

**IN THE COMMONWEALTH OF THE BAHAMAS**  
**IN THE SUPREME COURT**

**Probate Division**  
**2022/PRO/cpr/00032**

**IN THE ESTATE OF DAVID SAMUEL MOSS** late of Gregory Close Coral Harbour, in the Western District of New Providence, one of the Islands of the Commonwealth of The Bahamas, **Deceased**

**BETWEEN**

**BARBARA MOSS**

Claimant

**AND**

**TIMICA MOSS**

Defendant

**Before:** The Honourable Madam Justice Camille Darville Gomez

**Appearances:** Ms. Doneth Cartwright and Mr. Ian Cargill Jr. for the Claimant  
Mr. Mario Gray for the Defendant

**Hearing Date(s):** 15<sup>th</sup> December, 2023

**Submissions received:** 22nd July, 2024; 9<sup>th</sup> October, 2024

*Probate – Will – Requirements of a Will – Earlier Will valid – Later Will had express revocation clause - No appointment of Executor – No disposition of property – Whether Will valid*

**JUDGMENT**

This action was commenced by the Claimant, the wife of the David Moss, (the “deceased”) who died leaving two testamentary documents purporting to be Wills; one made in 2018 (the “2018 Will”) and another one, in 2020 (the “2020 Will”). The 2018 Will named the Defendant, the deceased’s daughter as Executrix and one of the beneficiaries. The 2020 Will did not name an Executor or beneficiaries save that it excluded two of the deceased’s children as beneficiaries and did not dispose of any property. After the

death of the deceased, the Defendant attempted to apply for a Grant of Probate and the Claimant filed a Caveat and subsequently commenced this action seeking inter alia, (i) a decree and/or an Order pronouncing against the validity of the 2018 Will; and (ii) an Order that the 2020 document be admitted to Probate. The Defendant has asserted that the 2020 Will is invalid because it does not meet the requirements of a will and therefore, the Court should pronounce in favour of the 2018 Will.

### **Introduction**

[1.] This action was commenced by Writ of Summons which was amended on 22<sup>nd</sup> August, 2022 by the Claimant, the wife of David Samuel Moss who died on the 2<sup>nd</sup> July, 2021. The Defendant, Timica Moss is one of the daughters of the deceased.

[2.] On 4<sup>th</sup> September, 2018 the Deceased made a document purporting to be a Will prepared by attorney, Mr. V. Alfred Gray in the following terms:

“I David Moss of Coral Harbour in the Western District of the Island of New Providence one of the Islands of the Commonwealth of The Bahamas hereby revoke all former wills and other testamentary dispositions made by me and declare this to be my Last Will and Testament.

1. I NOMINATE CONSTITUTE and APPOINT my daughter Timica Moss of 715 Grant Boulevard, Lehigh Acres, Florida, 33974 one of the States of the United States of America to be the Executrix of this my Last Will and Testament and I direct her to pay all my just debts and funeral and testamentary expenses as soon as possible after my death.
2. I DESIRE that the Law firm of V. Alfred Gray & Co. be the lawyers for my estate.
3. I GIVE and BEQUEATH my lot in Malcolm Allotment with four Apartment units on it to my daughter Timica Moss absolutely.
4. I GIVE and BEQUEATH my house and land in Coral Harbour to my daughter Timica Moss absolutely.
5. I GIVE and BEQUEATH my land situate in Malcolm Allotment with office structure on it to my daughter Timica Moss absolutely.
6. I GIVE and BEQUEATH all THREE (3) Lots which I own in Nassau Village to my daughter Timica Moss absolutely.
7. I GIVE and BEQUEATH all the rest and residue of my estate Whatsoever and Wheresoever situate to my daughter Timica Moss absolutely.”

[3.] After the funeral, the Claimant was advised by attorney, Judith Smith that the deceased made a second document purporting to be a Will on 13 March, 2020 in the following terms:

“ I David Moss, of Coral Harbour Subdivision situate in the Western District of the island of New Providence one of the islands of the Commonwealth of the Bahamas hereby revoke all wills and testamentary dispositions heretofore made by me AND DECLARE this to be my Last Will and

Testament. I hereby direct that my son David Moss Jr. and my daughter Davia Moss receive nothing from my real or personal estate.”

[4.] Therefore, when she discovered that the Defendant had applied to the Probate Registry for a grant of Probate of the earlier, 2018 Will, she filed a Caveat on the 9<sup>th</sup> September, 2021.

[5.] Subsequently she commenced this action and claimed the following reliefs:

- i. A Decree and/or Order pronouncing against the validity of the Last Will and Testament dated 4<sup>th</sup> September 2018 pursuant to Section 31C of the Probate and Administration of Estate Rules 2011.
- ii. An Order that the last Will and Testament of David Samuel Moss dated the 13<sup>th</sup> day of March 2020 be admitted for Probate on the basis of its validity;
- iii. An Order of the Court dismissing the Defendant’s application for Probate in the estate of the deceased;
- iv. Costs to be paid by the Estate; and
- v. Such further or other relief as the Court deems fit.

[6.] The Defendant filed a Defence in this action on the 5<sup>th</sup> September, 2022 and asserted as follows:

1. The Defendant TIMICA MOSS neither admits nor denies the contents of paragraphs 1 to 5 of the statement of claim.
2. The Defendant is the Executrix of her father’s Will dated the 4<sup>th</sup> day of September A.D., 2018 see a copy attached hereto and marked Exhibit “TM(1)”.
3. The Petition filed for letter of Probate was filed on the 26<sup>th</sup> July, A.D., 2021.
4. Subsequently to filing a Caveat was filed by the widow of the deceased who claimed she had the will which was signed by the deceased, after the Will that the defendant had was filed.
5. A casual look at the document which the Plaintiff claims to be a will, will show that the document does NOT meet the basic standard or criteria of or express the essence of a Will at ALL (see copy of same attached) hereto and Exhibited hereto as “TM(2)”.
6. That Document has no Executor named in it.
7. That Document has no Beneficiary named in it and
8. That Document express NO intention to give or bequeath any of the real or personal Estate of the Testator of the Deceased to anyone.
9. It is submitted that all of that above Elements MUST be in a Will in order to pass the Real or Personal Estate of the Testator of the Deceased to anyone.
10. In the circumstances it is prayed that the court will Declare the Will dated the 4<sup>th</sup> September, A.D., 2018 as the last Will and Testament of the Deceased and allow the Will

filed by the Defendant as Executor therein to be proved by the Court and that the proposed Will filed by the widow be Declared "Not to be a Will at all" and therefore null and void.

11. Any other declaration or order which the Court deems just be made.

### **Issues**

- [7.] The Claimant's case is that the 2020 Will expressly revoked the 2018 Will.
- [8.] On the other hand, the Defendant has challenged the validity of the 2020 Will on the following bases:
- (i) no named Executor;
  - (ii) no named beneficiary;
  - (iii) expressed no intention to give or bequeath any of the real or personal estate to anyone whatsoever.
- [9.] The Court must address the following issues:
- (i) Whether the 2020 document meets the requirements of a valid Will;
  - (ii) Whether the 2020 document revoked the 2018 document;

### **The Evidence**

#### *The Claimant's Case*

##### *The Claimant*

- [10.] Barbara Moss gave evidence and also relied on the testimony of Judith Smith, the Attorney responsible for the drafting of the 2020 document.
- [11.] In her examination-in-chief she explained that she was 66 years old, and had retired in early 2020. She said that she and her husband had been happily married for fifteen (15) years and that he had thirteen (13) adult children. They had no children together. He suffered with diabetes and hypertension and eventually had kidney failure and was placed on dialysis.
- [12.] The deceased was declared legally blind sometime around August 2013 at the age of 63 years and was being treated by Dr. Duranda Ash and Dr. Gurero. He had attempted to have surgery abroad to reverse his condition however, it was unsuccessful. Her retirement in 2020 was so that she could take care of her husband full time.
- [13.] Her evidence was that the Defendant had tried to influence her husband to divorce her and that he had become very suspicious of her afterwards. The Defendant had also been given a power of attorney by the testator however, he told her that he was going to his lawyer, V. Alfred Gray to have it revoked. According to her, he did revoke it and expressed to her his intention to hire another attorney to re-write his will as he no longer trusted the Defendant to handle or manage his affairs.

- [14.] She testified that she took care of her husband full time and they resided on rental income derived from various properties that he owns in New Providence and that none of the adult children came to help during that time. She said that her husband told her that he was going to sell the matrimonial home because he did not want her to have any issues with any of children so he wanted to use the proceeds to buy a duplex closer to the city of Nassau because she would be safer than in the secluded part of Coral Harbour where they lived. She claimed that on his death bed he told her not to move from the home even if she had to get someone to reside with her for security purposes and that no one had any authority to move her from their matrimonial home. She said that she found it difficult to believe that her husband would leave everything to Timica to the exclusion of her and the other children. However, she said that her husband had always insisted that his son, David Moss Jr. and daughter, Davia Moss were not to receive anything from his estate.
- [15.] She recalled that in or around February, 2020 her husband left the house and told her that he was going to a lawyer to prepare a will and shortly afterwards attorney Judith Smith visited the home with two (2) ladies whom he met in the dining room. She overheard her husband asking questions and insisting again that David and Davia Moss were to not benefit from his estate. She admitted that she was not at the table so she was not privy to the details of the Will but she witnessed the two ladies signing the Will after it was read to him. Later after her husband's funeral she was informed by Judith Smith that she had her husband's Will in her possession.
- [16.] On cross examination she admitted that she was aware of the 2018 Will because Timica had told her after her husband had died that he had a Will. She also admitted that Timica assisted in covering some of the medical expenses in relation to his illnesses as well as assisting him when he had financial issues relative to the mortgage on the Coral Harbour home. She testified that while she could not hear all of the conversation between her husband and his attorney Judith Smith that she did see when her husband and the two ladies who came with Miss Smith signed the document. She disagreed with the assertions by Mr. Gray that the main reason that Mr. Moss wanted to sell the house was to repay Timica for saving it and because it had not been sold that was the reason why he wanted to give her the house.
- [17.] On re-examination she explained that her husband fixed cars and she worked as the secretary in the office, however, sometime in 2013 when it was obvious that he could not see to drive to work that he stopped working and driving. She explained that she and her family paid for his funeral and it cost approximately \$3,000.

*Judith Smith*

- [18.] I set out the relevant portions of her evidence in chief:

*"4. I met Mr. David Moss in about January 2020. At the time I was located on Dowdeswell street in the chambers of Collie and Collie. According to Mr. Moss, Mr. Collie had previously done some work for him and he came to retain Mr. Collie. A file reference was located in the filing system of Collie and Collie, but I do not recall whether I ever located any file.*

5. At the time Mr. Collie was not practicing because he had a diplomatic appointment. So, I offered to assist Mr. Moss. At that meeting Mr. Moss had some concerns about his house and Scotiabank because he said he was told "his name was called in Justice Winder court". He mentioned he had papers to support his position. I told him I would look into it.

6. Mr. Moss left, and it was probably a week or so later, a Ms. Boules' came to the office. She explained she was Brenda Mae Boules, and she was the niece of Mr. Moss. She said that she would visit Mr. Moss often and he (Mr. Moss) wanted to make a will and she produced a list of requests he allegedly wanted to make. I made some notes on the document. I told her I would have to speak to him about this. Attached and marked "JMS-1" is a true copy of the list Ms. Boules gave me.

7. Mr. Moss came on January 31, 2020, and paid for his Will to be prepared. Mrs. Moss was not with him. I recall his friend Spyder bringing him. He said that he did not want David Moss Jr and Davia Moss to get anything. I asked him who he wants to be in charge to carry out his wishes, he said he would get back to me. I believe I asked him about the list Brenda Boules had given to me and asked about his properties, he said he would get back to me. He was just focused on disinheriting these two children. I did not ask Mr. Moss if he had a prior Will and he did not mention it. I did not know he had a prior Will.

8. On February 3, I went to Mr. Moss in Coral Harbour to discuss two things with him, - the Scotiabank matter and the preparation of the will. I arrived at Mr. Moss' house, his wife let me in, and I recall sitting at the dinner table with Mr. Moss. Mrs. Moss left I believe she went upstairs, or she could have been in the kitchen, but she was not a part of the conversation. Mr. Moss gave me some papers related to his matter at Scotiabank, we discussed them, and I took them to make copies and look at more carefully. I then raised the issue about the Will, and I mentioned the list and he became very gruff, and he said "he ain't dealing with that right now." He just wanted those two children disinherited. That ended the meeting, and he went upstairs, and Mrs. Moss showed me out.

9. Mr. Moss' reaction on that day regarding the list, made me think he did not want to discuss it there.

10. I probably saw Mr. Moss once again at the office after that, and he asked me about the will i.e., when it would be ready. I decided I better carry out his instructions as they were.

11. On March 13, 2020, I along with two (2) witnesses went to Mr. Moss' house in Coral Harbour and executed the Will. Mrs. Moss was there, and she let us in. Mr. Moss sat at the dining table, and I read the will to him. He indicated his agreement and he signed, and the witnesses signed. The attestation page was done later at the office. Mrs. Moss showed me and the witnesses out.

12. When Mr. Moss gave me the instructions to prepare the will and when he executed the document he was in sound mind. He was giving me instructions on not only the Scotiabank matter, but he had a land dispute (magistrate appeal) and a company matter he wanted sorted out. Mr. Moss was giving instructions about matters and eventually, I was introduced to Ms. Timica Moss, and she became more active around June 2020. Timica Moss and I had several conversations after that, and I updated her on what was happening.

13. In December of 2020 I was contacted by Timica Moss regarding a possible sale of the house in Coral Harbour. But even in her becoming more involved in Mr. Moss affairs, I went to Mr. Moss' house with another counsel. Mr. Moss, the other counsel, and I had a telephone meeting with Ms. Timica Moss

*and the discussion relating to his magistrate appeal; that I wanted the counsel present to take over from me and the sale of the house. Principally with the sale of the house, I wanted to confirm with Mr. Moss that I should take instructions from Timica Moss without reference to him on the sale and make sure he understood what it meant. Mr. Moss said yes, I could take instructions from Timica Moss without reference to him, but he wanted to be involved when it came to the disbursement of the money. As far as I am aware nothing came of the sale.*

*14. Mr. Moss' eyesight was not good but in my interaction with him, he appeared to not want to admit his sight was failing or had failed and hence I decided to use the testimonium for a blind person.*

*15. Mr. Moss was strong-willed, and he spoke very loudly. Because Mr. Moss lived so far away from town and I understood Mrs. Moss did not drive, he needed someone to pick him up and bring him into town and when I had most of my interaction with him it was Spyder who was driving him around. I know Mr. Moss said to me he wanted to move closer to town and hence he was trying to get some of his land issues cleared up and his house sold. "*

- [19.] On cross examination she admitted that she did not know that Mr. Moss had a Will and did not specifically ask whether he had a previous Will. She explained that she had first come into contact with Timica sometime in June 2020 and that Mr Moss had given Timica a power of attorney to deal with matters in the Magistrate Court and had given verbal instructions for her to act on his behalf regarding the sale of the house. In her evidence in chief she had testified that the testator's niece had produced written instructions allegedly from him and on cross examination she was asked why she did not prepare the Will from the written instructions. She explained that she did not receive any instructions from him to do that. She reiterated that his emphasis was that he did not want these two children to inherit anything from him.

#### *The Defendant's Case*

- [20.] The Defendant, Timica Moss gave evidence and relied on the evidence of V. Alfred Gray, the Attorney who drafted the 2018 Will.

#### *Timica Moss*

- [21.] Given that the Defendant's evidence in chief was brief, I set it out in its entirety:

- "1. That I am the Executrix of my fathers Will dated the 4<sup>th</sup> day of September A.D., 2018 see a copy attached hereto and marked Exhibit "TM(1)".
2. That I filed for letters of Probate on the 26<sup>th</sup> July, A.D., 2021.
3. Subsequently to my filing a Caveat was filed by his widow who claim she had a will which was signed by my father after the Will that I had.
4. I had a chance to look at the documents she claims to be a Will but on examination I am advised and I verily believe that the document does NOT meet the basic standard or criteria of or express the essence of a Will at ALL (see copy of same attached) hereto and Exhibit hereto as "TM(2)".
5. Firstly, that Document has no Executor named in it.

6. Secondly, that Document has no Beneficiary named in it and
7. Thirdly, that Document express NO intention to give or bequeath any real or personal Estate to anyone whatsoever.
8. I am further advised by my Attorney that all of that above Elements MUST be in a Will in order to pass the Real or Personal Estate to anyone.
9. In the circumstances I pray that the court will Declare the Will dated the 26<sup>th</sup> September, A.D., 2018 as the last Will and Testament of my father and allow the Will in my Petition as Executor therein to be proved by the Court and that the proposed Will filed by the widow be Declared "Not to be a Will at all".
10. The statements made herein are to the best of my knowledge and belief correct and true."

[22.] On cross examination Timica Moss testified that she was unaware that her father made a second Will and had only become aware after the Claimant's attorneys provided a copy to her attorney. She said that she had contributed \$1,500 towards the funeral costs of her father which was paid to the funeral director for the grave site.

[23.] She testified that she had a good relationship with her father however, out of the twelve siblings that she has, she is closest to the sibling with whom she shares a mother, however, out of the others only maybe about two of them. She also explained that her relationship with Mrs Moss was rocky and a bit strained. She said that even though she accompanied her father to the attorney who had prepared the 2018 Will that she was unaware of its contents until later. However, even though he had left everything to her, her father had told her spilt the assets with two of her sisters with whom he shared a close relationship. She said that her father trusted her that is why the instructions were given verbally. She admitted that because of the conversations shared with her father that it was not strange to her that he had not left Mrs. Moss anything. She went on to explain why which included the fact that they did not live together during the entire marriage and that it was a marriage of convenience (for immigration purposes to permit Mrs Moss to remain in the country legally). However, Mrs Moss did eventually move into the house and then he became blind. She conceded that Mrs Moss took care of him. She explained that she had saved her father's house from foreclosure from funds that she borrowed from her mother which she had to repay. However, she had evidence of the funds she put into the house but it had not been exhibited because she did not think it relevant to the case. She also covered expenses for trips, attorney fees, transportation and occasional hotel stays. She said that she bore a lot of expenses on behalf of her father. However, she insisted that she did not do any of that on the basis that she would be given the house, though she felt that he left the house to her because of everything she had done for him. She explained that she was unaware that her father had revoked the power of attorney to her and in any event up until the point of death she had been working on his behalf.

*V. Alfred Gray*

[24.] I set out below the evidence in chief of the attorney Mr. Gray who prepared the 2020 Will:



“3. On the 4<sup>th</sup> day of September 2018, Mr. David Moss attended the Offices of V. Alfred Gray & Co., for the execution of his Last Will and Testament. He was escorted into my chambers by his daughter, Ms. Timica Moss, who then returned to the office’s waiting area leaving myself and Mr. Moss alone.

4. Prior to Mr. Moss executing the said Last Will and Testament, I personally read to him the contents of the document and explained each paragraph to him, which he accepted as reflecting his wishes. He stated that he understood the various items and once I was satisfied that he understood. I guided his hand to the signature sections of the document and he affixed his signature in the presence of the witnesses.”

[25.] On cross examination he explained that Timica Moss brought her father to his office, not to prepare a Will because it had already been prepared. He confirmed that he had already been given instructions for the Will in an earlier conversation with Mr. Moss. When asked about the exclusion of beneficiaries, he explained that:

*“That was not my business, really. The Will was his to make and I took instructions, as per his instructions to me.*

*Q. But are you aware that in taking instructions, there’s some fiduciaries and other duties that we have to ensure that the Will is valid?*

*A. No, I don’t. I have never told people what to put in their Will, other than to make sure it conforms with the law. As to who he gives or as to who he does not give anything to that’s not my business. My job, as I understand it, even now, is to carry out his instructions.*

*Q. So it’s not important for him to be aware of his relatives and to show that if he doesn’t want them to get anything that he should express that or did he state that?*

*A. Oh, quite the reverse. If people want to give people anything they would tell you I like to give John, Mary and Sue but if they don’t tell me and they say I only want to give it to the judge of the Supreme Court, that’s it.”*

[26.] Mr. Gray testified that he was unaware of the 2020 Will until the filing of a caveat by the attorney for the Claimant which was after his firm had made an application for a grant of probate of the 2018 Will.

### **Analysis and Disposition**

[27.] The issues to be addressed are wholly legal in nature and the facts are largely undisputed by the parties. Therefore, a considerable amount of the testimony was irrelevant to the primary issues in dispute and for the purposes of this analysis, I have summarised the testimony significantly. The crux of the issue at hand is whether the 2020 document is a will.

[28.] The deceased testator, Mr. Moss made two documents both purporting to be wills during his lifetime, one in 2018 and the other, in 2020. The validity of the latter one is being disputed; there has been no such allegation in relation to the earlier one.

[29.] In the earlier, 2018 Will the testator named the Defendant as sole executrix and beneficiary of his estate. In the later, 2020 Will which had an express revocation clause, he neither named an

Executor nor devised any property. However, while he did not expressly name any beneficiaries, he did exclude two of his children as beneficiaries.

[30.] While there was much ado regarding the power of attorney given and then purportedly revoked to Timica Moss I also found this immaterial to the disposition of this matter.

[31.] At the outset, I commence with two definitions of a will. **Halsbury's Laws of England at Volume 102 (2021), paras 1-566; Volume 103(2021), paras 567-1304** defines a will as follows:

*A will or testament is the declaration in a prescribed manner of the intention of the person making it with regard to matters which he wishes to take effect on or after his death."*

[32.] Williams on Wills refers to a will as follows:

*In common with many legal concepts it is difficult to formulate an exhaustive definition of a will, and both the legislature and the judiciary have refrained from making any definitive statement. However, in general terms it can be noted that a will is a document in writing executed in accordance with certain formalities which is generally subject to probate and which contains statements regarding the disposition of a person's property on death.*

*A will is a characteristic document which is testamentary, ambulatory and revocable. A reference to a person's will can mean the expression of a person's testamentary wishes but more commonly refers to the document itself."*

[33.] Both definitions refer to a will as a document which expresses the wishes of a testator regarding matters or the disposition of property on death.

[34.] However, the second definition contemplated that "*both the legislature and the judiciary have refrained from making any definitive statement*" and the 2020 document has certainly challenged the definition of what is a will or what would generally be regarded as a will. This is principally because the deceased failed to distribute any of his property.

[35.] Section 2 of the Wills Act, 2002 also sets out a definition of a will as follows:

*"will" includes a testament, a codicil, an appointment by will or by writing in the nature of a will in exercise of a power, and any testamentary disposition.*

[36.] The Wills Act also contains in the First Schedule an example of a structure of a Will which includes a provision (a) appointing an executor and (b) devising property. In fact, section 5(5) refers to this Schedule as a guide to the formalities of a will. The Defendant had submitted that the 2020 document did not meet these requirements and thus was not a will.

[37.] However, the cases demonstrate that neither the absence of a provision appointing an executor nor the failure to dispose partially or wholly of property would not disqualify the 2020 document as a will. I refer to the dicta in the seminal case of **Re Skeats** [1936] Ch. 683 where Clauson J explained that the will was valid notwithstanding that it disposed of no property. He said as follows:

*"Intestate" includes a person who leaves a will, but dies intestate as to some beneficial interest in his real or personal estate.* The word "intestate" cannot possibly, in the latter part of that sentence, have the meaning "without leaving a will," which is its literal meaning, because the phrase is used in reference to a person who does leave a will. The phrase used means, in my view, a person who has not made an effective disposition of the beneficial interest in the whole of his property.

### **Whether the 2020 document meets the requirements of a Valid Will**

*The Will must be in writing*

[38.] The starting point for the consideration of the validity of the 2020 document as a Will is whether it complies with the statutory requirements. Section 5 of the Wills Act, Chapter 115 reads as follows.

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.*

[39.] In short, a valid will must be in writing, signed by the testator in the presence of two witnesses, and signed by those two attesting witnesses. These conditions presuppose that the testator is at least aged eighteen years and of sound disposing mind per section 4 of the Wills Act which were not disputed in the instant action, therefore, I did not need to consider them.

[40.] The 2020 document was in writing signed by the testator Mr. Moss in the presence of two witnesses, Gertrude Williams and Bernadette Williams who were both present at the same time.

[41.] Attorney Judith Smith had this to say in cross examination about the execution of the document:

*"I don't remember the names of the two children right now there were two of them I think a girl and a boy that he didn't want them to get anything. And that was all he wanted at that stage. And so, that is what I prepared and the Will was read over to him in the presence of the two witnesses and they signed the Will."* [my emphasis added]

[42.] The Defendant did not dispute the execution of the 2020 document or allege that there was some impropriety regarding its due execution. Therefore, on the evidence, I find that the 2020 document complied with sections 4 and 5 of the Wills Act, 2002.

#### *Position of the signature*

[43.] Per section 5 of the Wills Act, 2002 the 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”.

[My emphasis added.]

[44.] While neither party raised the issue of the placement of the deceased testator’s signature, it appeared to be written in an upward direction from the designated signature line into the contents of the Will. Therefore, it was not entirely on the signature line.

[45.] The undisputed evidence was that the deceased was legally blind during the time he created the will which may have accounted for this anomaly.

[46.] However, and in any event, the Will may still be valid even if the testator did not sign on the designated line. Section 5(3)(b) of the Wills Act, 2002 has expanded the provision to widen the ambit “*that it is apparent on the face of the will that the testator intended to give effect by such signature to the writing signed as his will*”.

[47.] The evidence was that the 2020 document was read over to the testator by attorney Judith Smith. In fact, her evidence in chief was:

*“14. Mr. Moss’ eyesight was not good but in my interaction with him, he appeared to not want to admit his sight was failing and hence I decided to use the testimonium for a blind person.*

[48.] The bottom of the 2020 document reads as follows:

*This Last Will and Testament having been first read over to the above-named Testator in our presence and the Testator appeared thoroughly to understand the same and to approve the contents thereof was signed by the Testator as his last will in the presence of us present at the same time who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses* [my emphasis added].

[49.] Attorney Smith appeared to have adopted the language contained in the form of attestation as contained in the Execution of Documents (Handicapped Persons) Act, chapter 6 which applies to persons who are blind.

[50.] There was no allegation that the contents of the 2020 document were not read aloud to Mr. Moss and Mrs. Moss corroborated the testimony of attorney Judith Smith that they were read over to him because she said that she could hear them from where she was in the house. Her evidence was:

*“17.....I overheard my husband asking several questions and insisting that David and Davia Moss were not to get anything from his estate. I did not sit at the table, so I was not privy to the details of the Will, but I was able to see the two ladies sign the Will after it was read to him.”*

[51.] The evidence regarding the execution of the 2020 document was uncontroverted.

[52.] Since the testator’s sight was impaired, it is necessary to address whether there was knowledge and approval of the contents of the Will. In **Hoff v Atherton [2005] WTLR 99 (COA)** Lord Justice Peter Gibson had this to say:

*“...the requirements of testamentary capacity and knowledge and approval are conceptually distinct. A finding of capacity to understand is, of course, a prerequisite to a finding of knowledge and approval. 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 sign does, in fact, understand what he is doing. And, where there is nothing to excite suspicion, the court may infer (without more) that a testator who signs a document as his will knows its contents. It would be surprising if he did not...If the court is to be satisfied that the testator did know and approve the contents of his will...that is to say, that he did understand what he was doing and its effect...it may require evidence that the effect of the document was explained, that the testator did know the extent of his property and that he did comprehend and appreciate the claims on his bounty to which he ought to give effect.”*

[my emphasis added]

[53.] In her evidence in chief, attorney Smith testified that she was visited by Brenda Mae Boules the niece of Mr. Moss who explained that she would visit Mr. Moss often and that he wanted to make a will and she produced a “list of requests” dated 4<sup>th</sup> January, 2020 which he allegedly wanted to make.

[54.] Attorney Judith Smith testified that she had a conversation with the deceased who stated that he wanted to prepare a Will to disinherit two of his children. She had this to say regarding the contents of his Will and the “list of requests”:

“7. Mr. Moss came on January 31, 2020, and paid for his Will to be prepared. Mrs. Moss was not with him. I recall his friend Spyder bringing him. He said that he did not want David Moss Jr and Davia Moss to get anything. I asked him who he wants to be in charge to carry out his wishes, he said he would get back to me. I believe I asked him about the list Brenda Boules had given to me and asked about his properties, he said he would get back to me. He was just focused on disinheriting these two children. I did not ask Mr. Moss if he had a prior Will and he did not mention it. I did not know he had a prior Will.”

[My emphasis added]

[55.] Given the evidence regarding the following: (i) how the instructions for the drafting of the will from Mr. Moss were obtained by attorney Smith; (ii) how she sought to clarify the “list of requests” from Brenda Boules; (iii) how she attended in-person to have the said Will executed; and, (iii) how she read over the Will prior to the execution by the testator it was obvious to the court that the testator both knew and approved the contents of his will.

[56.] Further, there was no allegation by the Defendant as to the lack of testamentary capacity of Mr. Moss and on the evidence before the court there was nothing to excite the court’s suspicion regarding his instructions for his will. His instructions concerning the exclusion of two of his children was unequivocal. This was corroborated by Mrs. Moss and the earlier 2018 Will excluded them as well.

- [57.] Therefore, I found that despite the placement of the testator's signature he did in fact intend to give effect to the 2020 document as his will and that he both knew and approved of its contents. The Court of Appeal in the case of **Wood v Smith [1993] Ch. 90** held that a written name could be considered a valid signature even if it was not in the usual place for a signature, as long as the testator intended it to give effect to the Will.

#### **Whether the 2020 Will revoked the 2018 Will**

- [58.] During examination in chief, Counsel for the Claimant questioned the witness surrounding the revocation clause and she responded saying that she did not explain the effects of the revocation clause to Mr. Moss, the deceased.
- [59.] The 2020 Will had an express revocation clause and I refer to section 16 of the Wills Act which reads as follows:

*"No will, or any part thereof is revocable otherwise than (a) in accordance with section 13: (b) by another Will; (c) by some writing, declaring an intention to revoke the will, executed in the same manner in which a will is required to be executed; or (d) by the testator, or some person in his presence and by his direction... with the intention of revoking it".*

- [60.] The Claimant submitted several cases regarding this issue of an express revocation clause including: **Toomer v Sobinska [1907] P.106** where the testator, Isabella Hudson Toomer left a document dated 25 May, 1905 in the following terms:

*"I, Isabella Hudson Toomer do hereby declare that the will I have made and which is not in my possession and which consequently I am unable to destroy at this moment, is null and void and it is my intention to express my wishes in a will to be prepared and executed shortly."*

- [61.] Justice Deane determined that in those circumstances the document duly revoked the earlier will.
- [62.] Additionally, in the case of **Collins and Tuffley v Elstone [1893] P 1** a testatrix died leaving a will dated 12 March, 1875; a codicil dated 21 July, 1885; and a will dated 17 October, 1889 all duly executed. The plaintiffs who were the executors of her estate applied for a grant of Probate but prayed that certain words of revocation contained in her 1889 will be omitted from the probate as having been inserted by mistake and without the knowledge and approval of the deceased. The defendant, opposed the grant of probate of the first two papers and prayed for probate of the will of 17 October, 1889 as it stood without the omission of the revocatory words. Evidence was adduced to show that the testatrix had objected to the words: "I hereby revoke all wills by me at any time heretofore made" contained in the will and said that she would not sign it if it had the effect of revoking the earlier will and codicil already made by her. She was assured that it would not have this effect and on that basis, she executed it. The Court held that despite the fact that it was compelled to come to a conclusion that would cause the real intentions of the testatrix to not be carried out, it was unable to strike out the words. The Judge cited the case of **Guardhouse v Blackburn (1866), L.R. 1 P & D 109** as authority for the proposition that *"subject to a question of fraud, the fact that a will has been read over to a capable testator on the occasion of its*

*execution, or its contents brought to the testator's notice in any other way should when coupled with his execution thereof be held conclusive evidence that he approved of as well as knew the contents."*

- [63.] Therefore, having already considered and concluded that Mr. Moss both knew and approved of the contents of his 2020 Will and intended by his signature to give effect to it, I also find that the 2020 Will expressly revoked the 2018 Will.

### **Consequences**

- [64.] It follows that the 2020 Will is valid and therefore, the 2018 Will cannot be admitted to probate.
- [65.] That leaves unresolved (i) the person entitled to apply for a grant of representation in Mr. Moss' estate; (ii) the distribution of his real and personal estate; and (iii) the type of grant to be applied for in his estate.

- [66.] Section 2 of **The Probate and Administration of Estates Act**, Chapter 108 reads:

"intestate" means a person who dies without leaving a will and includes a person who leaves a will but dies intestate as to some beneficial interest in his real or personal estate".

- [67.] Given that Mr. Moss in the 2020 Will did not dispose of property the seminal case on this issue is **Re Skeats [1936]** referred to earlier where the testator appointed his wife to be his sole executor to direct his debts, funeral and testamentary expenses. He did not give or dispose of any property in his Will. The court concluded that Mrs. Skeats held the testator's assets in trust for those rightfully entitled in accordance with section 46 of the Administration of Estates Act.

- [68.] However, in the instant action Mr. Moss failed to appoint an executor therefore, an administrator would need to be appointed to deal with the distribution of his estate. Rule 7 of the Probate and Administration Rules Chapter 108 refers to the order of priority where a deceased person left a Will and refers to rule 5. Rule 5(d) reads:

where the residue is not wholly disposed of by will, any person entitled to share in the undisposed of residue in accordance with the rules of intestacy.

- [69.] Pursuant to rule 9(1)(a), Mr. Moss' wife as the surviving spouse would be entitled in priority to make an application for a grant of representation as the administrator.

- [70.] With regard to who is entitled to the real and personal estate of Mr Moss I refer to section 4 (b)

"4. (1) The residuary estate of an intestate shall be distributed in the manner mentioned in this section, namely...(b) if the intestate...(i) leaves a husband or wife and...(B) children, the surviving husband or wife shall take one half of the residuary estate and the remainder shall be distributed equally among the children..."

- [71.] This case bears a striking similarity to **Toomer v Sobinska [1907] P.106** referred to earlier where the document left by the testator, Isabella Hudson Toomer duly revoked the will. However, Justice



Deane concluded that notwithstanding that the document duly revoked the will, the appropriate grant was for letters of administration, not letters of administration with the will annexed. In that case as in the instant action, there was no disposition of property save that Mr. Moss expressly disinherited David Jr. and Davia. Therefore, if that is interpreted as an exclusion from distribution, then it may be arguable that the appropriate grant is for Letters of Administration with the Will annexed. However, if the 2020 Will is interpreted as not disposing of any property despite the exclusion of the two children, then the appropriate application might be for Letters of Administration. Then, in those circumstances, if the Court were to apply the reasoning of Justice Deane in the Toomer case, the application would include a note that the grant was made in consequence of the execution of the Will dated 13 March, 2020 revoking the earlier will which disposed of no property.

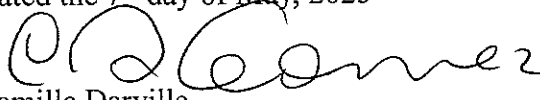
[72.] I make no determination on the type of grant of representation to be applied for or the distribution of Mr. Moss' estate because it may impact David Jr. and Davia who were not parties to these proceedings.

### **Conclusion**

[73.] Accordingly, I make the following orders:

- (i) I pronounce against the validity of the Last Will and Testament dated 4<sup>th</sup> September 2018 pursuant to Section 31C of the Probate and Administration of Estate Rules 2011.
- (ii) I dismiss the Defendant's application for Probate in the estate of the deceased;
- (iii) I declare the last Will and Testament of David Samuel Moss dated the 13<sup>th</sup> day of March 2020 valid;
- (iv) Costs to the Claimant to be paid by the Estate to be summarily assessed by the Court in accordance with the Civil Procedure Rules, 2022.

Dated the 7<sup>th</sup> day of May, 2025

  
Camille Darville  
Justice