

COMMONWEALTH OF THE BAHAMAS 2017/PRO/00315
IN THE SUPREME COURT

**IN THE MATTER OF THE ESTATE OF RUDOLPH ANTHONY
MCSWEENEY LATE OF STAPLEDON GARDENS IN THE WESTERN
DISTRICT OF THE ISLAND OF NEW PROVIDENCE ONE OF THE ISLANDS
OF THE COMMONWEALTH OF THE BAHAMAS, DECEASED.**

AND

**IN THE MATTER OF A GRANT OF PROBATE IN THE ESTATE OF
RUDOLPH ANTHONY MCSWEENEY No. 00315 of 2017.**

B E T W E E N

KOLAMAE ANN McSWEENEY

First Plaintiff

AND

THERESA SELENA McSWEENEY MACKEY

Second Plaintiff

AND

JASON ANGELO McSWEENEY

Third Plaintiff

AND

DESMOND F.L. EDWARDS

First Defendant

AND

RUDOLPH ANDREW McSWEENEY

Second Defendant

Appearance: Ms. Travette Pyfrom for Plaintiffs

Mrs. Tai Pinder for Defendants

Hearing Dates; 12th & 19th July 2023; 2nd November 2024

Decision: 24th February 2025

***Probate** - Probate -Validity of Will - Suspicious Circumstances - Testamentary capacity - Application for will to be declared void – Request for injunction to restrain Executor and Beneficiary.*

***Held:** Grant of Probate set aside. Earlier Will to be admitted to Probate.*

RULING

The instant application on behalf of the Plaintiffs by Originating Summons filed October 2017 for an Order that the Grant of Probate in the Estate of the late Rudolph Anthony McSweeney (the deceased) granted on the 26th May 2017 should be revoked and that the Last Will and Testament of Rudolph Anthony McSweeney dated 26th April 2017 (“the 2017 Will”) is invalid.

The Plaintiffs are also requesting that a Grant of Probate is given to the Last Will and Testament of the deceased dated 12th May 2016 (“the 2016 Will”).

The Plaintiffs are also asking for a Declaration that any transfer of property, except debts related to funeral expenses of the deceased, purported to be made under the said Grant of Probate is accounted for.

Additionally, the Plaintiffs are requesting that the Defendants are restrained from disposing of any assets of the deceased’s estate.

Background

1. The deceased executed the 2016 Will in May 2016 and appointed Denise Joanne Dorsett, to be the Executrix. In April 2017 he executed the 2017 Will and he appointed the 1st Defendant (“Mr Edwards”) as the Executor. He died 19 days later on the 5th May, 2017.
2. The Plaintiffs are the children of the deceased. The 2nd Plaintiff has, since the start of these proceedings, passed away.
3. The Mr Edwards is described as the deceased’s “*attorney and long time friend*”. The 2nd Defendant is a son of the deceased but he too has passed away since the start of these proceedings.
4. The 2016 Will granted gifts to all of the deceased’s children equally, for their lives and to their descendants as well as created a Trust to establish the *McSweeney Foundation*.
5. While the 2017 Will made gifts to the children, the majority of the estate however was granted to the 2nd Defendant.
6. Subsequent to filing the Originating Summons the Court restrained the Defendants from managing, operating and acting on behalf of, removing or otherwise disposing of any and all of the assets of the deceased. This injunction still stands.

Issues

7. The issues in this matter are:
 - i) Whether the 2017 Will was executed under suspicious circumstances.
 - ii) Whether the deceased had the mental capacity to give instructions to have the 2017 Will prepared and executed.

The Plaintiffs’ case

8. The Plaintiffs claim that prior to the execution of the 2017 Will the deceased’s health was failing him. Additionally due to his diabetes, his sight was affected. The 1st Plaintiff (“Kolamae”) claimed that she and the 2nd Defendant had the responsibility of caring for the deceased and attending to his physical needs. She stated that:

“My father’s health was steadily declining during the last year of his life and it got worse in February 2017 where he was hospitalized for a few days. He was suffering from numerous ailments including diabetes, which had gravely affected his sight...he always said he only could see clouds.”

9. She also said that he would admit at times that he was confused. She blames the 2nd Defendant for abusing her father’s trust. She said it was he who drove her father to Mr Edwards to prepare the 2017 Will. She said that the days leading up to his death were his most difficult days as his health further declined, additionally he was no longer able to identify denominations on a bill.
10. She claimed that the 2017 Will confused her father’s assets. She said her father was an astute businessman and was fully aware of his property holding. She said that it also referred to her as **“Colamae Pedican”** but she never used this name.
11. She said that her father lost confidence in Mr Edwards as his attorney.
12. Dr Gertrude Holder, a family medicine specialist gave evidence that she was his general physician for 14 years and that during that time she treated him for various ailments including heart disease, diabetes mellitus and hypertension. She said he became progressively **“short of breath requiring oxygen therapy with minimal activity as well as assistance with transfers and ambulation”**. Additionally, she stated that **“his vision continued to deteriorate as he was diagnosed with glaucoma with declining vision”**.
13. She went on to explain that:

“Within the last month of his life I would have seen and treated the deceased on several occasions. I noted the deterioration in his physical and mental health. He was able to answer basic questions; although slower in recall and in response. He was oriented to person. The decreased awareness of his surroundings and his perception were severely reduced. Without assistance he would not have been able to understand my instructions to him.

Had I been asked to provide an opinion on his mental fitness or ability to give instructions I would have confidently and without hesitation, opined that the deceased was not mentally fit to give instructions within the last few weeks of his life”.

Denise Dorsett, the named Executor and Attorney who drew the 2016 Will said that the deceased said he wanted her to prepare his Will because Mr. Edwards, his attorney, was dilatory in conducting his affairs.

Counsel for the Plaintiff submitted that the 2017 Will was drawn under suspicious circumstances. She explained that Mr Edwards knew the deceased for 30 years yet he never gave instructions to draw a Will until 19 days before he died.

She pointed out that the 2017 Will was contradictory as in one instance Mr Edwards said that the deceased telephoned him to give instructions for the Will and in another instance he said he attended to his (Edwards) office several times to give the instructions

The Defendant’s case

14. Mr. Edwards was the personal friend and attorney of the deceased for more than 30 years.
15. On the 26th April 2017, the deceased executed his last will and testament which, while it did not exclude the Plaintiffs, the deceased redistributed his assets differently than his previous Will.
16. Mr. Edwards stated that he read the Will to the deceased and that he explained the contents to which the deceased responded “Yes that’s what I want to do”.
17. The Will, he said, was prepared a couple weeks before it was executed. The deceased had contacted him via telephone and said **“Desmond I want to do a final Will and I wanted to come by and give you specific instructions”.**

18. The deceased, he said, came two to three times to ensure he was disposing of the properties he wanted. Mr. Edwards said that the deceased kept changing the Will until the final time he settled. When the deceased came he came with the assistance of his son Andrew (2nd Defendant, deceased) who helped him out of the car.
19. Mr. Edwards said the deceased told him that he did not bring the previous Will because he (Mr. McSweeney) said that he was under the influence of his girlfriend ***“my woman”*** when it was made. Mr. Edwards said that Mr. McSweeney kept changing his mind as to whether he would include her.
20. Mr. Edwards further explained that the deceased did not bring any documents with him when he came to the office because all the property and company documents were kept in his (Edwards) office since 1992 in his files.
21. He said that he was confident that the deceased was clear when he came into the office. That they spoke about various things including political involvement because the deceased, ***“was a political animal”***. He explained that the deceased was very clear about what he wanted to do.
22. He further stated that the deceased complained about the relationship he had with his daughter and the animosity she had and that they (the daughter and his girlfriend) may have colluded to get him to execute his previous Will.
23. In clause (6) of the 2017 Will in purporting to dispose one of the properties stated ***“to my four children, Rudolph Andrew McSweeney”***. Mr. Edwards explained this mistake occurred because he was cutting and pasting the Will.
24. The urgency to complete the Will was because the deceased told him over and over that he was not feeling well. Mr. Edwards surmised that it was because he (the deceased) knew he was running out of time.

1. Attorney Cathleen Hassan one of the attesting witnesses to the 2017 Will also gave evidence on the Defendants' behalf. I must note that Mrs. Hassan only responded to attending as a witness as a result of a subpoena. Her reason for not providing a Witness Statement was because she did not want anyone to write it for her nor did she wish to give it prior to appearing in Court as it was her first time appearing as a witness in a contentious probate. I find that this is an absurd statement for an attorney of almost 40 years at the Bar to utter.
2. Her evidence is that when she arrived at Desmond Edwards' office only he and the deceased were there.
3. She stated that she identified herself to him saying ***"I'm Oscar Johnson daughter"*** and ***"I know you know a lot about my father"***. His response was ***"Yes I know OJ well"***. She stated that to refer to her father as OJ meant that he was a close associate and was a political colleague from before 1992.
4. This exchange she stated ***"caused (her) to be satisfied that he was aware of what he was there for"***. She had asked if he was aware that that was his document to which the deceased replied ***"Yes that's my Will"***. The will she said was not read in her presence. She said that she watched the deceased sign it.
1. Counsel for the Defendants submitted that there was a presumption that a professionally drawn will was valid and made by a person whose capacity was not in doubt. She relied on the decision of the Privy Council in the case of **Lucky vs Tewari (1965) 8WIR** that ***"when the will has been read over to a capable testator on the occasion of the execution that is sufficient proof that he approved of as well as knew the contents of the will"*** ,

2. She further submitted that in the instant case Desmond Edwards gave evidence that he read the Will to the deceased. The Plaintiff's, she said, have not disproved this fact. Further Mrs Hassan's evidence that the deceased told her that it was his Will and it may cause some problems (*Emphasis mine*) and then proceeded to sign in her presence reinforces the fact that he knew the contents of his Will had changed and was aware of the changes he made.

25. Counsel commented on Dr Holder's evidence that she was not a gerontologist (a physician specializing in medical care of older adults), and that she had no formal training in aging and aging tissues and therefore her speculation that the deceased lacked testamentary capacity was not sufficient. She submitted that mild dementia does not deprive a testator from executing a Will and she supports this contention by Cockburn, CJ's decision in **Banks v Goodfellow** that "*...it seems unreasonable to deny testamentary capacity on the speculative possibility of unsoundness which has failed to display itself, and which, if existing in a latent and undiscovered form, would be little likely to have an influence on the disposition of the will...*"

26. She also submitted that there was no allegation of fraud in relation to the execution and therefore the Plaintiff accepts that it was the deceased's signature affixed to the Will.

The Statutory Framework

1. **Section 3 of the Wills Act (the Act) provides that every person may by will, executed in accordance with the Wills Act, dispose of his real and personal property which he owns at the time of his death.**

Section 4 outlines a person's legal capacity to make a valid will, that he must be;

- (a) aged eighteen years or over; and
- (b) of sound disposing mind.

27.

Doctrine of Suspicious Circumstance

1. The Plaintiff claimed that there were *suspicious circumstances* in the drawing and execution of the 2017 Will. She outlined several circumstances she said were suspicious.
 - a. *“Paragraphs 8 and 13 are contradictory. In one instance the deceased allegedly called and informed the 1st Defendant that he had signed a will that he was unhappy with. In paragraph 13 the deceased did not on the day the will was allegedly executed mention a previous will.*
 - b. *“Paragraph 9 suggests that the decision to change the will was somehow influenced by the relationship between the Plaintiff's and the deceased. However, during examination, the evidence of the Defendant was that the deceased said that “I'm not satisfied with this because I was under the influence of my girlfriend, my woman¹...”*
 - c. *“As appears from Clause 3 of the 2016 Will, the influence to prepare the 2016 will stemmed from the Testator's lack of confidence in the ability of his children to carry on his legacy.*
 - d. *“According to Mrs. Dorsett, the instructions to prepare the 2016 Will and the perfection of the Will took place over a period of months, with Mrs. Dorsett personally attending at the Testator's business address (never at his home), to clarify, review and amend the provisions, if and where necessary.*

- e. ***“Mr. Edwards, when cross examined on the reason the alleged influence of the deceased’s woman, was not included in his written evidence, the response was, to say the least, incredible;”***

Counsel for the Plaintiff pointed out that in his witness statement and again in his oral testimony Mr. Edwards stated that the witnesses to the 2017 Will signed it on the 27th June 2017 when in fact the deceased died 15th May 2017.

- (i) She submitted that the only conclusion is that the 2017 Will was not in fact witnessed by the witnesses to the Will until after the deceased passed (which may account for the reluctance of the witness to attend to be cross examined at the trial). She also submitted that the instructions to prepare the 2017 Will came from the 2nd Defendant. She further submitted that the 2017 Will was prepared after the deceased passed.

17. Counsel for the Petitioner relied in support of her submissions on a number of authorities including the leading case of **Barry v. Butlin (1838) II Moore 480** which laid down the principle of suspicious circumstance, that;

“...it is twofold, that the onus probandi lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. Secondly, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court”.

The test, according to **Lord Wilberforce in Lucky v Tewari (1965) 8 WLR** is that the evidence which gives rise to suspicion must create a real doubt whether the testator knew and approved of the contents of the Will.

Hence, the burden of *exciting the court’s suspicion* lies with the Plaintiff and once this is accomplished the burden then shifts to the Defendant to prove that the testator knew and approved of the contents of the will.

Analysis

The fact that Mr. Edwards says that the deceased attended his office to give the instructions on the one hand and on the other he said that he received instructions by way of a telephone call is contradictory. I accept the Plaintiff's evidence that her father was an astute businessman and the fact that he would incorrectly describe his assets is questionable.

The explanation given by Mr Edwards as to the errors that occurred in the preparation of the Will is concerning. He stated that the errors occurred because he was "*cutting and pasting*" but he never stated from what he was cutting as he admitted that he had not seen the 2016 Will.

Mr. Edwards said he read the Will over to the deceased however under cross examination he admitted that the final draft was not read over to him. Mrs. Hassan said the Will was not read over to him in her presence. She said that he acknowledged that it was his Will.

I note, which I consider is fundamental, that Mr Edwards' reference to the execution of the Will occurring on 27th June 2017 when in fact the deceased passed away in May 2017.

The evidence is that the deceased's health as well as his sight was failing him. I accept the evidence of Dr. Holder and do not agree with Counsel for the Defendant. Even though she was not a gerontologist she was nevertheless his physician for 14 years and she is competent to speak to his declining memory and his physical state.

Having observed Mr. Edwards' demeanor on the witness stand, I find that his evidence was not spontaneous. He was combative at times while at others he was hesitant to answer some of the questions. I prefer the evidence of Dr. Holder over that of Mr. Edwards relative to the deceased's cognitive ability at the time of the execution of the Will.

Conclusion

The circumstances noted above under which the 2017 Will was executed has "**excited the court's curiosity**". I find therefore that the Plaintiff has in fact raised

sufficient evidence to satisfy this requirement. Consequently, it was incumbent on the Defendant to produce evidence to negate this circumstance, which has not been done.

It is hereby ordered that:

- i) The Grant of Probate dated 26th July, 2017 is set aside and the 2016 Will to be admitted to Probate.
- ii) Any disposition of property in the estate is to be accounted for.
- iii) The Defendants are refrained from disposing of any assets of the estate.

Costs of the action to the Plaintiff to be taxed if not agreed.

Dated this 24th day of February 2025

A handwritten signature in black ink, appearing to read 'Donna D. Newton', is written over a horizontal line.

The Honourable Justice Donna D. Newton