

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE
(PROBATE)**

Claim No. BVIHCV 2018/0234

**In the estate of MABEL EILEEN E. WINTER known as EILEEN WINTER (DECEASED), LATE of
PALESTINA ESTATE**

BETWEEN:

BRENDA WARD

First Claimant/Intended Executor

MICHAEL WINTER SR.

Second Claimant/Intended Executor

AND

WILLIAM WINTER

Defendant/Objector

Appearances: Ms. Akilah Anderson, Counsel for the Claimant
Mr. Robert Nader, Counsel for the Defendant

**2021: June 21st – 24th
June 28th – 30th
July 1st
2022: August 30th**

JUDGMENT

[1] **ELLIS J:** Before the Court is a claim in which the named executors of the estate of Eileen Winter ("the Deceased") seek an order pronouncing her last will and testament dated 20th November, 2009 ("the 2009 Will") in solemn form.

[2] The Parties herein are three of the Deceased's children.

[3] By application dated 5th July 2018, the Claimants herein applied for probate of the 2009 Will in common form. The claim herein became necessary when (on 17th July 2018) a caveat was lodged by the Defendant, who objected to the grant of probate on the basis that there was a later will executed by the Deceased on an unknown date in 2011 ("the 2011 Will"). The caveat stated as follows:

TAKE NOTICE THAT WILLIAM WINTER of Palestina Estate, Tortola, British Virgin Islands objects to the prospective Grant of Probate of the above-named deceased to BRENDA WARD of 423 Belmont Circle, Brunswick, Georgia 31525, United States of America and MICHAEL WINTER SR of Palestina Estate, Tortola British Virgin Islands on the grounds that the Will bearing the date 20 November 2009 was revoked when the deceased executed another Will in 2011.

[4] Neither the 2011 Will nor a copy thereof was produced by the Defendant. He contends that the original 2011 Will was last in the custody of J. S. Archibald & Co. The principals in that law firm have denied having any will in their custody other than the 2009 Will which the Claimants seek by this action to prove in solemn form. Nevertheless, the Defendant asks the Court to:

- i. Find that the 2011 Will is lost.
- ii. Find that the 2009 Will was revoked by the making of the 2011 Will.
- iii. Find that the 2011 Will was valid and reflects the intention of the Deceased and accordingly, give effect to its contents as alleged by or recalled by him.

[5] The Claimants have asserted no knowledge of the 2011 Will and they put the Defendant to strict proof of the existence and validity of the same. They contend that there is no cogent evidence as to the contents of the 2011 Will sufficient to compel any court to give effect to its alleged terms. Accordingly, the Claimants ask that the Court finds that there was no 2011 Will.

[6] The Claimant further say that even if the existence of the 2011 Will could be proved, its validity would be vitiated by the diminished capacity of the Deceased or by duress and undue influence exerted by the Defendant who would have actively alienated the Deceased from the rest of her family. They assert that the 2009 Will is valid and was validly executed and that they have otherwise complied with the requirements for proof of the 2009 Will in common form including providing notice by way of publication on 7th and 14th July, 2018. Accordingly, the Claimants ask the Court to pronounce for the

force and validity of the 2009 Will and to make any consequential orders and/or declarations as are necessary for the grant of probate.

[7] The factual background in this case is very relevant to the determination of the issues and for that reason the Court has summarised the same below:

1. The Deceased died on 4th January 2018 at the age of 92. She was predeceased by her husband but at the date of her death she was the mother of all of the Parties herein as well as David and Steven Winter. It is common ground between the parties that all of her children would be entitled to a share of the Deceased's estate on intestacy.
2. At the date of her death, the Deceased held fairly substantial assets comprising extensive interest in land and buildings in Palestina Estate, Tortola. During her lifetime, the Deceased would have made various *inter vivos* gifts of land to her children.
3. In 2009, the Deceased prepared and executed the 2009 Will in which she named the Claimants as her executors. The 2009 Will would have revoked a previous will which would have essentially divided her estate equally among her 5 children. In the 2009 Will, the estate was redistributed among four children. The Defendant was not named as a beneficiary under this Will. It contains a clause to the effect that the Deceased believed that the Defendant has already received his fair share of her land holdings by way of *inter vivos* gifts.
4. The Defendant contends that the Deceased would have changed her mind about the 2009 Will having felt pressured into making it. He contends that in 2011, she contacted Ms. Anthea Smith, the then managing partner of J. S. Archibald & Co. and gave her instruction to prepare a new will which he contends was then duly executed by the Deceased.
5. In support of this contention the Defendant has relied on the evidence of Ms. Anthea Smith who avers that she did on the instructions of the Deceased prepare the 2011 Will which was then executed in her presence. The Defendant's case is that a copy of the 2011 Will would have been given to the Deceased but that the original would have been kept in a safe at the law offices of J. S. Archibald & Co.
6. The Defendant also relies on the evidence of Dr. Bain, a medical practitioner who avers that she examined the Deceased in order to ensure that she had the requisite capacity to execute a will. The Defendant has presented a cheque stub which he contends proves the part payment (payment on account) of the fees incurred in the preparation of the 2011 Will. He has also presented an invoice of 24th June 2011 and a further receipt of 26th January 2012 which references the 2011 Will.
7. The Defendant frankly concedes that the witnesses to the 2011 Will cannot be recalled and that the contents of the 2011 Will are unknown, however, he believes that the 2011 Will was in substantially the same terms as the 2004 Will, subject to the following alterations.

- (a) That his son, William Winter Jr., Kerry Winter and Christina Ward would receive a ½ acre of land consistent with the 2009 Will.
 - (b) That the Deceased's house would be jointly conveyed to Defendant and his son William Winter Jr.
 - (c) That Parcel 28 of Block 2635B would be given jointly to the Defendant and his sons.
 - (d) That the Defendant would be executor.
 - (e) That David Winter would receive the land abounding his land.
 - (f) That Steven Winter would receive the land abounding his land.
 - (g) That the Defendant would receive the land abounding his land.
8. The Claimant relied on the evidence of the current principal of J. S. Archibald & Co, Mrs. Patricia Archibald-Bowers who averred that despite extensive and diligent searches of the Chambers, no record can be found of the 2011 Will. Critically she further stated that the records of J. S. Archibald do not reflect the voiding of the 2009 Will. She outlined detailed procedures which would ordinarily be followed when preparing wills which makes it impossible to conclude that the 2011 Will could have been misplaced by the law firm.
 9. In their amended Reply, the Claimants also contends that in any event the 2011 Will would be invalidated on the basis that the Deceased would have operated under duress or undue influence when she would have executed the same.

THE ISSUES

[8] The central task of the Court in this claim is to determine whether the 2009 Will should be proved in solemn form. However, in reaching such a determination, the Court must consider a number of issues:

1. Whether the Deceased made and validly executed the 2011 Will.
2. Whether the 2011 Will would have revoked the 2009 Will.
3. Whether the 2011 Will could be proved as a lost Will.
4. Whether the 2011 Will, if it existed, would be amenable to being declared void on the grounds of duress; and/or undue influence.

Whether the Deceased made and validly executed the 2011 Will

- [9] The Defendant contends that this is a question of fact which must be determined in his favour when the Court has regard to the evidence of his principal witness Ms. Anthea Smith who at the material time was a managing partner in the law firm of J. S. Archibald & Co. Counsel for the Defendant, commended Ms. Smith to the Court as a witness of truth and an officer of the court, who has nothing to gain in this litigation.
- [10] She averred that by the material time, Dr. Archibald QC had passed on the firm's wills practice to her and so by 2011 Will, she would have prepared practically all of the wills at the law firm. She recalls that she was introduced to the Deceased by the then principal of the law firm, Dr. J. S. Archibald QC. From all accounts Dr. Archibald counted the Deceased as a close personal friend and would ordinarily have handled all of her legal business personally, but according to Ms. Smith, she would, in certain matters be asked to assist. Ms. Smith asserts that she is the attorney who drafted the 2011 Will and that she was present when the Deceased validly executed the same.
- [11] According to Ms. Smith she would have been personally involved in the preparation of the Deceased's 2009 Will, which she would have finalized on instructions from the Deceased. Ms. Smith recalled that she spoke to the Deceased who at the outset, indicated that she wanted to change that Will. Ms. Smith recalled that she had meetings with the Deceased (there appeared to have been at least two meetings before the Will was eventually executed) which took place at a private office in the family store rather than at the law firm or at the Deceased's home.
- [12] While there would have generally been persons present in the store, Ms. Smith confirmed that she never took instructions from anyone other than Mrs. Winter. After she was contacted by the Deceased, she took the precaution of contacting Dr. Bain a local doctor in order to secure an evaluation of the Deceased competency. At the time, Dr. Bain was the Deceased's regular physician (which Dr. Bain confirms).

- [13] According to Ms. Smith, the Deceased *“was ill and was 83 at the time – a combination of these 2 factors I simply wanted to be sure that I had her attending physician’s assurance that she was okay to give me her instructions.”* Ms. Smith later recalled *“getting the go-ahead”* from Dr. Bain. She could not recall the details of their conversation, but she was satisfied *“that she [Mrs. Winter] was competent and able to communicate her Will and there wasn’t any major illness that would affect her giving me instructions”*.
- [14] Ms. Smith was trenchant in her evidence that the 2011 Will was prepared and executed prior to her leaving the firm. She testified that: *“I know the Will was complete and finalized ...I do recall a finalized copy ...signed by Mrs Winter and witnessed by two persons in the presence of each other”*.
- [15] According to Ms. Smith, the 2011 Will would have been executed in the private office at the family store where she would have been present along with the Deceased and the witnesses. However, Ms. Smith could not recall the identity of those witnesses. Instead, she could only surmise that it may have been witnessed by at least another lawyer from her law firm, who would have attended for that purpose. However, she was not prepared to speculate as to the identity of the witnesses.
- [16] Ms. Smith was however adamant that the Defendant was not present when the 2011 Will was executed. Indeed, she did not recall any of the other Winter family members being present at the execution and according to her, she would *“not have permitted it”*.
- [17] Ms. Smith recalled making notes on a copy of the 2009 Will for the purposes of drafting the 2011 Will and she asserted that there should be records at the law firm J. S. Archibald & Co. which would include a copy of the 2011 Will on the client’s file and notes. According to Ms. Smith, there should also have been an electronic copy of the Will which would be maintained to enable later amendment if requested by the client. She maintains that the executed hard copy of the 2011 Will was placed by her on top of the safe which was kept at the office of J. S. Archibald & Co. She denies that the room was locked and says that she was able to access that room, as she had *“many times”* as managing partner.

- [18] When she was asked to consider a copy of an invoice **Exhibit WW-3**, she confirmed that it was the invoice issued in regard to the 2011 Will. She confirmed that it was genuine and that it bears her signature. Ms. Smith recognized the code on the invoice as a designation relating to her initials (“ALS”) and the initials of the secretary who would have prepared the invoice (“KS”). She recalled signing the invoice and was “*unsurprised [it] was paid because the work had been completed*”. She stated that the amount charged was likely a fixed fee and which reflected the right level for the preparation of a will.
- [19] Ms. Smith further recalled that during a later visit to the family store (which was something she did regularly), she informed the Defendant and the Deceased that she had left the law firm. The Defendant would have asked about the Deceased’s 2011 Will in the presence of the Deceased and she would have told them that she had not left the firm with any of the client’s will or files.
- [20] Dr. Bain, who provided crucial corroboration of Ms. Smith’s evidence, was also commended to the Court as a witness of truth who has absolutely nothing to gain in giving her account. Counsel for the Defendant urged the Court to discount any reference to the purported lawsuit brought against Dr. Bain by a client of J. S. Archibald & Co. (which appeared to be a landlord and tenant dispute) because it would not colour her evidence which was clear, measured and impartial and which lends very substantial weight to the Defendant’s contention that the 2011 Will was in fact made.
- [21] Dr. Bain made clear that she examined the Deceased in order to determine her capacity to make a will. She further recalls that at the time, the Deceased would have been accompanied by certain family members, including Kerry and Lisa Winter. She could not recall the exact date when this occurred but she stated that could not have been after 2012, because by that time she had moved to the Tropic Isle Building and she does not recall the Deceased ever visiting her at that location. She recalled speaking to Ms. Smith on the phone “*halfway through the examination*” and Ms. Smith asked her whether she was “*prepared to write a letter*”. Dr. Bain further recalled that she prepared a “*letter of evaluation that Mrs Winter was competent to have a Will done*”.
- [22] Counsel for the Defendant submitted that this supports both the contention that the 2011 Will was made and the account given by Ms. Smith as to her involvement in it. It also accords with the recollection of the Defendant and his immediate family. In the case of the Defendant, he was certain

that the Deceased made a will in 2011 because he was present at the family store when it would have been executed. According to the Defendant, at some point around 2011, the Deceased, had said she was not happy with “*some of the things*” in the 2009 Will. He assumed that she would have made a call to J. S. Archibald & Co. “*because that was where her lawyer was*”. Although he accepted that Dr. J. S. Archibald would have dealt with the Deceased’s affairs in the past, he found nothing unusual about Ms. Smith dealing with his mother’s legal business because he understood that her “*to be taking care of Eileen Winter business [sic]*”.

[23] The Defendant stated that “*Dr Archibald introduced Ms. Smith to mum*” in his presence and he surmised that after this introduction, his mother would have dealt with Ms. Smith directly. The Defendant distinctly recalled Ms. Smith coming to a meeting at the family store and he thought that the 2011 Will would have been executed sometime after the initial meeting. He also stated that although he was not present during the Deceased’s visit to Dr. Bain, he was informed about it and was well aware that the Deceased was being evaluated.

[24] Unfortunately, the Defendant was unable to produce a copy of the 2011 Will, despite his searches at the Deceased’s house and the family store. He however, confirmed that he had received an invoice and receipt related to the 2011 Will from his son, Kerry who would have paid the bill and kept those documents at his house.

[25] The other Defence witness to address this issue was the Defendant’s son William Winter Jr. also known as “BJ”. It is common ground that BJ resided with the Deceased at the material time. His evidence focused somewhat on the reason why the 2011 Will would have been made. He testified that he came back to the house for lunch one day and found the Deceased very upset. When he enquired of her, he was told that his “aunt and uncle [Brenda and Mr. Ward] told [the Deceased] that [Billy] had sold all her land”. BJ went on to explain that he called his brother Kerry, who brought a map of the estate and pointed out the location of her land. According to Counsel for the Defendant, this evidence explains the (erroneous) reason why the 2009 Will would have been executed (it was based on a misrepresentation of the position to the Deceased by Brenda and her husband), and why the 2011 Will would be corrective.

- [26] BJ also remembers the Deceased going for an evaluation with Dr. Bain in 2011 *"maybe March or April"*. He recalled Ms. Smith being at the store *"maybe one or two times on her own"* and remembers the Deceased meeting with Ms. Smith about the 2011 Will after visiting Dr. Bain. He further remembers the Deceased speaking to Ms. Smith about what she wanted to include in the 2011 Will, and Ms. Smith taking her details before she left. He asserted that he was in the shop when Ms. Smith and the Deceased were *"doing the Will"* and says that he knows the 2011 Will was signed and that *"whatever was done was done in the store"*. He also recalled that Kerry would have paid money to J.S. Archibald and Co. on behalf of the Deceased.
- [27] Critically, BJ asserted that the Claimants were well aware of the fact and existence of the 2011 Will. He stated that that he overheard a telephone conversation between the Deceased and the First Claimant in which they would have discussed the 2011 Will. When he was robustly taxed on this, he stated that he would have overheard a bit of the conversation from the sitting room, which was next to the Deceased's bedroom. He confessed that he did not hear any details; he *"just heard she made some changes"*. He surmised that it was about the Deceased (his grandmother) giving her house to his father and himself. He stated that he *"did not stick around"* realizing his grandmother was upset and that an argument was developing and that he *"didn't want"* to listen. Afterwards the phone call he stated that his grandmother was crying and he tried to comfort her. When he asked *"what's going on ... she [Mrs Winter] told him [BJ] that it was about the changes"* but did not go into any further detail.
- [28] Counsel for the Defendant submitted that notwithstanding the poor quality of the records at J.S. Archibald and Co., the existence of the relevant invoice and receipt, and the clear recollections of Ms. Smith, taken in particular in conjunction with the evidence of Dr. Bain, leads to the unavoidable conclusion that the 2011 Will existed but simply cannot now be located, having been misplaced at the law office of J. S. Archibald and Co.
- [29] Not surprisingly, the Claimants hold a different view. Unfortunately, neither of the Claimants could cogently speak to the non-existence of the 2011 Will. In the case of the First Claimant, her evidence focused largely on the 2009 Will, the motivation behind it and the basis upon which the Deceased would essentially have disinherited the Defendant. She also would have provided evidence which

would support the contention that (if there was a 2011 Will) following her illness, the Deceased would have been operating under duress or undue influence of the Defendant and his immediate family such that even if she had prepared a will in 2011 it would be invalid. The First Claimant however, also categorically refuted any suggestion that she would have been aware of the existence of the 2011 Will and she disputed the evidence advanced by BJ in which he recounted a telephone conversation which she would have had with the Deceased.

[30] Having had an opportunity to hear and observe both the First Claimant and BJ give their oral testimony, this Court is satisfied that while a conversation may have been overheard by BJ, it is impossible to find on a balance of probabilities that this conversation concerned the 2011 Will, neither can the Court impute knowledge of that Will to the Claimants.

[31] The Second Claimant stated that he had no knowledge of the 2011 Will and so his evidence was not relevant to this central issue. The Claimants have however relied extensively on the evidence of the current principal of J. S. Archibald & Co., Mrs. Patricia Archibald-Bowers. In that capacity, Mrs. Archibald-Bowers carried out extensive searches for the 2011 Will and related materials and documentation. Mrs. Archibald-Bowers was the daughter of Dr. J. S. Archibald QC and at the material time she would have been an associate at the law firm. She described in detail the firms' practice and procedures in relation to will preparation and storage and she disputed Ms. Smith's contention that her father Dr. J. S. Archibald QC would have completely delegated such a sensitive matter as the preparation of a will to Ms. Smith as the Deceased would have been a close family friend.

[32] Mrs. Archibald-Bowers describes meticulous procedures established by Dr. J. S. Archibald QC for the making and storing of wills. According to her, he was habit driven and almost paranoid when it came to procedures regarding keeping the integrity of wills. She maintains that the account given by Ms. Smith of placing the Deceased's 2011 Will on the top of a safe in her father's private rest room (which contained a safe to which only he had access in his lifetime), was highly improbable. Apart from being in breach of protocol, it was physically impossible because of the area that the space was tucked away in (under a flight of stairs) and besides, the top of it would have been piled with books and other very personal belongings of her father.

- [33] Mrs. Archibald-Bowers averred that she conducted diligent searches of the office safe which did not yield the 2011 Will. However, she found that it contained the 2009 Will, valid and intact. She stated that she also checked the ledger or “log book” of wills which was kept at the law firm and that revealed that there was no entry for the 2011 Will. In fact she stated that there were only 4 Wills recorded for 2011 and these did not include any will made by the Deceased. She did however observe that there is a record of a 2004 Will which was crossed out (revoked) and the 2009 Will which was not. Actual copies of these entries were not produced to the Court because this evidence was only advanced during her oral testimony. However, she indicated that if requested, she was quite happy to produce the same.
- [34] Mrs. Archibald-Bowers also stated that she examined the Deceased’s client file at the law firm and found that the file did not contain a copy of the 2011 Will or a voided/cancellation copy of the 2009 Will. According to Mrs. Archibald-Bowers, the only file notes on the file were Dr. Archibald’s. The next obvious avenue would have been an electronic search, but even that yielded no joy. Mrs. Archibald-Bowers’ evidence is that the firm’s servers had been destroyed in the hurricanes and there would not have been any cloud storage. The only available means of storage would be on jump drives and she concluded that no electronic record could be found of the 2011 Will.
- [35] Mrs. Archibald-Bowers similarly could not locate any record of the original or duplicate invoice for the 2011 Will or a receipt evidencing payment. Instead, she testified that the record of payments for January 2012 (the month in which the receipt for the payment in respect of the 2011 Will was issued [**Exhibit WW-3**]) reflected only two receipts were issued in that month. However, she accepted that the invoice and receipt in respect of the 2011 Will [at **Exhibit WW-3**] appeared genuine. She accepted that the stamp on the receipt appeared to be the genuine stamp of the law firm and she recognized the signatures on the invoice to be that of Ms. Smith and a member of support staff who was employed by the law firm at the relevant time and who would have processed receipts.
- [36] Ultimately, Mrs. Archibald-Bowers could not explain the course of events as described by Ms. Smith in taking instructions for a 2011 Will for Mrs. Winter, but was adamant that nothing about the procedures adopted would have been consistent with the firm’s policy or practice. She indicated that she was well acquainted with her deceased father’s practices and expressed the view that the

absence of the usual records, the fact that a “live” will – the 2009 Will – remained on the file pointed to a suggestion that no will including the purported 2011 Will followed that one. She stated that her father would have made copious notes on the file – it was firm practice especially where the lawyer went out to take instructions from the client and the last note on the file was her father’s, with instructions for the 2009 Will. However, there were no notes or anything suggesting that Ms. Smith had ever touched that file, much less prepared the 2011 Will.

[37] When the Court reviewed the totality of the evidence, it was left in the unenviable and invidious position of having to consider diametrically opposed evidence offered by two practicing attorneys who are also officers of the court. Both of these witnesses impressed the Court with their forthrightness and candour and the Court found it very difficult to ascertain the truth of these events. Ultimately, the Court had regard to what little documentary evidence was advanced. It is apparent that a copy of this 2011 Will could not be found in the law offices of J. S. Archibald and Co. but the invoice and receipt at the very least advanced some latent evidence that it was in fact prepared and paid for.

[38] The existence of the invoice and receipt related to the 2011 Will, are clear in their terms. Mrs. Archibald-Bowers does not consider those documents to be fabricated and so they stand as powerful evidence that a will was in fact prepared in 2011. The Court has also had regard to the evidence of Dr. Bain. Her evidence was, in the Court’s judgment independent and not significantly impugned. The Court has no doubt that the Deceased would indeed have been assessed in order to prove her testamentary capacity and competence.

[39] When the Court has regard to preponderance of the evidence, it leads the Court to conclude that Ms. Smith would indeed have prepared a Will for the Deceased in 2011. The Court however cannot however ignore the obvious lack of any record of this Will in the law offices of J. S. Archibald. The Court can therefore only conclude that the usual practices and procedures which would have been in force in J. S. Archibald would not have been applied and followed when this 2011 Will would have been prepared and finalised. Moreover, it would appear that this Will would have been prepared without any active involvement of the then principal Dr. J. S. Archibald who would not have made the usual annotations in the relevant logbook or on the face of the 2009 Will.

[40] Of course, the matter does not end there. Despite the eleventh hour (and unpleaded) attempt to impugn the validity of the 2009 Will it is clear that no cogent evidence has been advanced in that regard. It follows that the 2009 Will should be admitted to probate unless it can be determined that it was destroyed or revoked by a lawfully valid will. The Court must therefore go on to determine whether this 2011 Will would have revoked the 2009 Will and whether it in fact could be proved as a lost will.

REVOCATION OF WILLS

[41] Because testamentary intention is ambulatory until death, a will is in its nature a revocable instrument. Section 20 of the Wills Act provides that a will or codicil or any part thereof may be revoked by another will or codicil executed in accordance with the Act. It provides as follows:

“No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner herein-before required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is herein-before required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.”

[42] The mere fact of making a subsequent testamentary paper does not work as total revocation of a prior one unless the latter expressly or in effect revokes the former, or the two are incapable of standing together. A later will or codicil partially inconsistent with one of the earlier date will revoke it in so far as they are inconsistent.¹

[43] In general, a clause of revocation where it is in clear words revokes all former wills just as if they never existed and leaves no operation of any former will.² However, that is not an inflexible rule. In **Gladstone v Tempest**³ the English court:

“Generally speaking there is no doubt that by a general clause of revocation there is revocation of all prior testamentary acts. But it has over and over again laid down that probate of a paper may be granted of a date prior to a will with a revocatory clause, provided the court satisfied that it was not the deceased’s intention to revoke that particular legacy or benefit.”

¹ Townsend v Moore [1905] P 66 at 67

² Southern Dening (1881) 20 Ch. D 99 at 105 CA

³ (1840) 2 Curt. 650

[44] It is also now settled law that if the contents of a later will which has been lost cannot be proved, the earlier will stands even if it can be shown that the provisions of the lost will were, in unknown respects different from those of the earlier one. In **Cutto v Gilbert**⁴ Dr Lushington stated:

“There is not one authority which lays down the proposition that the execution of a subsequent will destroyed *animo revocandi* by the testator, the contents of which are not known, revokes a prior will. On the contrary, in all the cases where revocation has been held to be effected, there has been proof of a difference of disposition. These considerations alone would induce us to doubt the correctness of the judgment in the court below, in the case now under consideration; but the very foundation of that judgment appears to us to be unsound; that judgment is mainly based upon the evidence that the latter paper contained the words, 'This is my last will and testament'. We are of the opinion, that these words do not import that the paper contained a different disposition of the property, nor that the mere fact of so calling it could possibly render it a revocatory instrument.”

[45] The law is equally settled that in order to revoke the first will there must be clear, stringent and conclusive evidence that there was either a revocation clause in the lost will or that its provisions were inconsistent with those of the prior will.

[46] In **Re Wyatt**⁵ the deceased made a will in 1935 and in 1937 she executed a codicil thereto by which she appointed the plaintiff bank to be executors of her will. In October, 1937, she instructed a solicitor to prepare another will which was duly executed and deposited with the plaintiff bank. On 4th May 1939, the deceased withdrew this later will from the bank and it was never seen again, nor was there any information available concerning its contents except that it was the solicitor's usual practice to include a revocation clause in any draft will and to submit each draft will to the proposed testator or testatrix for perusal and approval.

[47] On a motion by the plaintiff bank for an order that the first will and codicil be admitted to probate Collingwood J. found that where it is sought to prove the revocation of an earlier will by oral evidence only, such evidence must be “stringent and conclusive”; there was no such evidence in this case; and, therefore, probate of the first will and codicil would be granted. The learned judge applied the ratio in **Cutto v Gilbert** and at page 1032 observed:

⁴ *Cutto v Gilbert* (1854) 9 Moo. P.C. 131 at 143

⁵ [1952] 1 ALL E.R. 1030

“On the other hand, the execution of a second will which *expressly revokes*—or is entirely inconsistent with a former one—revokes the first even though the second will is not forthcoming at the death of the testator, and its contents are proved by oral evidence: *Brown v Brown*; *Wood v Wood*. But in such a case the authorities show that there must be clear proof of the provisions of the missing will. In *Cutto v Gilbert* Dr Lushington, after agreeing with the proposition that the onus probandi lay on the party seeking to prove the revocation, said (9 Moo PCC 140):

“The fact first to be proved, is the execution of some subsequent testamentary paper; and we here think it right to observe, that we are of opinion, that where the revocation of an existing will is sought to be established by the proof of the execution of a subsequent will not appearing, and where there is no draft or instructions in writing when such fact is to be proved by oral evidence only, such evidence ought to be most clear and satisfactory; for we concur in the opinion which has been expressed by very learned persons, that to revoke an existing will by parol evidence alone that another will has been executed, is, though the law may admit of it, a course of proceeding not unattended with danger, and, consequently, that such oral evidence ought to be stringent and conclusive.”

[48] These principles were confirmed in **Hitchins v Basset**⁶, where it was proved that a subsequent will had been executed, but no evidence was available as to its contents, the earlier will was held not to be revoked. The same result was reached where the subsequent will was found to have contained a different disposition from the earlier, but in what particulars it differed was unknown: **Goodright d Rolfe v Harwood**⁷.

[49] In the case at bar, the Deceased executed the 2009 Will, which was neither cancelled nor destroyed at the time she died. The Court has found that she later executed the later 2011 Will but this has not been produced and no drafts or notes have been produced which can speak to its contents.

[50] The Defendant alleges that the 2009 Will has been revoked by the subsequent 2011 Will, duly executed by the Deceased for that purpose but that this latter instrument has been lost and not forthcoming but is nevertheless subject to being proved as a lost will in solemn form. Alternatively, he contends that the Deceased would have died intestate. As there are no written instructions, fair copy, draft, or notes produced as to the contents of the 2011 Will, in considering this matter, this Court under the necessity of forming its judgment is left to consider the testimony of the

⁶ (1694), 2 Salk 592, 91 ER 495

⁷ (1775), 7 Bro Parl Cas 489

recollection/memory of the witnesses who claim to have been privy to its contents and the whole circumstances of the case.

WHAT IS KNOWN ABOUT THE 2011 WILL?

- [51] While the Court may be satisfied that the 2011 Will would have been prepared and executed by the Deceased prior to her death, there is very little else of which the Court may be certain as no written instructions, fair copy, draft, or notes of the 2011 Will have been produced. This presents a difficulty for a number of reasons. First, the Court must consider whether the 2011 Will was validly executed. Second, the Court must determine whether that Will would have included a general clause of revocation or would have by its inconsistent terms revoked the 2009 Will. The Court will consider these matters in turn.

Validity of the 2011 Will

- [52] For a will to be valid and consequently admitted to probate, it must be made by a person who has attained the age of 21 years of age and who has the testamentary capacity to do so. In addition, the will must meet the formal requirements laid down in statute. In the Virgin Islands, the relevant statute is the **Wills Act**⁸ ("the Act") - section 7 of which requires that a will be in writing and signed by the testator or by someone in his/her presence or by his direction at the end or the foot in the presence of two or more witnesses who are required to attest and subscribe the will in the presence of the testator.
- [53] The only pertinent evidence on the question of validity comes from Ms. Smith who in her written evidence stated that the Deceased had the requisite capacity to provide instructions for the preparation of a Will. Dr. Bain would have confirmed that the Deceased was coherent and able to provide those instructions. Ms. Smith asserted that she would have spoken to and taken instructions from the Deceased on at least two occasions at the family store. On one occasion, she carried a copy of the 2009 Will and the Deceased informed her of the changes that she required. Ms. Smith later presented a draft will to the Deceased and further changes were made. She returned on a

⁸ Cap. 81 of the laws of the Virgin Islands

subsequent date at which time the 2011 Will was executed in Ms. Smith's presence as well as another lawyer at J. S. Archibald who was not identified. Ms. Smith concluded that the 2011 Will was finalised and properly executed and witnessed.

[54] When she was examined under oath, Ms. Smith's was adamant that the Will was completed or finalised. She explained that it was signed by the Deceased, witnessed and returned to the law firm. She further stated that she was well aware of the requirements for witnessing a will and that she would have made sure that the 2011 Will would have been properly witnessed.

[55] In the Court's judgment, a litigant who alleges the validity of a testamentary instrument must condescend to particulars. The bare averment that the 2011 Will was completed or finalised simply does not suffice. In the Virgin Islands, the statutory requirements for formal validity are unequivocal. It must therefore be specifically averred and proved with stringent evidence that the will had been executed in accordance with the Act - that is - it must only be signed by the Deceased or by someone in his/her presence or by her direction but such signature must be inscribed at the end or the foot of the Will and in the presence of two or more witnesses who are required to and did in fact attest and subscribe the will in the presence of the testator. Such clear and unambiguous evidence was simply not put before the Court and this lacuna did not in any way assist the Defendant's case.

[56] It is apparent that there is at least one other potential witness who could speak to the formal validity of the 2011 Will but their identity is unknown (Ms. Smith could not recall the names of the attesting witnesses) and they were not presented to this Court. This is unfortunate because given the length of time which would have elapsed since the relevant events and the admitted difficulties in recall which this would have presented, it is critical that the Court have sufficiently cogent and corroborative evidence which would speak to these issues.

Express Revocation: Did the 2011 Will include a general clause of revocation?

[57] It is settled law that the fact that a paper is described as a "*last will and testament*" or even as a "*last and only will*" is not conclusive or even presumptive evidence of an intention to revoke all previous will. Where a will is proved to have been duly executed, the party alleging revocation must prove his

allegation and in the absence of proof his case falls to the ground. At page 176 of the case of **Benson v Benson**⁹ Lord Penzance stated as follows:

“There is a principle with regard to questions of revocation upon which the Court always acts, and which is, I think, strongly applicable to this case. It is this, that when a will is once proved to have been duly executed, the Court must be satisfied that it has been revoked before pronouncing against it. In many cases it has happened that a will in a testator's custody has been found, after his death, obliterated in such a way as to amount to a revocation if he was of sane mind when he did it, and there has been no evidence whether it was done before or after he became insane. Does the Court, in the absence of proof, presume that it was done before he became insane, when it would amount to a revocation, or when he became insane, when it would not amount to a revocation? The answer is, that the Court always refuses to presume one way or the other, but holds that the party who alleges that it was done at a time when it would amount to a revocation must prove his allegation, and in the absence of proof the revocation falls to the ground.”

[58] It follows that the Defendant bears the burden of proving that the duly executed and un-cancelled 2009 Will would have been revoked by the 2011 Will and in circumstances where the Defendant is advancing that a later lost will has revoked the earlier 2009 Will then it is clear that this evidence must be clear, stringent and conclusive.

[59] At paragraph 4 of his defence, the Defendant states that:

4. Paragraph 1 is admitted. It is however averred that the deceased made a later Will in 2011 (the “2011 Will”) and that the will dated 29 November 2009 was expressly revoked. Emphasis added

The only evidence which supports this contention is found in the oral testimony of Ms. Smith who stated that once a new will would have been executed, more than likely one would want to know that the earlier will was amended or cancelled. The log book entry would be crossed out and the date of replacement indicated. Then two lines would be drawn through the original will to cancel it. Ms. Smith indicated that she would have seen Dr. J. S. Archibald QC do that early on in practice but that she would not usually be present when it was done. According to her, Dr. J. S. Archibald QC should have done that to the 2009 Will. It is however clear that this is not the case.

⁹ (1870) L. R. 2 P & D 172

[60] When she was specially asked about the contents of the 2011 Will, Ms. Smith's was forthright and honest when she stated that she could not recall the terms. This is not surprising because as Counsel for the Defendant has submitted, the Court is alive to the fact that the witnesses, on both sides, were turning their attention to matters that took place a decade ago. Ms. Smith's evidence is therefore understandably equivocal. She expressed the view that the 2011 Will should also have indicated that it revoked the previous 2009 Will because according to her, this is a standard clause she would have ordinarily include in all of the Wills which she would have prepared.

[61] She was asked about the 2011 Will's specific devises. Clearly in an invidious position, she stated that there was "...a piece of land by the sea side she [the Deceased] wanted to deal with ...she had a grandson that lived with her and wanted something done with the house and a piece of land across the street...but I cannot recall what she actually said without seeing what she said with respect to those." In the Court's judgment such evidence is nebulous at best and it was clear to the Court that even this witness was not certain as to its reliability. Finally, the Court has also noted with interest that Ms. Smith did not proffer any evidence about the appointment of executors (a factor which would be absolutely essential in proving the 2011 Will).¹⁰

[62] The court in **Re Wyatt** was presented with an eerily similar factual scenario. The court crystallised the central issue for determination in the following terms:

"The question then arises: Did the will of November, 1937, revoke the previous will of 1935? The mere fact of making a subsequent testamentary paper does not effect a total revocation of a prior one unless the later document expressly or impliedly revokes the former one. On the other hand, the execution of a second will which *expressly revokes*—or is entirely inconsistent with a former one—revokes the first even though the second will is not forthcoming at the death of the testator, and its contents are proved by oral evidence: **Brown v Brown; Wood v Wood**. But in such a case the authorities show that there must be clear proof of the provisions of the missing will."

¹⁰ Hellier v Hellier (1884) 9 PD 237 see: paragraph 68

[63] Collingwood J¹¹ had before him the solicitor's affidavit in which he stated that it was his practice to include a revocation clause in any draft will prepared by him on the instructions of a client, and he went on to describe the various stages of preparation which were customary, including the sending of the draft for perusal and approval, and the making of any amendments or deletions necessitated thereby, and final engrossment. The learned judge was then invited to draw the conclusion that the lost will contained a revocation clause.

[64] The learned Judge applied the dictum in **Cutto v Gilbert** and concluded as follows:

“In this case, on the evidence before me, I think that so to find involves the assumption that the solicitor's usual procedure was in fact following in the present instance, and the further assumption that the testatrix accepted the draft as correctly expressing her intentions in the matter. In my opinion, I ought not to make these assumptions in respect of a will the contents of which are wholly unknown. To do so would, I think, be to substitute surmise for the “stringent and conclusive” oral evidence required by Dr Lushington in *Cutto v Gilbert*, and thereby, to use his words, to pursue “a course of proceeding not unattended with danger.””

[65] Counsel for the Claimants has submitted that upon a close examination of Ms. Smith's written evidence (First Affidavit and Second Affidavit) and the questions asked in amplification at trial – there was no positive assertion that she included a revocation clause. There was only a tangential reference to what may have been her usual practice in drafting wills with no real historical support. Counsel submitted that this would not go far enough to prove on a balance of probabilities that a will *which was capable of revoking* the 2009 Will was produced at any time. This Court is forced to agree. Guided by the approach and by the ratio in **Re Wyatt** and given the paucity of the evidence, this Court is not prepared to make the assumption that the 2011 Will would have included an express revocation clause and therefore could be said to have expressly revoked the 2009 Will.

Implied Revocation - Could the 2011 Will be said to have revoked the 2009 Will by virtue of its inconsistent terms?

[66] This Court has applied the dictum of the English court in **Cutto v Gilbert** by which it is now well established that in considering whether a latter will revokes an earlier one should be admitted to probate, the court must consider whether the contents of the later will which is lost can be proved.

¹¹ Re Hampshire (1951) WN 174 where less stringent evidence was accepted was expressly not followed and see; Re Dear [1975] 2 NZLR 254 at 267

- [67] **Hellier v Hellier**¹² is a case which illustrates this. In that case, a testator made a will in 1864, appointing his wife sole executrix, and in 1877 he executed another document. There was no evidence of the contents of the second document, but after its execution the testator said: "I have made a will altering my affairs ... ", and at the foot of the earlier will was a memorandum: "This will is now useless, a new will having been made in October, 1877, upon my wife telling me she was sorry she had ever seen me". It was held that, in the absence of proof of an alteration of executrix or a revocatory clause, or a disposition wholly inconsistent with the first will, that will was not revoked, and was entitled to probate.
- [68] At paragraph 16 of the Defendant's affidavit of 13th March 2019, the Defendant avers that he always understood the 2011 Will to reflect his mother's last wishes to be and to have revoked the 2009 Will, the terms of which were very different.
- [69] The 2011 Will cannot be produced and so the burden of showing that it revoked the 2009 Will is on the Defendant who is the party alleging revocation. He is bound to prove its contents and its due execution and attestation by evidence which is clear and satisfactory.¹³ The Court is satisfied that the standard of proof required is the ordinary standard of proof in civil cases, namely the establishment of a reasonable balance of probability.¹⁴ The Defendant must advance with cogent proof that the 2011 Will contained a clause revoking the 2009 Will and, if as in this case, he has failed to do so on a balance of probabilities, then he must advance proof of a difference of disposition. Here, there has been no secondary documentary evidence advanced as to the 2011 Will's contents which shows that it would have expressly or impliedly revoked the earlier 2009 Will. The Court is therefore left to consider whether there is secondary or external parole evidence in order to ascertain the Deceased's intention.
- [70] In so doing, it is clear that courts are not generally permitted to receive parole evidence of what those present at the execution of the will thought the testator would have intended. see: **Townsend v Moore [1905] P. 66 at 84**. However, in considering whether a later will revokes an earlier one the

¹² (1884) 9 PD 237

¹³ *Harris v Knight* (1890) 15 PD 170 at 179, CA, per Lindley LJ; *Woodward v Goulstone* (1886) 11 App Cas 469 at 475, HL, per Lord Herschell LC; *Re MacGillivray* [1946] 2 ALL ER 301, CA.

¹⁴ *Woodward v Goulstone* (1869) 11 App Cas 469

court may consider the whole of the circumstances and the testamentary provisions and construe them.¹⁵

[71] It is apparent that in the 2009 Will, the Deceased would have appointed the Claimants as the executors and would have been specifically disinherited the Defendant. The Defendant claimed that he was aware of the terms of the 2009 Will, because he had discussed it with Kerry and BJ prior to 2011. He further stated that he did not think his mother could have intended to disinherit him given the nature of their relationship. In his written evidence, he recalled that at some point around 2011, he had a conversation with his mother (the Deceased) in which she was particularly concerned that the 2009 Will had the effect of disinheriting him and had other effects in relation to his children which she did not want.

[72] However, when he was examined under oath, he stated that his mother had said she was not happy with *“some of the things”* in the 2009 Will. He did not know what she did in respect of that unhappiness but he assumed she made a call to J.S Archibald and Co. *“because that was where her lawyer was”*. He further stated that this came up in a conversation in the family store and that his mother (the Deceased) *“didn’t say exactly”* what she wanted to change but he posited that she would have *“wanted BJ to have the house. That was always her dream”*. He also said *“there were some small parcels of land to be given to Steve and Dave and them – I’m not sure there was a piece by Mikey”*.

[73] This evidence was decidedly tenuous and stands in direct contrast to the definitive terms of paragraphs 13 – 14 of his Affidavit filed on 13th March 2019 in which he stated that he remembers the 2011 Will being executed because he was present at the store that he operated with his mother with Ms. Smith when that occurred. When he was examined by the Court, he reiterated that he was present together with Ms. Smith, another lawyer lady, Ms. George, Kerry and the Deceased when the Will was signed. According to the Defendant, he remained there until the Deceased signed the Will and then afterward everyone went their separate ways.

¹⁵ Re Petchell (1874) L.R. 3 P & D 153 at 156

[74] He could not recall positively who the witnesses were, but he stated that to the best of his knowledge the 2011 Will was in certain respects similar to the cancelled 2004 Will. He then proceeded to itemize several specific provisions (which may not be complete) including:

- i. That he would be sole executor and trustee of the Deceased's estate;
- ii. That 3 plots of an acre each were to be subdivided out of his mother's land situated in Palestina Estate and given to each of the following grandchildren; William Winter Jr. Christina Ward and Kerry Winter;
- iii. The Deceased's house in which she was resident up to the time of her death located on Block 2635B Parcel 242, Sea Cow's Bay Registration Section was to be given jointly to the Defendant and his son, William Winter Jr.;
- iv. That property known as Block 2635B Parcel 28 Sea Cow's Bay Registration Section was to be jointly the Defendant and his children William Winter Jr. and Kerry Winter;
- v. That land bounded by property held by David Winter also known as Block 2635B Parcel 53 Sea Cow's Bay Registration Section and bounded by the government main road would be transferred to David Winter;
- vi. That land bounded by property held by Steven Winter also known as Block 2635B Parcel 42 Sea Cow's Bay Registration Section and bounded by the government main road would be transferred to Steven Winter;
- vii. That land bounded by property held by his property also known as Block 2635B Parcel 42 Sea Cow's Bay Registration Section and bounded by the government main road would be transferred to him.

[75] In cross examination, the Defendant was specifically taxed about these purported variations and it was put to him that this evidence was dishonest and untrue. He responded that he "...did not have 100% involvement in that Will. Ms. Smith and my mom is who dealt with that." When it was suggested that given this indication he could not say that the details set out at paragraph 14 of his affidavit were in fact the terms of the Will, the Defendant simply repeated his evidence that he was not involved in the 2011 Will.

[76] When Counsel for the Defendant attempted (with no success) to address this equivocation on re-examination, the Defendant responded "*I do not know what was in the 2011 Will. That was done between the lawyers and the client. I had no involvement in that.*" When he was asked to explain his

evidence at paragraph 14 of his affidavit, he could only offer “*All the years I know my mother, she always say she would like BJ to have this little house of hers.*”

[77] When he was directly questioned by the Court, he stated that he could not recall whether the 2011 Will was read out, he did not hold it in his hand and he did not read it. When he was asked to explain his knowledge of the contents of the 2011 Will he stated that the first time that the lawyer came he would have heard her putting certain things the Deceased wanted in the Will but later he confessed that the Deceased would not have mentioned anything to him and he coyly concluded: “*I guess she made the changes she wanted to make.*”

[78] The Defendant's evidence must be construed together with that of his son, BJ who stated that he was in the shop when Ms. Smith and the Deceased were “*doing the Will*”. He is positive that the 2011 Will was signed and that “*whatever was done was done in the store*” but as to its terms he could only state that the Deceased “*always said she wanted me to have the house when she passed*”. He recalled that under the 2011 Will he was to get an ownership interest in Deceased's house, rather than the simple right to reside in it for life (under the 2009 Will). BJ really knows nothing that throws any light on the actual content effect of the 2011 Will. In the Court's judgment, his evidence did little to assist the Defendant's case.

[79] The Court must also contend with the evidence of Ms. Smith. When she was examined under oath, she recalled that she was contacted directly however she cannot recall who did so. However, in her written evidence she indicated that she was contacted by the Deceased who instructed her that she wished to amend the terms of the 2009 Will. This was to be achieved by drafting a further will by which the 2009 Will would be revoked. According to her, she took instructions from the Deceased at the store as to the changes that she wished to make and contrary to what was represented by the Defendant (who testified that he was involved in some discussion(s) relating to the content of the will, and that he was asked by the lawyer to clarify what was to be done with a particular piece of land), Ms. Smith indicated that she never took instructions from anyone else and that when she was taking instructions from the Deceased at the store there would have been no one else present other than herself and the Deceased. Later, she was equally firm that she had no discussions with the Defendant about the dispositions under the 2011 Will.

[80] Ms. Smith also confirmed that the 2011 Will was executed in the office at the family store and that she would have been present together with the Deceased and the witnesses. She appeared confident that the Defendant was not present in the room. Indeed, she did not recall any of the members of the Winter family being present at the execution because according to her, she would “*not have permitted it*”.

[81] It is well established that the contents of a lost will may be proved by the evidence of a single witness whose veracity and competency are un-impeached, even if he has an interest.¹⁶ However, in the Court’s judgment, the conflicting evidence damaged the Defendant’s credibility and his case. The Court has considered the Defendant’s written evidence and having observed the Defendant when he was examined under oath, the Court is satisfied that he was not a witness of truth and that his evidence has been impeached and is unreliable. The nebulous and equivocal evidence of his supporting witnesses, whose recollections were tenuous at best, did not assist or improve his case.

[82] There was no evidence of declarations by the Deceased following the purported execution of the 2011 Will to the effect that she had made a will leaving her assets in the manner alleged by the Defendant of at all. Rather, the Defendant relies on declarations alleged to have been made by the Deceased to the Defendant and to BJ over the course of many years to the effect that she wanted her house to go to BJ. It is clear that in so far as regards the admissibility of statements of a testator made before the execution of the will as to the contents of a will “in the making” there is no uncertainty. In **Woodward v Goulstone**¹⁷ the English House of Lords observed:

“If upon mere loose statements of the recollection of witnesses as to what has been said to them at some time or other, you were to grant probate of, and to establish as the will of testator, something which no one had even seen or purported to be able to depose to from recollection, it seems to me that you would be doing that which would be in the highest degree dangerous, and the more so when those statements are statements of witnesses and one knows how fallible human memory is even when there is no interest to bias it who have the strongest possible interest in remembering what they remember and in forgetting what they forget. I think, therefore, that in order to support a will propounded, when it is proved by parol evidence only, that evidence ought to be of extreme cogency, and such as to satisfy one beyond all reasonable doubt that there is really before one substantially the testamentary intentions of testator (Lord Herschell, C).”

¹⁶ Sugden v Lord St Leonards (1876) 1 PD 154, CA; Re Yelland, Broadbent v Francis (1975) 119 Sol Jo 562

¹⁷ (1886) 11 App Cas 469, 51 JP 307 and see: Sugden v. Lord St. Leonards confirms numerous earlier decisions

- [83] Having weighed all of the available evidence advanced by the Parties, the Court is unable to conclude that the 2011 Will was validly executed and as such that it is capable of revoking the 2009 Will. In arriving at this decision, the Court has considered and applied the decision in **Goodright d Rolfe v Harwood (1775) 7 Bro Parl Cas 489, 3 ER 318** where A made a will in 1784, and another in 1756. The first will was produced, but the other could not be found. Upon an issue the jury found that the latter will was different from the former, but in what particulars was unknown to them. Under these circumstances the latter will was not a revocation of the former.
- [84] The Court has also considered and applied the judgment in **Broadway v Fernandes**¹⁸ where the claimant was the executrix of the estate of the deceased. The defendant was the nephew of the deceased. The claimant, the deceased, and his partner became friends during the 1950s. During the 1980s, the claimant was provided with a key to the deceased's flat. On 5th March 1991, the deceased executed a will (the 1991 will) by which the claimant was appointed as executrix. Under the terms of that will, in the event that his partner predeceased him, the entirety of the deceased's estate was to have passed to the claimant. His partner died in 1994, and, after that date, the claimant remained a close friend of the deceased. He had a number of nieces and nephews, all of which, excepting the defendant, lived abroad and had little to do with him. A dispute had occurred between the defendant and the deceased during the 1990s. During 2000, the deceased's health began to decline. After the claimant had contacted the defendant to inform him of the deceased's ill-health, the defendant visited his uncle in April 2003. The defendant contended that during that visit, the deceased informed him that he had made a new will in 2003 (the alleged 2003 will), revoking the 1991 will and providing for all his nieces and nephews. In the event, the deceased died on 8 March 2005. The claimant maintained that she had found the 1991 will at the deceased's flat, and that no other wills, nor letters or documents suggesting that a later will had been made were found. The claimant applied for the 1991 will to be pronounced in solemn form. The defendant objected.
- [85] The principal issue that fell to be determined was whether, in the light of the fact that the alleged 2003 will had not been uncovered following the deceased's death, the 1991 will had in fact been revoked. The court ruled:

¹⁸ [2007] ALL ER (D) 485 (Mar)

“In the instant case, the 1991 will having been duly executed, the burden of proof in establishing that that will had been revoked fell upon the defendant. That threshold was particularly high in the light of the fact that the alleged 2003 will had not been found, nor had any documentary evidence indicating its existence been found. On the evidence, the defendant had failed to satisfy the burden of proof that the deceased had created a new will in 2003, revoking his earlier will of 1991. Accordingly, the 1991 will would be pronounced in solemn form.”

[86] In the Court’s judgment, the evidence advanced by the Defendant as to the terms of the 2011 Will is unreliable at best and fabricated at its worst. Given the Defendant’s responses, the Court was not satisfied that the inconsistencies could be solely ascribed to lapse of memory. Ultimately, the only witness who could cogently speak to the terms of the 2011 Will would have been the attorney who took instructions and prepared the same. Unfortunately, her lack of contemporaneous notes and the passage of time meant that she understandably had little recall which could assist the Defendant’s case. There is no cogent evidence which supports an express revocation. No inconsistency between the provisions of the 2011 Will and the 2009 Will has been proved because in the case at bar there was simply no clear, cogent or conclusive/reliable evidence of the terms of the 2011 Will. The Court has weighed all of the evidence and is satisfied that neither the Deceased nor Ms. Smith would not have discussed the contents of the 2011 Will with any member of the Winter family. They therefore could not purport to speak convincingly of its terms. The Court was therefore left with equivocation, conjecture and perhaps a healthy dose of wishful thinking.

[87] Ultimately, the Defendant’s pleaded case does not allege the 2009 Will lacked formal validity. Although in almost 11th hour submissions (not reflected with any cogency in its pleaded case) there appears to be some contention that the 2009 Will was made without the requisite knowledge and approval of the Deceased, (because she would have been pressured to by some members of the family), this case never got off the ground. There is simply no admissible or cogent evidence offered which would support this contention on a balance of probabilities. All other formalities having been satisfied, in these premises, the Court is satisfied that the Claimants are entitled to judgment in the action. The Court will therefore pronounce the 2009 Will in solemn form.

[88] Given the Court's conclusions herein, the Court does not need to go on to consider the question of whether the Deceased would have been acting under duress or undue influence in making the 2011 Will. The Court will therefore decline to assess the Parties' and their witnesses' evidence or the legal submissions advanced in that regard.

COSTS

[89] In her written arguments, Counsel for the Claimants would have submitted that all of the Claimants' reasonable costs should be derived from the Deceased's estate irrespective of whether the Claimants are successful on any or all of their claim. That position does not appear to be opposed by the Defendant. In the premises, the Court will make that order.

[90] **It is therefore ordered as follows:**

- i. Judgment is entered for the Claimants.**
- ii. The Court pronounces the will of the Deceased Mabel Eileen E. Winter also known as Eileen Winter dated 20th November 2009 in solemn form.**
- iii. The Claimants' reasonable costs are to be defrayed from the estate of the Deceased.**

[91] Finally, the Court conveys its sincere regrets for the inordinate delay in rendering the judgment in this matter and must thank Counsel and the Parties for their patience.

**Vicki Ann Ellis
High Court Judge**

By the Court

Registrar