application.

95. The Plaintiff also raised the doctrine of amino revocandi and asserts that in the event that the Will is valid, the onus is on the Defendant to prove that the will had not been revoked or destroyed animo revocandi.

96. The Plaintiff relied on **Welch v Phillips (1836) 1 Moore 299**, where Lord Parke B stated at page 302:-

***"Now the rule of the law of evidence on this subject as established by a course of decisions in the Ecclesiastical Court, is this: that if a Will, traced to the possession of the Deceased, and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect, unless there is sufficient evidence to repel it. It is a presumption founded on good sense; for it is highly reasonable to suppose that an instrument of so much importance would be carefully preserved, by a person of ordinary caution, in some place of safety, and would not be either lost or stolen; and if, on the death of the maker; it is not found in his usual repositories, or else where he resides, it is in a high degree probable, that the Deceased himself has purposely destroyed it. But this presumption, like all others of fact, may be rebutted by others which raise a higher degree of probability to the contrary.***

***The onus of proof of such circumstances is undoubtedly on the party propounding the Will."***

97. **Welch v Phillips** held that wills which are presumed to be lost on the day of the Deceased's death, the Deceased had destroyed it himself, ***"It is a presumption founded on good sense; for it is highly reasonable to suppose that an instrument of so much importance would be carefully preserved, by a person of ordinary caution, in some place of safety, and would not be either lost or stolen".***

98. The Defendant has not rebutted this doctrine with any evidence.

*Revocation of Letters of Administration received by the Defendant*

99. **Section 29(1) of the Probate and Administration of Estate Act** states that the court may revoke any grant of representation:-

**"(1) Where it appears to the court that –**

> ***(a)*** **A grant of representation either ought not to have been made; or**
> ***(b)*** **contains an error,**
>
> **The court may call in the grant and if satisfied that it could be revoked at the instance of any party interested, may revoke it."**

100. The original Grant of Letters of Administration was issued on the 20th March 2001 and the Defendant stated under oath that the Deceased had died intestate. However, the Defendant later evidenced in her Witness Statement dated 12th April 2021 to having knowledge that the Deceased had died testate. This evidence could be relied on to support an application to revoke the initial grant. This contradiction challenges the credibility of the Defendant.

101. As this relief would only be sought after the determination of the preliminary issue of the validity of the will, the court does not make a determination on the revocation of the grant of Letters of Administration.

## Conclusion

102. I do not accept that the Defendant has satisfied the burden of proof of proving that the purported Will of the deceased is a valid Will. The circumstances surrounding the execution of the will, the Deceased's ability to execute the same and the lack of medical expert and documentary evidence all impact the validity of the will. The contradictory evidence of the Defendant does not assist. Finally the legal principle of animo revocandi had not been rebutted by the Defendant.

103. The outstanding issues in the action must be determined by trial.

104. The Plaintiff is entitled to his costs of the application to be taxed if not agreed.

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