COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2016/CLE/gen/01465

BETWEEN

JANICE CURRY

1st Plaintiff

-AND-

EUNICE JOHNSON

2nd Plaintiff

-AND-

DERRICK JOHNSON

3rd Plaintiff

-AND-

ROGER COX
(In his capacity as Executor of the Estate of the Late Eleadon Elias Cox)

1st Defendant

-AND-

WARREN COX
(In his capacity as Executor of the Estate of the Late Eleadon Elias Cox)

2nd Defendant

Before: The Honourable Madam Senior Justice Indra H. Charles

Appearances: Mrs. Krystal Rolle KC with her Ms. Kendrea Demeritte of Rolle & Rolle for the Plaintiffs
Mrs. Gia Moxey-Lockhart of Moxey Law Chambers for the Defendants

Hearing Dates: 18 February 2021, 27 April 2021, 28 April 2021, 9 June 2021, 14 December 2021

Probate – Will – Validity – Defendants obtained grant of probate –Plaintiffs contend that Will does not comply with statutory provisions – Plaintiffs seek declaration to invalidate Will - Whether signature on Will was forged – Whether Deceased was out of the jurisdiction at the time of execution of Will - Handwriting experts – Section 5 Wills Act, 2002

The parties are five (5) of the nine (9) children of the late Eleadon Elias Cox ("the Deceased"). The Defendants were granted Probate of the Will of the Deceased dated 4 March 2013 ("the Will"). The Plaintiffs commenced this action, contesting the validity of the Will. They allege that it was forged and that it was not executed in accordance with section 5 of the Wills Act, 2002.

The Defendants assert the validity of the Will. They contend that the Will was not forged.

HELD: Finding that the Will of 4 March 2013 is valid since the Plaintiffs have failed to establish that the Deceased's signature on the Will was forged, the action is dismissed with costs to the Defendants in the sum of $25,000 with disbursements of $4,530.35.

1. It is well-established that the burden of propounding a will lies with the party doing so. He must prove that the will is the last will of a capable and free testator. This is not limited to circumstances where the drafter of the will benefits under it. Only after the propounder of the will proves that the will was the testator's true intention does the burden shift to the party opposing the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will: **Turnquest and another v Dames and another** [2009] 2 BHS J No 23; **Barry v Butlin** (1838) 2 Moo 480; 12 ER 1089 and **Tyrell v Painton and another** (1894) PD 151 applied.

2. Where the only issue is the authenticity of the Deceased's signature, if attesting witnesses are not available, handwriting expert opinions can be used to prove the execution of the will. This does not, however, mean that, in circumstances where the attesting witnesses give evidence, the opinion evidence of handwriting experts becomes less important: **Turnquest** (supra) and **Lyle Ethrin Adderley and Lyric Ethan Adderley (Minors) and Lakisha Hield (Mother and Next Friend) v Michael Duran Adderley & Anor** [2020] 1 BHS J. No. 8 considered.

JUDGMENT

Charles Snr. J:

Introduction

[1] By Generally Indorsed Writ of Summons filed 3 November 2016 and a Statement of Claim filed 26 September 2018, the Plaintiffs, who are three (3) of the nine (9) children of Eleadon Elias Cox a.k.a. Eleadon Cox ("the Deceased") commenced

this action against the Defendants (who are also the children of the Deceased), seeking the following relief:

1. Revocation of the Grant of Probate dated 22 May 2017 pursuant to the Probate and Administration of Estates Act, 2010 and under the inherent jurisdiction of the Court;

2. A Declaration that the document dated 4 March 2013 purporting to be the Last Will and Testament of the Deceased is a fraudulent document and is invalid;

3. A Declaration that the Deceased died intestate as the Will was not executed in accordance with the provisions of the Wills Act, Chapter 115 of the Statute Law of The Bahamas;

4. A Grant of Letters of Administration to the Plaintiffs in the Estate of the Deceased;

5. An injunction restraining the Defendants whether by themselves, their servants and/or agents or otherwise from selling, parting, leasing, changing, disposing of, liquidating, settling or otherwise interfering with any and or all assets of the Deceased;

6. A true and proper accounting of all the assets of the Estate of the Deceased;

7. Damages;

8. Costs and any further or other relief that the Court deems fit and just.

[2] On 31 January 2017, at an *inter partes* hearing, this Court ordered that the *status quo* relating to the assets of the Deceased be maintained pending further order of the Court.

[3] In a nutshell, the Plaintiffs assert that the document purporting to be the Will and Last Testament of the Deceased dated 4 March 2013 (for convenience "the Will") was forged. The nature of the forgery alleged is that the Deceased did not sign the Will and it was executed at a time when he was out of the jurisdiction.

[4] The Defendants resist the allegation of the Plaintiffs asserting that the Will was not forged and that it is indeed the Last Will and Testament of the Deceased.

Agreed facts

[5] The Deceased died on 8 February 2016. He died a widower and was survived by nine (9) children.

[6] The 1st Plaintiff ("Janice") and the 2nd Plaintiff ("Eunice") are the lawful daughters of the Deceased and the 3rd Plaintiff ("Derrick") is the Deceased's lawful son.

[7] The 1st Defendant ("Roger") and the 2nd Defendant ("Warren") are also the lawful sons of the Deceased. They are the Executors of his Estate having been appointed by a Grant of Probate dated 22 May 2017. The Grant of Probate was issued in respect of the Last Will and Testament of the Deceased.

[8] The Plaintiffs were not named as beneficiaries under the Will.

The issues

[9] The parties identified six issues which could be subsumed under three broad heads namely:

1. Whether the signature on the Will is that of the Deceased?

2. Whether the Deceased was in the jurisdiction when the Will was executed?

3. Whether the signature of the Deceased on the Will is a forgery?

The law

Formalities for a will

[10] Section 5 of the Wills Act Chapter 115 of the Statute Law of the Bahamas ("the Act") sets out the formalities required for a will to be validly executed. Section 5 provides:

> **"(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."**

[11] Shortly put, a will must be in writing, signed by the testator or by some other person in his presence and under his direction. The testator's signature must be made or acknowledged in the presence of two (2) or more witnesses at the same time and each witness must then attest and sign the will or acknowledge his signature in the presence of the testator.

Burden of proof

[12] Even though it is the Plaintiffs who are alleging that the Will is a forgery, the burden of proof rests on the Defendants to prove that the Will is the Last Will and Testament of the Deceased.

[13] The law is that the burden of propounding a will lies on the party propounding it. He must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator: **Turnquest and another v Dames and another** [2009] 2 BHS J. No. 23 citing **Barry v Butlin** (1838) 2 Moo 480; 12 ER 1089. This well-established principle was restated in **Tyrell v Painton and another** (1894) P 151.

[14] Lindley L.J. explained that the rule in **Barry v Butlin** establishing that the burden lies on the party propounding the will is not limited to circumstances where someone who writes the will benefits thereunder. It extends to all cases where there are circumstances that excite the suspicion of the Court. At page 157, Lindley L.J. stated:

> **"In *Barry v. Butlin* [(1)] Parke, B., delivering the opinion of the Judicial Committee, said: "The rules of law according to which cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two: The first, that the onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased." The same principle was laid down and acted upon in *Fulton v. Andrew* [(1)] and *Brown v. Fisher* [(2)] . None of these cases turned on the plea of fraud. Thomas Painton wrote the will, and it was in favour of his father. The testatrix had omitted him on November 7: had she by the 9th changed her mind?**
>
> **The rule in *Barry v. Butlin* [(3)] , *Fulton v. Andrew* [(1)] , and *Brown v. Fisher* [(2)] is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will."** [Emphasis added]

The evidence

[15] Janice Curry gave evidence on behalf of the Plaintiffs. The Plaintiffs also called a handwriting expert witness, Mr. Curt Baggett. The Defendants, Roger Cox and

Warren Cox gave evidence and called their own handwriting witness, F. Harley Norwitch.

Janice Curry

[16] Janice's evidence in chief is contained in her Witness Statement filed on 22 September 2020. In summary, her evidence is that she does not believe that the Deceased disinherited any of his children. She intimated that either of the Defendants (or both) forged the Will.

[17] Janice stated that, during their lifetime, their parents often said that their assets were to be shared equally among all nine (9) children when they died. According to her, that intention was reflected in her mother's Will.

[18] Janice testified that, sometime in or about 2003, there was a break-in at the Deceased's home. Before the break-in, the Deceased kept his important documents in the safe which had been broken into. As she was helping to clean up, she read the wills of her mother and father, which she said were very similar. She stated that both wills provided for the inheritance of all nine (9) children. No child had been left out.

[19] According to Janice, after the break-in, Roger insisted on keeping both wills and other documents since the Deceased was not in Nassau but in Acklins. After the Deceased became ill in or about February 2012, Roger travelled with him back and forth to Cuba for medical treatment. He had the Deceased's passport. She never travelled with the Deceased to Cuba. From 2012 to 2016, when the Deceased was very sick and weak, all of the children took care of him.

[20] Janice testified that the Deceased was very ill and weak when the Will was purportedly executed. Roger presented the Will after the Deceased died. Upon reading it, she immediately noticed that it was different from the one she had seen on the day of the break-in. Under the new Will, she, Eunice and Derrick were disinherited. She was shocked at their disinheritance especially since the Deceased always told them that he wanted all his children to equally inherit.

Because of that, she immediately became suspicious of its validity. She said that Eunice and Derrick were also suspicious and they did not believe that the Will was genuine. They did not believe that the signature on the Will was that of their father. As a result of their suspicions, they ultimately engaged the services of Mr. Curt Baggett, a handwriting expert, who examined the Will and confirmed that the signature of the Deceased was a forgery. She also believed that the Will was executed at a time when the Deceased was in Cuba.

[21] Janice alleged that she was unaware of any incident or occurrence in their family or in the relationship with the Deceased which would have caused him (the Deceased) to change the Will and disinherit her siblings and herself. She stated that Roger took her father's Will and never produced it again.

[22] Under cross-examination, Janice however conceded that, in 2012, she had a disagreement with the Deceased about his female friend whom he had at his house after their mother's death and who cursed at her. After the disagreement, she stayed away for two (2) months, but, according to her, the relationship did not change.

[23] Janice rejected the suggestion from the Defendants' Counsel that the reason for her disagreement with her father was because he was entertaining a female friend. She said that she stayed away because of what her father said: that her mother's house was in the grave. Under re-examination, she said this was the only disagreement she had with the Deceased.

[24] Janice further stated that the Deceased did not call her during the period that she stayed away. According to her, she apologized to her father after two (2) months and they were fine. He even gave her a grouper when she left. She insisted that she and her father reconciled in 2014; the year of her retirement. She said that she would spend hours at his home throughout the day. She maintained that the relationship remained that way until he died. Janice insisted that they had a good relationship.

[25] Janice further testified that it was not until the Deceased died that she became aware that she was the beneficiary of the Deceased's life insurance policy. Contrary to the evidence of the Defendants, she stated that, during his lifetime, the Deceased never asked her to remove herself as the beneficiary.

[26] During cross-examination about the safety deposit boxes, Janice stated that, over the years, the Deceased had two safety deposit boxes at the Royal Bank of Canada ("RBC"); the first was closed out and then he opened a second one. He asked her to open a second one which was the only one he had at the time of his death.

[27] Janice stated that the first safety box was in her name and the Deceased and they each had a key. The second safety box was in her name, Eunice's and the Deceased's. She and Eunice had a key each. The Deceased did not have a key to that safety box. The second box was opened in 2010. All of the Deceased' original land papers were kept in that box. She stated that the first safety box was closed because Roger told the Deceased that he could use the safe at his house instead of paying for a box. The reason for opening the second box was because the house had flooded and she told the Deceased that it was not safe to keep the documents there. The Deceased then asked her to open the second safety box. She rejected the suggestion that she insisted that the papers be moved out of the safe at the house to a safety box at RBC because she worked there and could have access to the key. She acknowledged that she conducted the day to day affairs of the Deceased after her mother died but she was not "in control".

[28] Under further cross-examination, Janice conceded that the Deceased asked her to give a key to Roger but she did not because Roger's name was not on the box. She accepted that the Deceased sent a message through her husband to return his land papers. She said that she refused to return the papers because she did not want them to get lost by sending through other people. She admitted that her refusal to return the papers may have annoyed the Deceased. She gave the key

for the box to Brenda, another sibling, to give to the Deceased which Brenda did not do. As a result, she instructed her husband to collect the key back from Brenda.

[29] With respect to Eunice's relationship with the Deceased, Janice admitted that she knew that the Deceased had attempted to evict Eunice from a property he owned in Regency Park sometime in 2013. Eunice and the Deceased subsequently arrived at an agreement under which she was to remain in the property until he paid her $15,000. Janice rejected the suggestion that Eunice refused to move out until she received the money. However, after reading the written agreement between the Deceased and Eunice, which was presented to her during cross examination, Janice agreed that Eunice was still in the property at the time the agreement was made and which stipulated that she would remain in the property until she received the money.

[30] Janice also admitted that she was aware of an issue between the Deceased and Derrick regarding a duplex that Derrick owned with Lionel, another brother.

[31] Contrary to the Defendants' evidence, Janice stated that she did not believe Eunice's relationship with the Deceased was strained after the Deceased took out proceedings in the Magistrate Court against her. She conceded that she heard the Deceased accuse Eunice of removing property papers relative to a property in Regency Park. Further, contrary to the Defendants' evidence, she said that the Deceased found the papers before he died: that Roger secured them from Ms. Rogers.

[32] She felt that Roger was feeding lies to the Deceased which is why he asked her for his land papers back.

[33] After the Deceased' death, she along with Eunice and Derrick visited the law offices of Mr. Godfrey Kelly ("Attorney Kelly") and asked him whether he had prepared the Will. She said that Attorney Kelly asked his secretary whether he had been there when the Deceased came and the secretary answered in the

affirmative. With respect to the eviction notice to Eunice, Janice stated that Attorney Kelly said he had not prepared it.

[34] According to Janice, since the Grant of Probate, the executors, Roger and Warren, have been depleting the assets of the Deceased's estate. They have been collecting rent from the rental properties without distributing to the other siblings. Under cross-examination, however, she stated that they distributed some to the other siblings right after the Deceased's funeral but not after. Additionally, they have continued construction on certain properties despite the order of the Court to maintain the status quo.

[35] Under re-examination, Mrs. Rolle KC, appearing as Counsel for the Plaintiffs, asked Janice whether she is aware of any altercations and/or disagreements between Roger and/or Warren and the Deceased. She stated that Roger used to have disagreements with the Deceased because he always depended on the Deceased to take care of him and, at one point, they were not speaking. According to her, Warren also had an altercation with the Deceased. He wanted his land papers from the Deceased who refused to give them to him. She stated that she intervened and asked the Deceased to give Warren his land papers since Warren had threatened to kill him.

Roger Cox

[36] Roger Cox filed a Witness Statement on 15 October 2020 which stood as his evidence in chief at trial.

[37] Basically, his evidence is that, after their mother's death, he, along with Brenda, Warren, Janice and Eunice (up until 2010/2011) assisted their father with his day to day care and maintenance at varying times, including driving him to various places. He said that the Deceased's relationship with Janice and Eunice changed after several arguments. Roger stated that the Deceased's issue with Eunice was that he wanted her to vacate his property which she had been occupying for the operation of a dry goods/general store and a beauty salon. Eunice refused to do

so. As a result, shortly after his visit to Attorney Kelly's office, she was served with an eviction notice to vacate the property. Eunice persisted in her refusal to leave the premises. Mr. Nathaniel Cooper of Cooper & Co. ("Attorney Cooper") was instructed to commence proceedings against Eunice in the Magistrate's Court, seeking her removal. The matter was settled after the Deceased paid Eunice $15,000. He stated that this ordeal fractured Eunice's relationship with the Deceased and she never apologized to him. However, under cross-examination, Roger agreed that the Deceased's issue with Eunice was resolved but the relationship was never mended.

[38] According to Roger, the Deceased's issues with Janice was with respect to his land papers, the key to a safety deposit box and an insurance policy. He stated that the Deceased gave the land papers to him to secure. He secured them in a safe at the Deceased's home. Janice insisted that the 'at-home' safe was not secure so the Deceased put them in a safety deposit box at RBC. Roger said that, in his presence, the Deceased asked Janice to give him a key to the box but she flatly refused. He said that he understood the Deceased sent messages with Janice's husband to send the key to the safety deposit box but Janice refused.

[39] Janice eventually gave the key to her husband, who left it with Brenda's daughter. So as not to further complicate the family issues, Brenda returned the key to Janice's husband, directing him to give it to the Deceased. Roger said that he went with the Deceased to see the safety box at RBC and they noticed that the original land papers for the building occupied by Eunice were missing. Those documents were never found. The Deceased instructed Attorney Cooper to commence proceedings seeking possession of the key from Janice.

[40] Roger also stated that Janice refused to consent to her removal as beneficiary of the Deceased's life insurance policy. After this dispute, the Deceased's relationship with Janice was fractured up until his death. Janice never apologized and the Deceased felt hurt.

[41] According to Roger, the Deceased's relationship with Derrick was also fractured. Before their mother's death, Lionel and Derrick constructed a duplex apartment. Derrick and his wife lived in one half of the duplex. The other half was rented for Lionel's benefit. Lionel eventually purchased Derrick's interest in the building and they agreed that Derrick could continue to occupy one half so long as he paid rent to Lionel. Derrick refused to pay any rent and his parents intervened to resolve the issue. Derrick became upset and threatened to throw a block at their mother. The Deceased was angry and disappointed.

[42] According to Roger, after the death of their mother, Derrick had a disagreement over an apartment that had been owned by them. They had allowed Derrick to reside there since he had fallen on hard times. After years of financially supporting Derrick, the Deceased evicted him after he had failed to pay the utilities. Derrick had also taken money that the Deceased had given him to pay a lawyer and instead, used it for something else. When confronted about these issues, Derrick tried to fight the Deceased. Derrick never apologized.

[43] Roger testified that after the Deceased lost confidence in Janice and Eunice, he (the Deceased) called on him to do everything for him. After the Deceased's issues with Janice, Eunice and Derrick, they did not call or visit the Deceased while he was sick. They only visited him about a month or two before his death.

[44] Roger asserted that he saw the Deceased sign the Will on 4 March 2013. On that day, the Deceased asked him to drive him "downtown". The Deceased directed him to the parking lot of Higgs & Kelly. They both entered Attorney Kelly's office and the Deceased told Attorney Kelly that he wanted to remove Janice, Derrick and Eunice from his Will and he wanted Eunice out of his building where she had her business.

[45] According to Roger, Attorney Kelly called his legal assistant into the room and gave her those instructions. She went away for a short period and returned with another woman. The assistant handed some documents to Attorney Kelly, who read them

and gave them to the Deceased for his own perusal. He saw his father sign the documents and he (the Deceased) left the law offices with some documents.

[46] After the Deceased's death, Attorney Cooper was instructed to probate the Will.

[47] Under cross-examination, Roger said that he had heard about his father having a Will prior to the subject Will but he has never seen it. He said he did not take the original 1998 Will after the break-in.

[48] He maintained that he never had an argument with the Deceased nor was he financially dependent on him. He rejected the suggestion that, on 4 March 2013, when the Will was supposedly signed, the Deceased was still in Cuba undergoing medical treatment.

[49] Roger agreed that there are Cuban immigration stamps in the Deceased's passport for 2015 but not for the years 2012 to 2014 when they went to Cuba. The reason for no stamps is because he sometimes told the Cuban Immigration not to stamp the passport. He said that he does not know why pages 8 and 9 of the passport are missing.

[50] He admitted that he had brain surgery in 2011 but denied not having worked since then and receiving a weekly sum of money from the Deceased to maintain himself. He denied that he was responsible for the exclusion of Janice, Eunice and Derrick from the Deceased's Will.

Warren Cox

[51] Warren filed a Witness Statement on 15 October 2020 which stood as his evidence in chief at trial.

[52] Warren asserted that, when his mother died in 2001, the Deceased inherited her estate. He (the Deceased) was semi-retired. The Deceased asked Brenda, Eunice and Janice to help him with his businesses. Janice was his main helper. She collected rent, paid bills and made sure his affairs were in good standing.

[53] Warren's evidence was consistent with that of Roger.

[54] Under cross-examination, Warren denied that Janice had apologized to the Deceased and that they had repaired their relationship after the argument about the woman in the house. He stated that he was not present when the Deceased searched the safety deposit box for his land papers. Warren rejected the suggestion that Roger wanted to take control of the safety deposit box and that the request for the key originated from Roger because he wanted to access the Deceased's papers. He maintained that the disputes between Derrick and the Deceased and Eunice and the Deceased were not resolved before his death in 2016.

[55] Warren conceded that some of the other siblings probably had disputes with the Deceased but nobody's disputes were as intense as Janice's, Eunice's and Derrick's. He admitted that Janice convinced the Deceased to convey a piece of property to him. He said that he never went to Higgs & Kelly save to execute his own will and to accompany the Deceased so that he (the Deceased) could convey a piece of property to him.

[56] Warren acknowledged that it was the Deceased's intention for all of his children to equally share his estate. However, that intention changed when Janice, Eunice and Derrick did what they did. According to him, "*they angered him deeply. I used to see the hurt in my father's face when he talk about what they did to him*."

Karen Rogers

[57] Karen Rogers was subpoenaed by the Defendants. She filed an Affidavit on 28 January 2020. She was the legal assistant of Attorney Kelly and was so employed at the material time. She worked in that capacity for thirty two (32) years until her retirement.

[58] Ms. Rogers stated that the Deceased was a client of the firm for more than fifty (50) years up until his death. The firm was his principal conveyancing attorney.

She became familiar with the Deceased's signature since he had signed in her presence on numerous occasions.

[59] Ms. Rogers identified her signature on six (6) documents where she witnessed the Deceased's signature including the eviction notice and the Will. She also identified Attorney Kelly's signature in the margin of the Will. Under cross-examination, she asserted that the Will was probated by Higgs & Kelly and that the Deed of Assent was also prepared by Higgs & Kelly. However, she later stated that the firm did not probate the Will. Yet, she said that the firm's practice was not to sign the margin until the Will was being probated.

[60] According to Ms. Rogers, on 4 March 2013, the Deceased came to Attorney Kelly's office with his two sons. They went inside the office and talked. Attorney Kelly then called her into his office and he told her what changes she should make to the Will. She made the changes and took it back to his office. The Deceased signed it in her presence as well as in the presence of Lana Moses and Attorney Kelly.

[61] Ms. Rogers stated that she could not remember all of the changes but remembered Eunice being removed from the Will. She believed the executors were changed but she was not sure.

[62] Under cross-examination by Mrs. Rolle KC, Ms. Rogers said that Attorney Kelly worked every work days. She also stated that, before 4 March 2013, Roger and Warren would accompany the Deceased to the firm. The firm usually execute two original wills, one of which was kept by the firm and put into their safety deposit box at First Caribbean Bank and the other would be kept by the client if they wished to keep it. She could not remember whether the client kept the Will but she knows that the firm had one in its safety deposit box, which was retrieved and given to the Deceased's sons after he passed away.

[63] She accepted that the signature of Attorney Cooper was in the margin of the Will. When the Will was probated, she and Attorney Kelly were still working. Neither of them had retired. She could not recall whether Attorney Cooper asked her to sign

the Will in the margin when he came for her and Lana to sign their respective affidavits.

[64] Ms. Rogers said that she and Lana signed in the margin of the Will at the request of Attorney Cooper but Attorney Kelly did not. She insisted that he never signed the margins of wills that he did not probate. She stated that the reason why Attorney Kelly did not probate the Will was because he was getting out of doing probating and was just concentrating on conveyancing. Ms. Rogers rejected Mrs. Rolle's suggestion that Attorney Kelly did not probate the Will because he did not prepare it. She also rejected the suggestion that the Will was already signed when it was presented to her and that Attorney Kelly was not present in his office on 4 March 2013.

[65] Learned King's Counsel Mrs. Rolle interrogated Ms. Rogers as to whether she recalled a meeting that took place after the Deceased died where Janice came to the office. She stated that she recalled Janice being there but she was not in Attorney Kelly's office and as such, she did not know what went on. She rejected Mrs. Rolle's suggestion that Attorney Kelly called her into his office and asked her whether the Deceased came into the office to do that Will.

Lana Moses

[66] Lana Moses swore an Affidavit dated 28 January 2020 which stood as her evidence in chief at trial. She is a legal assistant at Higgs & Kelly and has been employed there since 1983. She still works there.

[67] Mrs. Moses identified her signature in the margin of the Will. She stated that, at Higgs & Kelly, she predominantly worked for James Cole but Attorney Kelly would call her if he was 'short-handed'. She said that Attorney Kelly was ninety one (91) years old when he retired. He came to the office every day although he struggled to last the entire day. She testified that there were no particular days that he did not work. In the years leading up to his retirement, he reduced his work load.

[68] She agreed that her Affidavit was brought to Higgs & Kelly for her signature by Attorney Cooper. She could not recall exactly when she put her signature in the margin of the Will. She assumed that she did so when the Will was being probated but she does not recall.

[69] She stated that Attorney Kelly would call her about 5 to 10 times a year to witness the signing of various wills. Normally, it was herself and Ms. Rogers who would witness the signing of these wills. When asked whether Attorney Kelly generally signs the margins of Wills that he prepares, she said "*I don't know. No.*" Mrs. Moses said that, on 4 March 2013, the Deceased went into Mr. Kelly's office and read the Will. Ms. Rogers then called her to witness when he was ready to sign. He signed the Will. She witnessed it and she then left.

[70] She rejected Mrs. Rolle's suggestions that Attorney Kelly was not present at the office on 4 March 2013 and that the Deceased was also not there. She was unsure whether anyone else was present. She confirmed that the Will was not probated by Higgs & Kelly. She said that, since the firm only has one attorney now, they do estate matters only occasionally: if the person was a long standing client they might make the exception.

[71] Mrs. Moses said that Attorney Kelly was still working at the office when Attorney Cooper came for her and Ms. Rogers to sign their respective affidavits.

Expert evidence
Curt Baggett

[72] The Plaintiffs called Curt Baggett as their expert witness. Learned Counsel for the Defendants, Mrs. Moxey-Lockhart objected to Mr. Baggett being deemed an expert in forensic document examination and handwriting since, according to her, he does not have the requisite qualifications and experience. He does not have a degree in any of the hard sciences. His degree is in the field of education, psychology and speech. However, he has given evidence before more than 100 judges and completed more than 6,000 cases. He is the only expert in the USA who has examined documents and has testified in every state of the USA and at

least 12 foreign countries including The Bahamas. In 2011 and 2016, he gave expert evidence as a Forensic Document Examiner in our Supreme Court before four Supreme Court judges including Chief Justice Barnett (as he then was).

[73] Not to belabour this point, having scrutinized his qualifications and experience, I deemed Mr. Baggett an expert in forensic document examination and handwriting.

[74] Mr. Baggett examined six (6) documents with the known signatures of Eleadon Cox. He labelled them "K1" through "K6". He then compared the signatures of Eleadon Cox on the "K" documents to the Eleadon Cox signature on the questioned document (the Will dated 4 March 2013 and purportedly signed by the Deceased) identified as "Q1" to determine if the author of the Eleadon Cox signatures on the "K" documents was the same person who authored the name of Eleadon Cox on the questioned document.

[75] With respect to the methodology and instruments used, Mr. Baggett testified that he used a copy machine to enlarge the signatures to 200 percent then put them on the lab table, where he placed the questioned signature on top to compare the size, shape and slants. He then took a picture with a magnifying camera to see where the breaks are. He used a small magnifying device to check each of the letters.

[76] Firstly, he said that he has seen 14 known signatures including the Deceased's passport. In none of those 14 signatures did the Deceased use his middle name, "Elias".

[77] Secondly, the end of the 'E' in "Elias" is too short when compared to the other E's in his known signatures.

[78] Thirdly, the 'L' in "Elias" is taller than the "L" in "Eleadon" and has stops and starts. He said a stop and start is one of the first indicators of forgery because a forger cannot make the turns the same way that the person does ordinarily.

[79] Fourthly, Elias is misspelt and the ‘I’ and ‘S’ of “Elias” on the questioned signature are not discernable and no ‘A’ exists in Elias whereas the ‘X’ in Cox in the other samples are often not distinguishable.

[80] Fifthly, the signature on the Will has no base line and the signatures are not written on the line.

[81] Sixthly, the left side of the ‘E’ in Eleadon is slanted to the left. In the known signatures (K1 –K6), all of the left side is either straight up and down or slightly to the right. None of the 6 known signatures lean to the left. According to Mr. Baggett, that is another indicator of forgery.

[82] Seventhly, the ‘L’ in Eleadon is slightly to the left on the left side: left slanted. The top is pointed and is flat on the right side, has an ink dot on the top right side and it stops and starts on the left side and the ‘L’ is shaky which suggests that there is no fluidly as compared to normal handwriting. Mr. Baggett explained that it does not match the pattern of Mr. Cox’s normal handwriting.

[83] Eighthly, on the purported Will, the ‘E’ in “Eleadon” is half as tall as the ‘L’ and is wider and bigger than it normally is. He said that, even in the samples, where the ‘E’ was a little bigger than others, it did not approach the half mark of the ‘L’.

[84] Ninthly, the ‘C’ in Cox is materially different from the ‘C’ in the samples. The beginning stroke in the ‘C’ in Cox begins too far up on the ‘C’ stem, goes up near the top of the ‘C’ – in the known signatures the ‘C’ begins below the half mark on the stem and goes right through the stem and up on the right side.

[85] Tenthly, the top of the ‘C’ in Cox has a hook on the right and stops and, lastly, in the last name Cox, the ‘C’ is incomplete and has two strokes.

[86] Mr. Baggett postulated that there are significant rules of which only one significant, unexplainable difference indicates a forgery. In this case, there are almost a dozen

differences that do not match the normal handwriting and the known samples K1-K6.

[87] Mr. Baggett was shown the eviction notice to Eunice which bore the Deceased's signature. Mrs. Rolle asked him whether it was likely that the Deceased executed that document at the same time as the Will, one after the other. In addition to the fact that the eviction notice did not bear his middle name, Mr. Baggett said that the 'C' in Cox is entirely different. He said people do not usually immediately change the way they sign altogether in the same sitting. He acknowledged that there are extenuating circumstances sometimes but the pattern of handwriting is almost always the dominant factor. He said that it further convinces him that the Will was not signed by the Deceased.

[88] In his expert opinion, Mr. Baggett concluded that the Will had been forged by someone who could not duplicate the Deceased's handwriting and signature.

[89] Under cross-examination, Mr. Baggett acknowledged that his List of Differences on the Question Signature of the Deceased ("Exhibit "CB2"") was prepared after he received the Defendants' Expert Report of Mr. Norwitch. Mr. Baggett also stated that he received the signatures by email.

[90] He does not consider it so much important to be provided with the original documents in handwriting analysis. He does not consider that an original document is better than a really good copy of an original. He stated that 90% of his examinations are done with emails and copies and all courts across the globe accept those. He maintained that the original document is not better than a good copy.

[91] Mr. Baggett did not accept that someone's handwriting varies with age. He was evasive with respect to the question of whether people's strength and agility change as they age.

F. Harley Norwitch

[92] Mr. Norwitch has been a forensic document examiner for about forty-two (42) years. His Curriculum Vitae needs no recapitulation. With no objection by Mrs. Rolle KC, he was deemed an expert in forensic document examination.

[93] In summary, he opined that the Will was not forged. In arriving at that conclusion, Mr. Norwitch stated that his examination consisted of a side by side visual examination of the questioned signature of the Deceased with his known signature. He said that people never write the same way twice. It is always slightly different. According to him "*if every time we wrote something that's exactly the same, you certainly wouldn't need me*". The question, he explained, is whether the questioned signature fits into the parameters of individual variation.

[94] Mr. Norwitch said that he used original documents, save for the signature on the eviction notice. He stated that it is important to use original documents because many times a photocopy hides some of the things that examiners are looking to see. He said that you lose and do not gain resolution by using a machine copy. Mr. Norwitch said that the ability to be definitive is lessened using a photocopy whereas you do not have that problem with an original.

[95] Under cross-examination, Mr. Norwitch said that most of us, if not all of us, over time, develop certain habits or patterns in our writing which change over the years and in a person's formative years maybe up to the age of 17 or even 20, their handwriting is still not quite fixed. He explained that, even when you reach adulthood, there is an established pattern of handwriting which does not mean that it is static. It is a dynamic process. According to him, as we get older and, in his case, he has noticed that there is a little tremor in his handwriting and he is taking a little more shortcuts in writing his signature.

[96] Under intensive cross-examination by Mrs. Rolle KC, Mr. Norwitch said, over time, handwriting habits change. It continually evolves. He said it is important that signatures are compared chronologically. He said the aging process of the

signatures he used was evident although not very marked. Had he gone back from 1990s or that timeframe, he might see a greater difference between them and the more recent signatures.

[97] Mr. Norwitch further stated that when examining signatures, he is more concerned with the individual characteristic pattern and *"the middle name being there, not being there, doesn't make any difference.*" He maintained that he did not see anything problematic with respect to the omission of the middle name, even if both the Will and the eviction notice was signed one after the other or on the same day.

[98] Mr. Norwitch also commented on the List of Differences in Mr. Baggett's Report. With respect to the sudden inclusion of the Deceased's middle name, Mr. Norwitch stated that it happens in many cases but that does not obviate the fact that you also have the first name and the last name. He said that a great many people including himself may not use a full name unless it was pre-printed on the form, which, in this case, on the Will, was his first, middle and last names. He did not agree that there was a pattern of not using his middle name. He said that he would like to see more formal signatures to see if he signed his middle name. He said he believed that the Deceased included his middle name on the Will because it was a formal document although it was not included on his passport or voter's cards. He also stated that although he does not know this for a fact, his belief is based on forty two (42) years of experience and analyzing approximately 12,000 cases.

[99] With respect to the 'E' in Elias being too short and not connecting to the 'L', he said that Mr. Baggett had no other "Elias" to compare it to. The 'L' in Elias being taller than the 'L' in Eleadon is not significant because many people write the same letter in different portions of their name differently.

[100] Mr. Norwitch stated that the dot at the top which was labelled "a *start and stop"* by Mr. Baggett is not a start and stop, but rather is 'ink gooping', which he said he found using a microscope. He explained that many people leave out a letter or two

in their name if they are in a hurry. This, he said, could have explained why the ‘I’ and ‘A’ in Elias cannot be seen.

[101] With respect to the slants of the ‘E’ in Eleadon, Mr. Norwitch said that there is no proper slant. It fits within the parameters of variation. He said that the observation that the beginning stroke of the ‘C’ in Cox begins too far up on the ‘C’ stem is incorrect. According to him, there is no start and stop on that ‘C’. He said that there is another sample where two strokes were used on that ‘C’.

[102] He said the signatures are very complex. “*To think that somebody could do an artistic reproduction of that is simply virtually non-existent. This signature was written by Mr. Cox*.”

[103] He opined that the signature on the Will and that on the eviction notice are very similar, although they are not exactly the same, which they could never be. He said that, when taken together with the other seven known signatures, it is patently observable that the eviction notice signature and the questioned signature is at least pictorially similar to a layperson.

Factual findings

[104] Credibility of the witnesses is germane to this action. Having had the opportunity of seeing, hearing and observing their demeanour as they testified and analyzing the documentary evidence which was presented, I preferred the evidence of the Defendants to that of Janice. In my opinion, Janice was not candid and straightforward with respect to her, Eunice’s and Derrick’s arguments with the Deceased. That said, I do believe that she was the Deceased’s main helper after their mother died. I accept Janice’s evidence with respect to the Deceased’s arguments with both Roger and Warren. However, as Warren stated in his evidence, those disagreements were not as intense and therefore did not have the same effect on the Deceased as those of the Plaintiffs. The fact that the Deceased commenced legal proceedings against both Janice and Eunice was uncontroverted and says a great deal.

[105] I also believe that the Deceased asked Janice to remove her name as the beneficiary from his life insurance policy but she refused. In my opinion, that refusal, compounded with the disagreement that kept her away for two months, the dispute over the key to the safety box and the land papers severely fractured her relationship with the Deceased.

[106] The written agreement between the Deceased and Eunice clearly stated that her moving out was contingent on him giving her $15,000. This, to my mind, exacerbated the broken relationship with the Deceased so much so that he had to resort to commencing proceedings against her, which, in itself, was detrimental.

[107] I believe that the Deceased financially assisted both Roger and Derrick. After all, Roger used to accompany him to Cuba for his medical treatments.

[108] I do not believe that when Janice visited Higgs & Kelly, Attorney Kelly asked his legal assistant whether he was at the office when the Deceased came on 4 March 2013. Further, I do not believe that Attorney Kelly said that he did not prepare the eviction notice issued to Eunice. I am of the view that he did prepare it.

[109] The Plaintiffs alleged that the Deceased was not in the jurisdiction on 4 March 2013 when the Will was executed, thereby rendering it impossible for him to have signed it. It was agreed between the parties that, from 2012, the Deceased travelled to Cuba on numerous occasions for medical treatment. Having inspected the passport pages of the Deceased as well as Roger, including the arrival stamps by the Bahamas Department of Immigration, it is unlikely that they were not in The Bahamas on 4 March 2013. While Mrs. Rolle KC noted that several pages were missing from the copy of the Deceased's passport those pages were produced by the Defendants. The full document was produced upon request and examined by the Court.

[110] With respect to the evidence of Ms. Rogers and Mrs. Moses, I found them to be credible witnesses. Both of them gave their evidence in a clear, concise and

straightforward manner. In my opinion, they brought some objectivity to the proceedings as they are independent witnesses with no axe to grind.

[111] With respect to the expert evidence, both experts were convincing and held on to their respective views with respect to whether the Will was forged or not. I have examined their evidence in a more wholesome manner below.

Discussion and analysis

[112] Learned Counsel Mrs. Moxey-Lockhart submitted that the Deceased's intention for his children to equally share his estate changed as a result of several incidents between him and the Plaintiffs that fractured their respective relationships.

[113] On the other hand, learned Counsel Mrs. Rolle KC, argued that having regard to the Deceased's intention that his children would share his estate equally, it is more plausible that the Will was forged as opposed to the submission by the Defendants that the Deceased's intention changed due to arguments with the Plaintiffs, especially since he was strong-willed and because the Defendants also did not have perfect relationships with him.

[114] It is not disputed that the Deceased had disagreements with the Plaintiffs. I also believe that he had disagreements with some of his other children including the Defendants. However, I accept Warren's evidence that those disagreements were not as intense as those with the Plaintiffs. The severity of the disagreement with Janice is evidenced by the fact that she did not return the key to the Deceased herself and chose to send it through her husband and through Brenda. It is possible that Janice apologized after the argument that arose as a result of the Deceased's house guest. This was not, however, their only disagreement. There was also the issue with the Deceased's life insurance policy.

[115] Taken individually, the incidents may not be sufficiently persuasive to prove that there was a convincing reason for the Deceased to disinherit the Plaintiffs. However, each of the Plaintiffs, especially Janice and Eunice had several disagreements with the Deceased. When taken together, they lead to one

conclusion only: that they were excluded from the Will because of the many disagreements with the Deceased. In my judgment, those disagreements were serious enough to cause the Deceased to change his mind and disinherit the Plaintiffs. It cannot be ignored that he even commence legal proceedings against Janice and Eunice.

[116] As I mentioned already, I believe the Deceased financially assisted both Roger and Derrick. However, the evidence was that more issues arose from Derrick's financial assistance, which gives credence to Derrick and not Roger being disinherited.

[117] The evidence of Ms. Rogers and Mrs. Moses is probative evidence in proving that the Deceased signed the Will. They are independent witnesses and their accounts were consistent with that of Roger who alleged that he was there. In my considered opinion, it is not significant that Mrs. Moses did not recall whether Roger was present, as he claimed he was. It was a long time ago and not a substantial part of her daily duties.

[118] Learned Counsel Mrs. Moxey-Lockhart submitted that the effect of Isaacs J's judgment in **Turnquest** is that handwriting expert opinions only become important where attesting witnesses of the Will are not available. As such, she intimated that the evidence of both handwriting experts is secondary.

[119] Mrs. Rolle KC challenged this submission. She relied on a judgment of mine in **Lyle Ethrin Adderley and Lyric Ethan Adderley (Minors) and Lakisha Hield (Mother and Next Friend) v Michael Duran Adderley & Anor** [2020] 1 BHS J. No. 8. In that case, this Court did place emphasis on the expert opinions notwithstanding that attesting witnesses gave evidence. I agree with Mrs. Rolle KC that the evidence of the attesting witnesses and the expert opinions are equally important. Isaac J in **Turnquest** merely stated that, in cases where the only issue is the authenticity of the deceased's signature, if attesting witnesses are not

available, handwriting expert opinions can be used to prove the execution of the will. At para 26, he said:

> **"26 In Belbin v Skeats 1 Sw and Tr 148, it was held that it is not necessary to call both attesting witnesses to prove the execution of a will by the deceased. However, it seems to me at least one should come to give evidence that the deceased duly executed the will. Still, failing any attesting witness appearing where the only issue joined between the parties is the authenticity of the deceased's signature, it may be possible for the execution of the will to be proved through handwriting, i.e., evidence of a handwriting expert confirming the signature as that of the deceased."** [Emphasis added]

[120] The expert opinion evidence of Mr. Baggett and Mr. Norwitch are in sharp contrast. Both experts were unequivocal in stating their positions. Both Counsel urged the Court to prefer their expert evidence over the other.

[121] Both experts were pretty convincing. Each felt that the other was wrong in his opinions. That said, the Court has before it the evidence of two experts which is materially different.

[122] Looking at their evidence in a holistic manner, I note that Mr. Baggett's List of Differences only came about after Mr. Norwitch's Report was produced and, although there were many differences put forward by him, they were, for the most part, minute differences.

[123] Further, I find it difficult to process Mr. Baggett's opinion that a person's signature does not vary with age and he does not consider it so much important to be provided with original documents in handwriting analysis. Further, he maintained that the original document is not better than a good copy.

[124] I accept Mr. Norwitch's expert testimony that no two signatures are the same even of the same individual. There were differences even within the known signatures of the Deceased that were used to compare with the questioned signature. Further, I accept Mr. Norwitch's evidence that handwriting and signatures may change slightly with age.

[125] I do not think that the inclusion of the middle name in the signature suggests that the Deceased did not sign it. In my opinion, this can equally be used in favour of the other side, as it could be suggested that, if the Deceased's signature was being forged, the forger would have used the other signatures as a guide and endeavour to take extra care to use the name(s) that the Deceased customarily used. In that regard, I agree with Mr. Norwitch that because there are no samples of how the Deceased wrote his middle name, the fact that the middle letters were rushed over or are not distinguishable is not probative to establish forgery.

[126] The main hurdle faced by the Defendants with respect to the Deceased's signature on the Will is the difference in signature on the Will versus the eviction notice. As I stated, I believe that Attorney Kelly prepared the eviction notice. However, there is no evidence as to whether the eviction notice was signed in his office or somewhere else. This is not very surprising since there are no formal requirements that the eviction notice needed to be signed in the presence of an attorney and/or witnesses unlike a will. Mrs. Rolle KC submitted that it was unlikely that the Deceased would have signed the Will and the eviction notice differently since they had been signed one after the other. However, no evidence was adduced that the Will and the eviction notice were signed one after the other. Although both documents may have been presented to the Deceased during the same visit to Attorney Kelly's office, the eviction notice could have been signed anytime and anywhere. The evidence of Ms. Rogers and Mrs. Moses is that they saw the Deceased sign the Will. It is independent evidence and outweighed the mere speculation that the two documents were signed one after the other.

[127] Having regard to all the circumstances, it seems to me that because each of the Plaintiffs had disagreements with the Deceased, he changed his mind about his estate being shared equally by his children and he disinherited them.

[128] On a balance of probabilities, I therefore find that the Will was signed by the Deceased and it was executed in accordance with the Act. It was not a forgery.

[129] Given the findings above, the issue of the Plaintiffs' request for a true and proper accounting of the Estate of the Deceased falls away.

[130] My order dated 31 January 2017 that the *status quo* be maintained pending further order of the Court is now obsolete given the findings above.

Costs

[131] Prior to the delivery of this Judgment, I requested and both parties provided their respective Bill of Costs. Mrs. Moxey-Lockhart submitted a Bill of Costs in the amount of $47,000.00 with disbursements of $4,530.50.

[132] In civil proceedings, costs are discretionary. The discretionary power to award costs to a successful party must always be exercised in accordance with established principles and in relation to the facts of the case and on relevant grounds connected with the case, which included any matter relating to the litigation; the parties' conduct in it and the circumstances leading to the litigation, but nothing else: see Buckley L.J. in **Scherer v Counting Instruments Ltd** [1986] 2 All ER 529 at pages 536-537.

Reasonable costs

[133] In deciding what would be reasonable the court must take into account all the circumstances, including but not limited to:

a) any order that has already been made;

b) the care, speed and economy with which the case was prepared;

c) the conduct of the parties before as well as during the proceedings;

d) the degree of responsibility accepted by the legal practitioner;

e) the importance of the matter to the parties;

f) the novelty, weight and complexity of the case; and

g) the time reasonably spent on the case.

[134] Having considered these factors, a reasonable figure representing professional charges is $25,000 with disbursements of $4,530.50 which are payable to the Defendants, the successful party, by the Plaintiffs.

[135] Whilst this litigation was fought hard, the Plaintiffs and the Defendants are whole blood siblings. I do hope that even though I have made a cost order in favour of the Defendants, they could opt not to pursue it. I understand that the resentment might be immense but hopefully this family will unite and become one again.

Dated this 21st day of September 2022

Indra H. Charles
Senior Justice