

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW AND EQUITY DIVISION**

**2012//CLE/gen/00114**

**BETWEEN**

**In the Estate of the Wills Act**

**-and-**

**In the Matter of the Last Will and Testament  
of the late ALICE ROBERTS (deceased)**

**GELETA A. GOODING**

**Plaintiff**

**-and-**

**LYNDA LAMBERT**

**Defendant**

**Before:** The Honourable Madam Justice Indra H. Charles

**Appearances:** Mr. Nathan Smith for the Plaintiff  
Mr. Joseph Moxey of Mackay & Moxey for the Defendant

**Hearing Dates:** 24 February 2017, 6 November 2017, 23 February 2018

**Probate – Validity of Will – Testamentary Capacity –Sections 3- 5 of the Wills Act, 2002,  
Chapter 115**

The Plaintiff instituted these proceedings against the Defendant alleging that the Last Will and Testament of her grandmother (“the deceased”) is invalid because it was obtained under suspicious circumstances in that the deceased was literate and could have signed her name instead of signing by making an “X” and she was not of the testamentary capacity to make such Will as a result of the stroke which she suffered.

**HELD:** dismissing the action with costs to the Defendant to be taxed if not agreed and finding that the Last Will and Testament of the late Alice Roberts is valid and complies with all the requirements of sections 3 to 5 of the Wills Act, 2002, Chapter 115.

1. The onus is on the Plaintiff to demonstrate that the Last Will and Testament of the deceased is invalid.
2. The Plaintiff has alleged fraud and /or duress but has adduced no evidence to substantiate the same. Fraud must be specifically pleaded and proved. The Plaintiff had failed to do so.
3. In The Bahamas, two pre-conditions are necessary for a will to be valid namely: (i) the testator must be 18 years or over and (ii) the testator must be of sound disposing mind: Section 4 of the Wills Act, 2002, Chapter 115. The Will made by the deceased on 17 July 2006, five years before she passed away, satisfied both of those pre-conditions.

## **JUDGMENT**

### **Charles J:**

[1] By Originating Summons filed on 30 January 2012 which, by Order of the Court, was converted to a Writ of Summons and a Statement of Claim filed on 30 October 2012, the Plaintiff, Geleta Gooding (“Ms. Gooding”), the eldest grand-daughter of the late Alice Roberts (“the deceased”), sued the Defendant, Lynda Lambert (“Ms. Lambert”), the Executrix and principal beneficiary of the Will of the deceased, for the following relief:

1. A Declaration that the purported Last Will and Testament of the deceased dated 17 July 2006 (“the Will”) is void ab initio and of no effect on the ground that the purported mark in the form of an (X) is not the mark of the deceased since she was capable of writing her name;
2. A Declaration that the purported signature of the late Livingstone Basil Johnson, Attorney-at-Law (“Attorney Johnson”) and the purported Administrator of the said Will of the deceased is not genuine;
3. A Declaration that when regard is had to all the known oral and written intentions of the deceased, the true beneficiary of her Will is Geleta Gooding;
4. An Order that the Will of the deceased is void and of no effect for failure to comply with the provisions of the Wills Act, 2002, Chapter 115 and;

## 5. Costs.

- [2] In a nutshell, Ms. Gooding alleged that the Will of the deceased was executed in suspicious circumstances and/or alternatively fraudulently under undue influence.
- [3] In her Defence, Ms. Lambert denied that the Will of the deceased is not a valid Will and puts Ms. Gooding to strict proof of the assertions contained in her Statement of Claim. In fact, says Ms. Lambert, since 2000, Ms. Gooding had not even seen the deceased so she is utterly unaware that the deceased, who was 93 at the date of her death, was suffering from a stroke and had severe arthritis rendering her unable to sign her name but her mental faculties were intact.

### **The issues**

- [4] The issues which arise are as follows:
1. Whether the deceased was of sound disposing mind to execute the Will in accordance with the provisions of the Wills Act?
  2. Whether the Will is void on the ground that the mark (X) is not that of the deceased? and;
  3. Whether the Will complies with the statutory requirements of sections 4 and 5 of the Wills Act?

### **The Statutory Framework**

- [5] The Wills Act, 2002 (Chapter 115) (“the Act”) is an Act to make fresh provisions relating to the law of wills in The Bahamas. Section 3 deals with property that is disposable by will. It provides as follows:

**“Subject to this Act, every person may dispose by will executed in accordance with this Act all real estate and all personal estate owned by him at the time of his death.”**

[6] Section 4 of the Act relates to the capacity of a person to make a will. It states that “to be valid, a will shall be made by a person who (a) is aged eighteen years or over; and (b) is of sound disposing mind.”

[7] Section 5 deals with the formalities for the execution of a will. It provides as follows:

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

**(2) The signature of the testator or other person mentioned in subsection (1) is effective if —**

**(a) so far as its position is concerned it satisfies subsection (3);**

**(b) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and**

**(c) each witness either —**

**(i) attests and signs the will; or**

**(ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness), but no form of attestation is necessary nor is publication of the will necessary.**

**(3) So far as regards the position of the signature of the testator, or of the person signing for him —**

**(a) a will is valid if the signature is so placed at, after, following, under, beside or opposite the end of the will that it is apparent on the face of the will that the testator intended to give effect, by the signature, to the writing signed as his will;**

**(b) no will is affected by the circumstances that —**

**(i) the signature does not follow, or is not immediately after, the foot or end of the will;**

**(ii) a blank space intervenes between the concluding word of the will and the signature;**

**(iii) the signature is placed among the words of the testimonium clause or of the clause of attestation or follows or is after or under the clause of attestation, either with or without a blank space intervening,**

**or follows or is after, under or beside the names or one of the names of the subscribing witnesses;**

**(iv) the signature is on a side page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will is written above the signature; or**

**(v) there appears to be sufficient space to contain the signature on or at the bottom of the preceding side, page or other portion of the same paper on which the will is written, and the enumeration of the circumstances in paragraph (b) does not restrict the generality of this subsection, but no signature under this section operates to give effect to any disposition or direction which is underneath or follows it, nor does it give effect to any disposition or direction inserted after the signature is made.**

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

### **The evidence**

[8] Ms. Gooding was the sole witness to testify for the Plaintiff. She is the eldest granddaughter of the deceased who died on 17 January 2011. She testified that she lived with her grandmother at her homestead in Chippingham from the age of 3 and until 18 when she went off to the United States. She asserted that she moved back permanently to the Bahamas in 1990 but she visited her grandmother whenever she was in Nassau. She stated that her grandmother was the owner of many houses and apartments situate in different parts in Nassau. She also owed a motel/guest house known as “Ree’s Guest House” in the Chippingham area.

[9] Ms. Gooding further testified that her grandmother was a wealthy woman. She was also not illiterate. In fact, she was quite literate and able to write in coherent and legible form. She had seen her grandmother’s signature on many occasions. Ms. Gooding said that she was present when her grandmother appended her signature to her driver’s licence in 1973: See Bundle of Pleadings at Tab. 25

[10] Ms. Gooding next averred that during those occasions when her grandmother was able to travel, she completed and signed her immigration entry forms in her own

handwriting: see Bahamas Immigration Forms No. 136980 and 1505576 in Bundle of Pleadings at Tab. 25.

- [11] Ms. Gooding said that she first met Attorney Johnson in or about 1999 when she received a letter from him instructing her to desist from collecting rent from Ree's Guest House on behalf of her grandmother. According to her, she confronted her grandmother who said that she was not aware of what she was talking about whereupon her grandmother instantly telephoned Attorney Johnson and summoned him to her house. She said that Attorney Johnson said that she was acting on Ms. Lambert's instructions and it was at that time that her grandmother introduced her to Attorney Johnson as her eldest grand-daughter.
- [12] Ms. Gooding stated that there came a point when she realized that Ms. Lambert was taking advantage of her grandmother so she did some 'digging' and discovered that on 1 December 2006, Ms. Lambert had unduly influenced the deceased or fraudulently had her execute a Deed of Gift to her as well as a Conveyance to Unadell Charlton and Brenda Bannister in 2010 and a Power of Attorney dated 19 April 2010 appointing Ms. Lambert as her niece. On all these documents, the deceased was purported to have signed with an X.
- [13] Ms. Gooding testified that shortly after her grandmother's death on 17 January 2011, a letter dated 30 May 2011 from Mrs. Daphne E. Clarke of Mortimer & Co. was sent to her attorney Mr. Sidney S. Collie, Esq. demanding that she desists from collecting rent from the property. She said that the letter did not disclose on whose instruction Mrs. Clarke was acting: Tab. 29.
- [14] Ms. Gooding stated that by letter dated 17 May 2011, Mr. Lowell J. Mortimer ("Mr. Mortimer") informed that the deceased made her Last Will and Testament on 17 July 2006 in which she named Attorney Johnson as her Executor and in the event that Attorney Johnson predeceased her, then Ms. Lambert would be the Executrix of her Will.

- [15] Ms. Gooding then went on to cast some aspersions on her former attorney for failing to carry out her instructions by refusing to submit the affidavit of Mr. Percy Miller (“Mr. Miller”), the chauffeur of her grandmother and to obtain an affidavit from Mrs. Maria Russell-Coakley of the Department of Environmental Health who could confirm that the deceased was the one who signed the papers from Environmental Health for her to go to Court. Unfortunately, neither of these two persons testified at this trial to confirm what Ms. Gooding had testified.
- [16] Ms. Gooding stated that after careful consideration of the Will and having regard to the deceased’ intention, she immediately instructed her Attorney to file a caveat against the probating of the Will by Ms. Lambert.
- [17] She testified that she had never visited the deceased after Ms. Lambert moved her to live at Skyline Drive with her in 2000 because Ms. Lambert did not want her to visit her house. However, the deceased would ring her or visit her at school or at home with Mr. Miller. According to her, her grandmother was isolated from some of her family.
- [18] Ms. Gooding also testified that in a letter dated 10 May 2013 from Dr. Judson F. Eneas, Dr. Eneas states” *“I cared for Mrs. Roberts from May 2, 2001 until November 7, 2006 in my office until she fractured her hip and eventually became bedridden. During that time she was of sound mind and body and was able to make her own decisions.”*
- [19] At paragraph 28 of her witness statement, she referred to the medical reports of the deceased from Princess Margaret Hospital and Doctors Hospital. She queried how the deceased was semi-conscious with deformities to both knees and had her right 3<sup>rd</sup> toe infected and the 4<sup>th</sup> right toe broken around with no nail. In her opinion, “a woman who had a maid looking after her, could not possibly be in that state”. That said, she was unable to produce any medical evidence to substantiate that the deceased suffered these injuries.

- [20] Ms. Gooding also queried the referrals of Ms. Lambert as the deceased' daughter or granddaughter. According to her, the deceased had two daughters (deceased) and four granddaughters.
- [21] At paragraph 29 of her witness statement, Ms. Gooding stated that Ms. Lambert lied upon the deceased' admission by stating that a family conference was held and it was the wish of the family that no aggressive management be instituted so when the deceased had cardiopulmonary arrest, no resuscitation was attempted.
- [22] At paragraph 30, Ms. Gooding states that she is informed by her attorneys that the purported Will of the deceased was executed in suspicious circumstances and/or alternatively fraudulently under undue influence and as such, should arouse the suspicion of the Court.
- [23] Under cross-examination by learned Counsel, Mr. Moxey who appeared for Ms. Lambert, Ms. Gooding stated that the driver's license which she produced was issued in 1973 when the deceased was 57 years old; she having been born on 29 December 1916. She also stated that the deceased was isolated from most of her family, her grand-children and especially her great-grandchildren.
- [24] Further, Ms. Gooding was asked to compare the signatures of the deceased as they appear in various documents namely, in the letter dated 15 July 2005 addressed to "To Whom It May Concern" and her driver's licence and the embarkation card wherein the deceased signed in 1973. Ms. Gooding admitted that in 1973, the deceased signed as "Mrs. Alice Roberts" and in the letter of 15 July 2005 giving her full authorization to collect rent and take over all of her affairs, the name "Alice Roberts" appears. In fact, it is suggested that the letter dated 15 July 2005 is a forgery since in 2005, the deceased signed by marking an "X". It was suggested that even in the same letter, the deceased marked an "X" but Ms. Gooding said that her daughter put the "X" there so that the deceased would know where to sign.



- [25] Learned Counsel Mr. Moxey next cross-examined Ms. Gooding with respect to Attorney Johnson's signature since Ms. Gooding alleged that the signature on the Will is not that of Attorney Johnson. She was shown the letter of 18 August 2005 and she admitted that it is Attorney Johnson's signature. She was asked to compare it with the signature of the Will and she stated that "they don't look alike." She was then referred to the Conveyance: see Exhibit LL11 in Supplemental affidavit of Ms. Lambert filed on 10 February 2017. Ms. Gooding maintained that the signatures purported to be that of Attorney Johnson do not look alike.
- [26] Lastly, Mr. Moxey suggested to Ms. Gooding that she is here because she is of the belief that she is entitled and she admitted that she is entitled.
- [27] Under re-examination, Ms. Gooding insisted that she was unable to visit the deceased when she lived with Ms. Lambert but the deceased would come and visit her at school or at home. She stated that about two biological relatives were able to visit the deceased while she resided with Ms. Lambert. She stated that Mr. Miller was the chauffeur of the deceased at one point and Mr. Stanley was also her chauffeur. She also stated that she had never seen the deceased marked any document with an "X".
- [28] Ms. Lambert and her witness, Mr. Ngumen testified on 6 November 2017. She stated that she was appointed Executrix in the Will of the deceased executed on 17 July 2006. The Will was prepared and signed by Attorney Johnson and witnessed by Charmaine A. Johnson and Thelma Rolle.
- [29] She next stated that the deceased instructed Attorney Johnson to write to Ms. Gooding to instruct her to desist from collecting rent on her behalf because she did not authorize Ms. Gooding to do so. See "Exhibit LL-3".
- [30] Further, by letter dated 25 January 2005, Ms. Roberts instructed Attorney Johnson to write a letter to Mrs. Mary Mitchell-Rolle, Coordinator of the Fort Charlotte Urban Renewal Project informing them that she had some disability and was unable to

manage her affairs and she was appointing Mr. Pat Rutherford is be her agent: "Exhibit LL-4".

[31] Ms. Lambert next deposed that on 19 April 2010, the deceased executed a Power of Attorney giving her power over her estate. The Power of Attorney was prepared by Attorney Johnson and witnessed by Daphne E. Clarke ("Ms. Clarke") and Tine Usher-Knowles ("Mrs. Knowles"): "Exhibit LL-2".

[32] Ms. Lambert deposed at paragraph 6 of her witness statement that, contrary to Ms. Gooding's assertion that the deceased was a young and healthy woman who could sign her name (as shown on the driver's licence and immigration forms), that was prior to 1973 and long before the deceased suffered a stroke and had arthritis issues. She stated that the document dated 15 July 2005 wherein it is purported that the deceased signed her name in the presence of two witnesses conveniently does not have the names of the two witnesses. She asserted that she knows that the deceased could not have signed that document because of her medical disabilities. She also stated that Ms. Gooding had not seen the deceased since 2000 when she moved to Skyline Drive and stayed there until her death in 2011 and is therefore unable to speak to the medical condition of the deceased.

[33] Ms. Lambert next deposed that Ms. Gooding produced a letter dated 18 August 2005 – "Exhibit LL-7" and signed by Attorney Johnson giving tenants of the deceased a Notice to vacate the premises and whose signature Ms. Gooding accepted as authentic. She asserted that it is the same signature of Attorney Johnson that appears on the Will. Nevertheless, Ms. Gooding insisted that the Will is invalid and was not prepared by Attorney Johnson who also signed an attesting affidavit to his explanation of the Will to the deceased who signed by making her mark "X".

[34] At paragraph 10 of her witness statement, Ms. Lambert alleged that she obtained a copy of the deceased' Continuing Eligibility to Receive an Assistance form from the National Insurance Board dated 24 November 2010 that bears the mark "X" of

the deceased: "Exhibit LL-1" attached to her Supplemental Affidavit filed on 10 February 2017.

[35] Ms. Lambert further alleged that in 2006, the deceased gave her a piece of property which is reflected in a Deed of Gift: "Exhibit LL-1" attached to her Supplemental Affidavit filed on 10 February 2017.

[36] Ms. Lambert was extensively cross-examined by Mr. Smith (who had taken over from learned Counsel Mr. Moultrie, now Speaker of the House of Assembly). She stated that from age 5, she was told that she was adopted by the deceased. She agreed that she is not blood-related to the deceased but an adopted daughter. She never saw any legal document to that effect.

[37] In the Power of Attorney ("Exhibit LL-2"), she is referred to as the 'niece.' Under cross-examination, she said that she is not the niece. She said that she called the deceased 'mother' or 'grammy'. After her children were born, she referred to the deceased as 'grammy'. She said that she was distraught on the night that the deceased fell ill and she might have said 'grand-daughter' or 'daughter.'

[38] Ms. Lambert testified that the deceased had a stroke in her 80's. She stated that when she moved into her house in 2000, the deceased moved with her and she did not isolate her from her family and all family members who wished to see her, did so. She said that Albrina Tucker visited the deceased on many occasions. She said that the deceased said to her that her grandchildren did nothing for her. She said that she was not present when the Will was made and it was not made under her instructions. Nor was the Power of Attorney. She said that deceased called Attorney Johnson who came to the house.

[39] Ms. Lambert said that the deceased was treated by Dr. Eneas and around 2006, she had arthritis but was of sound mind. It was suggested that the purported Will is not a valid Will as the deceased was able to write her name as she did in 1973. She stated that the deceased could not write her name at the time of the making of the Will. It was also suggested that she was the one who gave instructions with

respect to the Will. She categorically denied that and said that the deceased was of sound mind.

[40] The next witness to testify on behalf of the Defendant was Mr. Van Ming Ngumen. He is retired and lives in Freeport. He stated that he was born in 1942 and he is the nephew of the deceased. He had known his aunt all of his life and he always stayed in contact with her right up to her death.

[41] Mr. Ngumen deposed that he often visited his aunt on his trips to Nassau and would often stay at her residence in Chippingham where she would allow him to stay in one of her guest rooms in an apartment next door.

[42] In paragraph 5 of his witness statement filed on 10 February 2017, Mr. Ngumen averred that he knew that his aunt had a stroke and very often, she would complain of having arthritis pain all over her body and that her hands and legs were very painful at times. He said that because of the stroke and arthritis, his aunt had difficulty holding a pen to write and he had seen her signed her name with an "X".

[43] Under cross-examination, Mr. Ngumen stated that he is resident in Freeport. He said that he left The Bahamas in 1965 to go to New York but had a dream that his sister had died so he returned to The Bahamas to live. He was a bar-tender in Freeport and worked full-time until his retirement in 2003. He said that he was born in Chippingham. He said that his aunt never stayed in Chippingham but Foster Street. He was adamant that she had a stroke and arthritis.

[44] Mr. Ngumen stated that he was present when his aunt signed the first document. She called him to come to Nassau. According to him, his aunt had a "couple of lots" that she wanted to share between himself and Ms. Lambert.

[45] With respect to the Will, Mr. Ngumen was asked whether the deceased' address was Flamingo Avenue, Chippingham. He said that It is not the same as Skyline Drive. The last time he visited his aunt, she was living with Ms. Lambert at Skyline Drive.

[46] By the Court, he was asked whether he knows Ms. Gooding and he stated that, as far as he knows, she is the granddaughter of his aunt.

[47] That was the extent of the evidence led before this Court.

### **Factual findings**

[48] I had the advantage of seeing, hearing and observing the demeanour of the witnesses who testified before the Court. From the outset, I should say that I did not find Ms. Gooding to be a credible witness. I came to the conclusion and indeed, it is supported by Ms. Gooding's answer under cross-examination, that because she is a blood relative of the deceased, she is automatically entitled to the property of the deceased. No doubt, she considered Ms. Lambert to be a total stranger. On the other hand, I found Ms. Lambert and her witness Mr. Ngumen to be credible witnesses and I accepted their evidence, which in material particulars, was substantiated by documentary evidence which I shall come to momentarily.

[49] The facts, as I found them are as follows: On 17 July 2006, the deceased signed her Last Will and Testament by making an "X" before her Attorney, Mr. Johnson, now deceased. The Will was witnessed by Charmaine A. Johnson and Thelma Rolle. In the Will, the deceased appointed Attorney Johnson as her Executor and in the event that he predeceased her, then Ms. Lambert would be the Executrix of her Will. There is no law that prevents a person from appointing his/her attorney as an executor.

[50] The deceased suffered a stroke in early 2000 and coupled with severe arthritis, it left her with a physical not mental disability. This evidence is substantiated by Mr. Ngumen whom I found to be a witness of truth. In addition, in his letter to Ms. Gooding, Dr. Eneas stated that he cared for the deceased from 2 May 2001 until 7 November 2006. According to him, during those periods, the deceased was of sound mind and body and was capable of making her own decisions.

- [51] The Will was made during this period that she was a patient of Dr. Eneas who found her to be of sound mind, one of the requirements for a will to be valid.
- [52] I found as a fact that at the date of the making of her Will, the deceased was suffering from arthritis and was unable to write. The fact that she was unable to write in or about 2006 is supported by various documents that she made before Attorney Johnson.
- [53] Thus, the assertion by Ms. Gooding that the deceased could have signed her name is unfounded since the documents which Ms. Gooding produced to support her contention were signed pre-1973. In 1973, the deceased was 57 years old. At the date of the execution of the Will, the deceased was five months shy of her 90<sup>th</sup> birthday. It hardly could be doubted that as we approach our twilight years, the once agile and healthy body slows down. In the case of the deceased, she was also bed-ridden.
- [54] In my opinion, the fact that the deceased was unable to sign her name is bolstered by the Continuing Eligibility to Receive an Assistance Form issued by the National Insurance Board on 24 November 2010 that bears the deceased mark as "X".
- [55] I find as a fact that Ms. Gooding is a disgruntled relative. She emphasized that she is a blood relative. However, she was not a part of the deceased' life. In my opinion, there is nothing strange or suspicious that a person may decide to leave their property to strangers who have assisted them especially in their twilight years, when relatives have distanced themselves. When Ms. Lambert built and moved into her own home, she took the deceased with her.
- [56] I did not believe Ms. Gooding when she stated that that when the deceased moved in to live with Ms. Lambert in 2000, she would come to her workplace at the school or at her home to visit.

## Discussion

[57] Learned Counsel, Mr. Smith who appeared for Ms. Gooding submitted that the onus is on Ms. Lambert to establish that the deceased had the capacity to make the Will. He submitted that in making a will, there must be:

1. Animus testandi – intention must take effect on the testator’s death;
2. Capacity to make a will – soundness of the mind, four criteria as per Cockburn CJ in **Banks v Goodfellow** (1870) LR 5 QB 549, at 567, namely:
  - i. The testator must understand ‘the nature of the business in which he is engaged’
  - ii. The testator must have a recollection of the property he means to dispose of;
  - iii. The testator must recollect ‘the persons who are the objects of his bounty’; and
  - iv. The testator must have a recollection of ‘the manner in which the property is to be distributed between ‘the objects of his bounty’.

[58] Learned Counsel submits that Ms. Lambert has not discharged the onus of establishing testamentary capacity and also, that such capacity is further challenged by the suspicious circumstances leading up to the execution of the purported will in combination with the obvious undue influence and apparent fraud in the preparation and execution of the Will.

[59] As I understand the law, since it is Ms. Gooding who alleges that the Will is invalid because of testamentary incapacity, the onus to prove that the deceased was incapacitated when she made the Will rests on her; not Ms. Lambert. She has to satisfy this Court that the deceased was not of sound disposing mind, as provided for in section 4 of the Act. In my opinion, Ms. Gooding makes allegations which are unsupported by any evidence because she is so obsessed by the fact that since she is a blood relative, she should be entitled to the estate of the deceased that she sees no further. In her view, how can a Haitian stranger who came to live with

her grandmother, at her behest, at age 5, become entitled to almost all of her grandmother's estate?

[60] That said, the case of **Banks v Goodfellow**, cited by learned Counsel Mr. Smith, is inapplicable to the present situation. In **Banks**, the testator was so insane that he was incapable of making a will. The question at the trial before a jury was the capacity of the testator to make a will on 2 December 1863 when instructions given for the will were provisionally executed as a will, or on 28 December 1863 when the formal will was executed. The instant case does not present a similar situation.

[61] Learned Counsel Mr. Smith next submitted that in attempting to justify the marking of an 'X' by the deceased, Ms. Lambert, at paragraph 10 of her affidavit filed on 28 March 2013, alleged, without proof, that the deceased had suffered a stroke and impliedly inferred that, as a consequence, she was unable to write her signature. He asserted that in the case of **In the Estate of Park** (1953) 2 All ER 1411, CA the will of a 78 year old testator was declared invalid because of the affects of two strokes suffered by the testator. In similar vein, he submitted that if the Court accepts that the deceased had suffered a stroke which affects her mental capacity to write her signature, then the deceased would not have had the capacity to make the Will.

[62] Learned Counsel further submitted that the burden of proof or the onus probandi lies in every case upon the party propounding a Will; and the propounder must satisfy the conscience of the Court that the instrument being propounded is the last Will and Testament of a free and capable Testator. He referred to the case of **Tyrrell v Painton** [1894] P. 151. CA at page 157.

[63] Mr. Smith further submitted that the Will is not rational on its face in that the purported Will of the deceased excludes all of her blood relatives and makes Ms. Lambert the sole beneficiary. This is not true as Ms. Lambert is the principal but not sole beneficiary as thirteen percent of the deceased' estate went to other beneficiaries including some family members.



[64] In **Tyrrell**, the proposed will had been made by the testatrix when she was ill. She had signed a first will two days earlier. Her doctor said she was exhausted and was drowsy and had complained to her. The treating doctor said that she had been disturbed by the introduction of a strange young man to her room. The strange young man was an attesting witness to her alleged further will. The trial judge accepted the evidence of the attesting witnesses, one of whom was the son of the person who would take under the alleged will. It was held that it was not necessary to show that the will was the result of a fraudulent scheme on the part of the beneficiary or the attesting witnesses. It was enough that suspicion attached to the execution of the second will which was not removed. Davey LJ said ‘wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the court ought not to pronounce in favour of it unless that suspicion is removed.’ Then at page 157, Lindley LJ said:

**“The rule in *Barry v Butlin, Fulton v Andrew and Brown v Fisher* is not, in my opinion, confined to the single case in which a will prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exists, and whatever their nature may be, it is for those who propound the will to remove that suspicion, and to prove affirmatively that the testator knew and approved the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will.”**

[65] In my considered opinion and agreeing with the legal principles emanating from the case of **Tyrrell**, the facts and circumstances of the present case are very distinguishable. In the present case, the deceased did not make two wills. In addition, the Will was prepared and executed before an attorney and properly attested to in accordance with section 5 of the Act. In addition, there is not an iota of evidence that the deceased was not free or capable and that her capability was severely impacted by the undue influence of Ms. Lambert. Ms. Gooding’s allegations are speculative and conjectural. Further, Dr. Eneas, who was the deceased’ doctor, said, in his letter to Ms. Gooding dated 10 May 2103, that from 2 May 2001 to 7 November 2006 (when he cared for the deceased), **“the deceased was of sound mind and body and was able to make her own**

**decisions.**” Undoubtedly, the requirements of the Act, namely the testator must be (i) over 18 years and (ii) of sound disposing mind are the conditions which must be satisfied which, to my mind, Ms. Lambert has ably satisfied. The fact that the deceased had a stroke, which she did in or about 2000, did not affect her sound mind, as found by Dr. Eneas. Attorney Johnson also found her to be of sound mind because in his attestation letter, he stated as follows:

**“I, LIVINGSTONE BASIL JOHNSON, of the Eastern District of the Island of New Providence one of the Islands of the Commonwealth of The Bahamas, Attorney-at-Law and Notary Public. HEREBY DECLARE that I read and explained the annexed Last Will to Alice Roberts of the Western District of the Island of New Providence, aforesaid, before she executed the same by making her Mark, and that she stated that she heard and fully understood the contents and meaning thereof.**

**Dated the seventeenth day of July, A.D., 2006.**

**Notary Public**

- [66] Ms. Gooding even challenged the signature of Attorney Johnson as not being his but she did not bring any handwriting expert to disprove this. Therefore, the challenge must fail.
- [67] Mr. Smith raised the issue of undue influence and relies on the affidavit of Mr. Miller who was the deceased’ chauffeur for many years. Although Mr. Miller swore an affidavit in these proceedings, he was not called as a witness to testify at this trial. His affidavit is therefore expunged from the record. That said, and evaluating the evidence advanced by Ms. Gooding, she has not satisfied this Court, on a balance of probabilities, that Ms. Lambert pressured or influenced the deceased to make a will largely in her favour. There is no evidence that Ms. Lambert was present when the Will was executed.
- [68] Learned Counsel Mr. Moxey submitted that Ms. Gooding had not seen the deceased for many years and so, she was oblivious to the deceased’ physical medical conditions and the fact that the deceased suffered a stroke in early 2000. Coupled with the stroke, the deceased had severe arthritis, which left her with a physical but not mental disability. Despite the fact that Ms. Gooding challenged

that there is no medical evidence of the physical disability of the deceased, it is beyond doubt that the deceased was bedridden. That said, I accept the evidence of Ms. Lambert and Mr. Ngumen that the deceased suffered a stroke and had severe arthritis. That did not affect her mental capacity to make her Last Will and Testament.

### **Conclusion**

- [69] In the premises, I find that the deceased, Alice Roberts was of sound mind and over the age of eighteen years when she executed her Last Will and Testament dated 17 July 2006. The Will was signed by two (2) attesting witnesses namely Charmaine A. Johnson and Thelma Rolle who confirmed their presence when the deceased marked her "X". Furthermore, Attorney Johnson (now deceased) attested to the deceased signing and understanding the contents of the Will. The Will conforms to the requirements of sections 4 to 5 of the Wills Act. Accordingly, I will declare that the Last Will and Testament of Alice Roberts dated 17 July 2006 is a valid will.
- [70] In addition, on a balance of probabilities, the evidence adduced by Ms. Lambert far outweighs the evidence adduced by Ms. Gooding. Accordingly, Ms. Gooding's claim must fail. I therefore dismiss this action with costs to the Defendant to be taxed if not agreed.

**Dated this 22<sup>nd</sup> day of March, A.D., 2019**

**Indra H. Charles**  
**Justice**