IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 108 of 2020

BETWEEN:

ZONIA LOLITA PEARSON GOODING

PLAINTIFF

-AND-

JULIETTE GOODING
(AS EXECUTOR OF THE ESTATE OF DAVID ARCHIBALD GOODING, DECEASED)

DEFENDANT

OPEN COURT

Appearances:	**Ms Keva Reid of McKinney Reid for the Plaintiff** **Mr Delroy Murray of Murray & Westerborg for the Defendant**
Before:	**Hon Justice Alistair Walters (Actg.)**
Date of Hearing:	**8 and 9 March 2022**
Draft circulated:	**16 March 2022**
Judgment Delivered:	**1 April 2022**

HEADNOTE

Dispute as to validity of will, dispute as to whether testator had read the will prior to executing and was coerced into signing, relevance of date of will and date of execution to question of validity, application of section 13 Wills Act revoking wills executed prior to marriage.

JUDGMENT

Summary of background

1. These proceedings relate to a will executed by the late David Archibald Gooding (the "Testator") shortly before his death. The Testator was a retired senior officer in the Royal Cayman Islands Police Service. The will in question was dated 19 March 2020 (the "Will"). On the same date, the Testator married the Plaintiff. The preamble to the Will includes express wording as follows:

> *"I David Archibald Gooding ..... being aware of the uncertainty of this human life, do hereby declare that this is my Last Will and Testament ... and declare that this Will is not to be revoked by my intended marriage to [the Plaintiff] and will remain effective irrespective of whether that marriage takes place, and all former Wills, codicils, testamentary dispositions made by me are revoked by this Will."*

2. The Will went to on to appoint the Defendant (the Testator's niece) as executor and to divide his estate between his four children, David Stephen Gooding ("Mr Gooding Jr"), Celia Carmichael ("Ms Carmichael"), Chantal Pearson (the Testator's adult daughter with the Plaintiff whose married name is Hintzen) ("Ms Hintzen"), Marlon Bush ("Mr Bush") and his brother, Kenrick Gooding. The two most significant bequests were of the Testator's home in the Cayman Islands (60 Merrimac Close), which he left to Mr Gooding Jr and his home in Barbados (17 Mount Pleasant Gardens), which he left in equal shares to Ms Carmichael, Mr Gooding Jr and Ms Hintzen with the caveat that;

> *"As House # 17 is a significant memorial to my family, it is my wish and desire that it be retained and continued to be used as a family home by my family named in this Clause 6 and their children to enjoy for generations to come,"*

3. Clause 10 of the Will provided that:

> *"I give, devise and bequeath to my Trustee the proceeds (if any) from my Cayman Islands Royal Police Service Pension Fund, to pay therefrom a one-time lump sum amount of Five Thousand Cayman Islands Dollars (KYD5,000.00) to my beloved son, MARLON BUSH, and the balance (if any) to be divided equally between my three beloved children, namely CELIA CARMICHAEL, DAVID STEPHEN GOODING, Jr., and CHANTAL PEARSON."*

4. At the time of the execution of the Will and his marriage to the Plaintiff the Testator was terminally ill with prostate cancer. His family were aware of this and he died on 7 April 2020 at the age of 71.

5. In summary, the Plaintiff's case is that the Will was not in fact executed on the 19 March 2020, but two days later, on 21 March 2020 and is incorrectly dated. The Plaintiff says that this fact, when combined with certain other facts which give rise to suspicions about the circumstances in which the Will was executed and which suggest that the Testator executed it knowing that Clause 10 was incapable of being performed, are a sufficient basis for the court to revoke the grant of probate of the Will. The Plaintiff suggests that the execution of the Will was fraudulent and that the Testator did not sign the Will willingly or knowingly.

6. The Testator had not executed a prior will but there are two earlier draft wills that were provided by Mr Murray for the Defendant after the hearing. I refer to those below.

7. If the Plaintiff succeeds, then, as explained below, the effect will be that the Testator would have died intestate. As a result, the Plaintiff would be entitled to share in the Testator's estate pursuant to section 29 (1) of the Succession Act (2021 Revision).

8. The Defendant's position is that the Will was executed by the Testator on the morning of 19 March 2020 immediately prior to his wedding.

9. Both parties agree that if the Will was executed prior to the Testator's marriage to the Plaintiff then section 13 of the Wills Act (2021 Revision) will apply. That section states:

> "*13. Every will made by a person shall be revoked by that person's marriage or civil partnership except a will made in exercise of a power of appointment when the real or personal estate thereby appointed would not in default of such appointment pass to that person's heir, customary heir, executor or administrator, or the person entitled as that person's next of kin under the Succession Act (2021 Revision).*"

10. Subject to what I say below, Counsel agree that a power of appointment was not being exercised in this case so the simple effect of section 13 would be to revoke the Will if it was executed prior to the marriage. The Defendant's position seems at first blush to be counter-intuitive. However, Mr Murray on behalf of the Defendant has argued, in reliance on a number of United States authorities which considered similar statutory wording, that the court has a discretion to disapply section 13 if the public policy reason for the existence of the section does not exist in a particular case. He argues that the fact that the Will is a will executed in contemplation of marriage (on the day of the marriage) means that, in the exercise of the court's discretion, it should benefit from the disapplication of section 13 and should be treated as valid.

Background to these proceedings

11. As mentioned above, the Testator died on 7 April 2020. Probate was granted on 11 August 2020 in favour of the Defendant (the "Grant of Probate"). Annexed to the Grant of Probate was a copy of the Will. The Grant of Probate records that the Will was proven and registered with the court on 5 August 2020. The Plaintiff's evidence in chief at trial comprised an affidavit dated 24 September 2020 and a witness statement dated 22 March 2021. In both documents the Plaintiff

states that after the Testator's death, she discovered that he had left a will. She says that she asked the Defendant for a copy but was not provided with one. However, she was told by the Defendant that an application for a grant of probate had been made. The Defendant says that she obtained a copy of the Will from the court.

12. The Defendant says that she was alarmed by the contents of the Will and the fact that the Defendant was named as executor. The Plaintiff must have instructed attorneys relatively quickly because a writ endorsed with a statement of claim dated 23 July 2020 was issued on her behalf on 29 July 2020.

13. The Plaintiff claims in the statement of claim that the Will was not lawfully executed, was executed after the day that it is dated and that the Grant of Probate should be revoked if granted.

14. What the Plaintiff did not do is object to the granting of probate whilst that process was still underway. Pursuant to the Succession Act (2006 Revision) the Probate and Administration Rules (2008 Revision) were issued (the "Rules"). There are a variety of sections of the Rules that are intended to address concerns about the validity of wills, prior to the grant of probate. These include:

> "*16 A Judge shall not issue any grant [of probate] until all inquiries which he sees fit to make have been answered to his satisfaction, and a Judge may require proof of the identity of the deceased or of the applicant beyond that contained in the oath.*
>
> ...
>
> *24. Where it appears to a Judge that there is some doubt as to the due execution of a will by lack of any sufficient attestation clause or other reason, the Judge may require an affidavit of execution from one or more of the attesting witnesses or, in the unavailability of such witness, from any person who was present at the execution.*
>
> ...
>
> *27 (3) Where the date of the execution of a will is in doubt a Judge may require evidence to establish such date."*

15. It does not seem that the existence of the proceedings was made known to the department within the Grand Court dealing with the grant of probate. A defence was served on 17 August 2020. It is brief, but does deny that the Will was executed on 21 March 2020 and denies that the Plaintiff and Testator were together the entire time on 19 March 2020 as claimed by the Plaintiff. It admits, as claimed by the Plaintiff, that the Testator met with Mr Gooding Jr on 21 March 2020 but avers that

the meeting was to discuss the transfer of the Testator's home to Mr Gooding Jr (which, as mentioned above, the Will made express provision for) and to sign documents relating to various personal items separate to the Will.

16. By consent, on 20 October 2020, an order was made restraining any dealing with the Testator's estate until the conclusion of the proceedings.

Evidence at trial

The Plaintiff

17. The Plaintiff's evidence is that she and the Testator had been friends for over 30 years. They have a daughter together (Ms Hintzen). The Plaintiff claims that the Testator was close to Ms Hintzen and there was no suggestion that this was not the case.

18. The Testator's first wife died in July 2019. The Plaintiff says that about three months later the Testator asked her to marry him. She says that she told him that she wished to wait a year before doing so. Apparently they planned a wedding in August 2020 in Barbados, where the Testator was born.

19. Unexpectedly, the Testator became gravely ill and the Plaintiff's evidence is that the Testator moved into her home in September 2019, where she cared for him. The Testator insisted on the wedding going ahead so, in view of the seriousness of his condition, the decision was taken to move the wedding to 19 March 2020 in the Cayman Islands.

20. The Plaintiff states that on several occasions the Testator intimated his wish to ensure that she was financially secure. Apparently he talked with the Plaintiff about his assets generally and, in particular, his pension and his health insurance. Her understanding was that he would ensure that she benefited from both in the event of his death.

21. As mentioned above, clause 10 of the Will is incontinent with this.

22. It was not disputed that the Defendant had drafted the Will, she says on the Testator's instructions. The Defendant also prepared the two earlier drafts of the Testator's will. The Plaintiff says that she cannot understand why the Testator would have executed his Will excluding her from benefiting in any part of his estate and especially his pension which they had discussed prior to his death. The Plaintiff says that she believes that the Testator

would have known from his years working as a civil servant that clause 10 of the Will was of no effect because, on his death, as his widow, she was entitled automatically to receive the benefit of his pension (which she is doing).

23. The Plaintiff also says that the Defendant herself must have known that clause 10 would be of no effect and that, amongst other things, the inclusion of that paragraph raises suspicions about the Defendant's intent to exclude the Plaintiff from the entirety of the Testator's estate and whether the Testator read or understood the Will prior to its execution.

24. The Plaintiff was cross examined on her contention that there was undue influence on the Testator and that he was forced to sign the Will against his wishes. At one point she suggested that the Testator's signature on the Will had been copied from his passport. However, she conceded that there was no evidence to support those claims and Ms Reid, her counsel did not seek to advance those arguments any further.

25. The Plaintiff says that on their wedding day, the Testator was excited, happy and in good spirits. Apparently they awoke around 07.00 that morning. After breakfast at around 08.30, Mr Gooding Jr and Ann Marie Wheatley ("Ms Wheatley"), a family friend of the Plaintiff and Ms Hintzen arrived at their home. Mr Gooding Jr assisted his father with getting dressed and Ms Wheatley assisted the Plaintiff.

26. The Plaintiff says that when they were ready to go to the wedding chapel, the Testator left in one car with Mr Gooding Jr and she left in a separate car with Mr Hintzen and Ms Wheatley. She said in cross examination that the cars left closely together and suggested that she was able to see the car in which the Testator was driving the whole journey to the wedding chapel. In re-examination the Plaintiff accepted that the two cars had left approximately 5-10 minutes apart although maintained that she could still see the other vehicle as they travelled. The Plaintiff also confirmed that the Testator and his son were already at the wedding chapel when she arrived.

27. The Plaintiff's evidence is that, at their wedding, the Testator was fully cognizant of the proceedings and repeated his vows knowingly.

28. After the wedding, the Plaintiff says that she and the Testator returned home with Ms Wheatley and were joined by Ms Hintzen and her husband. She says that they did not leave the house again that day.

29. The Plaintiff says that at around midday on 21 March 2020, two days after the wedding, Mr Gooding Jr came to their house to collect the Testator. The Testator told the Plaintiff subsequently that he was taken to the home of Mr Walton Gooding, a distant relative of the Testator. Apparently when the Testator returned home later that afternoon, he was upset. He complained of having had to climb a flight of stairs to sign a document that he had not read and that he had been left in excruciating pain as a result.

30. In cross examination the Plaintiff was asked about a family meeting that took placed after the Testator's death. The meeting was with the Plaintiff, Defendant and some of the Testator's children including Mr Hintzen in order to discuss funeral arrangements. It was put to the Plaintiff that her only concern at the meeting was to ensure that she benefited from the Testator's pension and health insurance. The Plaintiff denied that was the case.

Joseph Woods

31. Mr Woods was due to be called but had a pressing work engagement. He had sworn an affidavit in October 2020. It was agreed that his affidavit would be admitted as his evidence in chief and as Mr Murray did not wish to cross examine him, he was not asked to appear.

32. Mr Wood's evidence had limited relevance to the issues at hand. He is a former colleague of the Testator and had known him for over 36 years. He did confirm that, at the Testator's request, he witnessed the Testator's signature on the form for the required 10 days' notice of marriage to be posted at the wedding chapel. Mr Woods states in his affidavit that he was happy to do so and was of the view that the Testator was entering the marriage with a sound mind, that he loved the Plaintiff and wanted to marry her.

Ms Hintzen

33. Ms Hintzen who is a teacher had sworn an affidavit dated 24 September 2020 which stood as her evidence in chief. In that affidavit she covered some of the same facts as the Plaintiff, repeating what the Plaintiff had said about the early part of the wedding day. Ms Hintzen noted that Mr Gooding Jr assisted his father with tying a tie prior to leaving for the wedding chapel. Ms Hintzen states that her father and the Plaintiff were both very happy and that it was a "beautiful ceremony". Her recollection of the events of 21 March 2020 was very similar that of the Plaintiff.

34. In cross examination, Ms Hintzen was asked about a family meeting that she had attended in April 2019. The meeting had been with the Testator, Mr Gooding Jr, Ms Carmichael and the Defendant. At the time the Testator was still married to his former wife, Gertrude Gooding (the "Late Ms Gooding"). Ms Hintzen confirmed that at the meeting the Testator discussed his assets and how he was proposing to deal with them in his will. Ms Hintzen recalls the Testator asking the Defendant at the end of the meeting to prepare a draft will for him based on what had been discussed.

35. Ms Hintzen was also asked about the family meeting to discuss funeral arrangements. She says that she did recall the issue of the Testator's pension being raised generally but did not recall the Plaintiff suggesting that all she wanted was to benefit from the Testator's pension and the health insurance.

Ms Wheatley

36. Ms Wheatley had sworn an affidavit dated 8 October 2020 which stood as her evidence in chief. Ms Wheatley's evidence was consistent with that of the Plaintiff and Ms Hintzen in relation to the morning of the 19 March 2020. She confirms that the Testator and Mr Gooding Jr left for the wedding chapel just ahead of her and the Plaintiff. Because of traffic she says that they arrived about 10 minutes after the Testator. She says that the Testator seemed tired at the ceremony and remained seated.

37. In cross examination, Ms Wheatley was asked about the time that it took for the car in which she was travelling to get to the wedding chapel. Her recollection was that it took between 20-25 minutes.

The Defendant

38. The Defendant's witness statement dated 25 March 2021 stood as her evidence in chief. She confirmed that she is the niece of the Testator and that she had a close relationship with him. He apparently confided in her a great deal and in particular about his Will.

39. Apparently, for some time the Testator had discussed with the Defendant the preparation of a will. At the family meeting in April 2019, the Defendant had taken notes and says that at the end of the meeting she read them back to the Testator to ensure that she had accurately recorded his wishes. The Defendant prepared a will for the Defendant after the meeting which included provision for the Late Ms Gooding (who was still alive at that point) to remain in the family home after his death.

40. Apparently the draft will was subject to some changes and in late January or early February 2020 the Defendant received further instruction from the Testator about removing his deceased wife from the draft. The Defendant says that on 18 March 2020 she received a telephone call from the Testator indicating that he wished to change the provision in his will in so far as it related to his son Marlon Bush. He also apparently told the Defendant that although he was going to marry the Plaintiff he wanted it to be expressed in his will that he did not wish for his will to be revoked or challenged as he intended for only his children to inherit his estate.

41. The Defendant says that she warned the Testator that marriage would have a bearing on a will if the will was signed beforehand. Apparently the Testator responded to her by saying that the Plaintiff didn't want anything from him but would benefit from his better health insurance and for that reason he had agreed to bring the marriage forward.

42. The Defendant says that she made the changes to the will and gave the draft to Mr Gooding Jr on 18 March 2020. She says that when she followed up with the Testator he said that he had not signed the will that day because he was tired but would do it the next day.

43. The Defendant's further evidence is that at the meeting to discuss funeral arrangements, the Plaintiff did say that all she was concerned about was the Testator's health insurance but not his pension. The Defendant says that she told the Plaintiff that she would automatically benefit from the Testator's pension so no one thought more about it.

44. In cross examination, the Defendant confirmed that she had not been present when the Will was executed. It was put to her that her relationship with the Testator was a contentious one and that on one occasion the Testator had said that he was tired of the Defendant meddling in his affairs. The Defendant agreed that on subjects such as politics and cricket they argued but that otherwise they had a close relationship and she did not recall him asking her not to meddle in his affairs.

45. The Defendant was asked about clause 10 of the Will and why it was included when the Defendant was of the view that the Plaintiff would benefit automatically from the Testator's pension on his death and when the Testator himself should have known that would be the positon. The Defendant said that the Testator insisted that it should be included.

46. It was put to the Defendant that the inclusion of clause 10 supported the Plaintiff's position that the Testator had not read the Will and was not aware of its contents. The Defendant denied that

was the case and maintained that she believed that the Testator had read the Will. She further confirmed that she had read it out to him aloud.

47. It was put to the Defendant that she had a poor relationship with the Plaintiff and that the Defendant had not wanted the Plaintiff to inherit anything from the Testator. The Defendant denied that and reiterated that the Will included what the Testator has asked her to include, that she had read the Will to the Testator and that he had said that he had read it a "hundred times".

Mr Gooding Jr

48. Mr Gooding Jr's witness statement dated 25 March 2021 stood as his evidence in chief. He confirmed that he was present at the family meeting April 2019 when the Testator discussed his estate and how he wished to leave it. His recollection is that the Testator wished to leave 60 Merrimac Close to him (Mr Gooding Jr) on condition that the Late Ms Gooding resided there until her death. The Testator indicated that he wished to leave 17 Mount Pleasant Gardens in equal shares to his four children, including at that point, Mr Bush.

49. Mr Gooding Jr stated that at his father's request he telephoned the Defendant on the 18 March 2020 in order to arrange to collect the Will, which he did later that day. The Testator was not well enough to execute the will that day and he apparently signed it on 19 March 2020 at the home of Mr Walton Gooding. Mr Gooding Jr says that along with Mr Robert Michelin ("Mr Michelin") (the husband of the Defendant) he witnessed the Testator execute the Will and that, although frail, the Testator was aware of what he was doing.

50. In cross examination Mr Gooding Jr said that on 19 March 2020 he met with the Testator and the Plaintiff just after 09.00. He said that he left to take the Testator to Mr Walton Gooding's house at around 10.00. Apparently when they arrived at Mr Walton Gooding's home they climbed a flight of stairs to the second floor and the Will was executed in the dining room of the home. As an aside, he commented that the Testator had also had to climb a set of stairs at the wedding chapel. He said that the Testator had read most of the Will before he signed it and that they were at Mr Walton Gooding's house for around 10 – 15 minutes. He estimated that it took 20 – 30 minutes to then get to the wedding chapel.

Walton Gooding

51. Mr Walton Gooding confirmed that he is a master electrician. He had signed a witness statement dated 25 March 2021 which stood as his evidence in chief. He confirmed that along with Mr

Michelin and Mr Gooding Jr he had witnessed the Testator sign the Will on 19 March 2020 at his home. He said that he was aware that the Testator was in poor health and that he looked frail but was alert and lucid. The Testator assured him that he knew what he was doing and that he had read the Will a "hundred times".

52. In cross examination, Mr Walton Gooding said that he couldn't remember exactly when it was during the day that the Testator had executed the Will. The best that he could say was that it was during daylight hours. He said that he did see the Testator read the Will although could not be sure that he read all of it and that he had asked the Testator about it.

53. Mr Walton Gooding was unable to recall how the Testator was dressed when he came to his house. He said that he did not recall seeing the Testator dressed for a wedding and when pressed by counsel could only say that he was dressed normally. He was not able to describe how Mr Gooding Jr was dressed.

54. It was put to Mr Walton Gooding that the Will was not signed on 19 March 2020. In response he said that the Testator had arrived at his home, had gone through the Will and had signed it. He repeated however that he could not remember the time of day and believed that it was 19 March 2020 but that there was nothing special that reminded him of the date.

55. In re-examination he confirmed that it was his signature on the Will and that he tended to put his signature on documents with the correct date.

56. After counsel had concluded the re-examination, in response to questions that I posed to him he confirmed that he was not invited to the wedding. He also said whilst at his house, Mr Gooding Jr and Mr Michelin seemed more concerned with the Testator's health than being in a hurry to get anywhere.

Ms Carmichael

57. Ms Carmichael had signed a witness statement dated 25 March 2021 which stood as her evidence in chief. She attended the hearing via Zoom. Her evidence related to the family meeting in April 2019 which she attended in person. Her recollection as that the Testator explained how he wished to leave his estate and that the Defendant has taken notes and read them back to all present at the end of the meeting. The intention in relation to the major assets was, as explained by earlier witnesses, that 60 Merrimac Close was to be left to Mr Gooding Jr subject to the Late Ms Gooding

residing there until her death, 17 Mount Pleasant Gardens was to be shared equally by all of the children. The Late Ms Gooding was to be provided for via his pension.

Mr Michelin

58. Mr Michelin had signed a witness statement dated 25 March 2021 which stood as his evidence in chief. He is an Advanced Emergency Medical Technician. He confirmed that he was at Mr Walton Gooding's home on 19 March 2020 and witnessed the Testator sign the Will. He said that he was aware that the Testator was in poor health and that day looked frail. However, he said that the Testator was mentally aware of what was happening and why he was doing it. Mr Michelin said that he had no doubt that the Testator knew what he was doing. He said that in response to an enquiry from Mr Michelin apparently the Testator had told him that he was aware of the contents of the Will and had read it a "hundred times".

59. In cross examination Mr Michelin said that he arrived at Mr Walton Gooding's house before the Testator and Mr Gooding Jr. Mr Gooding Jr telephoned to confirm when they had arrived. Mr Michelin first saw the Testator when he was inside the house either in the kitchen or the living room and that the Testator was seated. In response to questions from counsel he said that the Testator looked normal bearing in mind his illness. He thought that the Testator was wearing a suit but thought that Mr Gooding Jr was dressed casually.

60. Mr Michelin said that he thought that the Testator had read the Will. He did not recall how long the Testator was there or if the Will was signed upstairs or downstairs in the house. He said that he did not recall whether the Testator appeared to be in a hurry.

61. When it was put to him that the Will was actually signed on 21 March 2020 Mr Michelin responded by saying that his recollection was that it was signed on 19 March 2020 and that was the date on the document.

The draft wills

62. As mentioned earlier, after the hearing had concluded and I had reserved judgment I asked counsel through my assistant whether their clients were aware of any preexisting will executed by the Testator. The response was that their clients were not aware of any preexisting will but Mr Murray indicted that his client had offered to provide copies of two earlier draft wills that she said that she prepared on the instructions of the Testator. Neither document was disclosed in the Defendant's list of documents. Copies were also provided to Ms Reid. In the usual way, this judgment was

released in draft form initially and if there were any matters arising from the production of these drafts then I expected counsel to raise them at that point and Ms Reid did so. Ms Reid objected to the court being provided with the draft wills and relying on them as evidence. At a short hearing on 31 March 2022 this was raised along with the question of costs which I deal with below. In relation to the draft wills, Mr Murray's position was that they had not been disclosed in his client's discovery because they were not regarded as being relevant to the pleaded issues. My view is that the draft wills are consistent with the oral evidence given at the hearing of this matter and although they are not determinative of the substantive issues they are relevant. On that basis, I have taken them into account.

63. Through counsel, the Defendant states that the first of the draft wills was prepared by her following the family meeting in April 2019. Consistent with the evidence given at the trial, the draft will deals with the major assets by leaving 60 Merrimac Close to Mr Gooding Jr subject to the Late Ms Gooding residing there until her death. 17 Mount Pleasant Gardens was to be shared equally by all of the children. Paragraph 5 of the draft provides:

> *"**I HEREBY GIVE AND BEQUEATH** to my faithful and loyal wife **Gertrude Iminel Seymour Gooding**, all benefits from my Public Services Pension Fund, for her sole and absolute use. In the event that she precedes me in death, these funds are to be divided equally between my 4 children."*

64. The second draft will has a format and content that is more consistent with that of the Will. It is not clear when this was prepared but it still makes reference to the Late Ms Gooding so I assume that she was still alive when it was drafted. The bequests from the first draft that I have referred to above do not change materially.

65. It was confirmed by Ms Reid during the course of the hearing that the Plaintiff is receiving the benefit of the Testator's pension and health insurance.

Discussion of facts and relevant law

66. In my view, the first question to address is whether, in my opinion, the Will is valid. That may or may not determine the question of when the Will was signed. If it does not, then that will be a separate question to address.

67. Section 6 of the Wills Act (2021 Revision) sets out the criteria for a will to be treated as valid.

67.1 it must be in writing;

67.2 signed by the testator at the foot or end; and,

67.3 the testator's signature is to be witnessed in the presence of two witnesses who shall attest to the testator's signature before them.

68. As mentioned earlier, the Rules provide a mechanism for probate to be granted and as part of that process a will's validity is considered. It is only when a judge is satisfied that there is no doubt as to a will that probate is granted.

69. The criteria set out in section 6 of the Wills Act were and are in my view met and I have no doubt that, on its face, the Will is valid. It is in writing, it is signed by the Testator at the end and it was duly witnessed. Neither counsel sought to argue otherwise.

70. However, as mentioned above, Ms Reid has sought to impugn the Will in reliance on what she says is its incorrect date and by virtue of what she says were "suspicious" circumstances in relation to the execution of the Will and inclusion of paragraph 10 dealing with the Testator's pension rights. Ms Reid says that the Defendant must have known that, once married, the Plaintiff would automatically benefit from his pension on his death. She says that including a paragraph in the Will seeking to bequeath the pension rights contrary to that suggests that the Testator had not read the Will and/or was coerced into signing it.

71. During the trial I referred counsel to the case of *In The Estate of Lindzen* [2015 (2) CILR 1]. This was a decision of the Honourable Chief Justice dealing with a non-contentious application questioning the validity of the will of the deceased prior to probate being granted due to her alleged mental incapacity. The headnote states:

> "*The deceased had suffered from Parkinson's disease, and her capacity was occasionally diminished to the extent that she might have had difficulty understanding documents such as her will, though with medication she was not normally mentally incapacitated. It was suggested that on the day the will was purportedly executed the deceased appeared frail and agitated, and her legal advisers stated that the will had not been read to her in their presence.*
> ***Held**, granting probate:*
> *The will would be upheld and probate would be granted as the deceased had demonstrated an ability to converse and consult with her legal advisers on the day the will was signed, it appeared that she had understood the nature of the transaction, and there was no serious or grave doubt that she had lacked*

competence. In considering a seemingly valid will, the presumption of due execution would lead the court to the conclusion that it was valid unless rebutted. In order to rebut the presumption, it was necessary to positively demonstrate that the deceased lacked testamentary intention and capacity to execute a will, and concerns regarding a testator's physical and emotional state were, without more, insufficient."

72. The Chief Justice explained further (paragraph 20):

> *"The understandable misgivings of her advisers about her lack of capacity do not persuade me that I should deny the presumption of due execution that would otherwise apply. Clear evidence is needed to lead to such an outcome, and the presumption of due execution will still be applied where the evidence shows that a will might not have been duly executed but does not positively demonstrate that it was not."*

73. Despite the serious illness from which the Testator was suffering, from the evidence given, it seems to me clear that the Testator was lucid and understood what he was doing when he signed the Will, just as he appears to have known what he was doing when he agreed to get married and said his vows.

74. Ms Reid referred to a number of cases in her submissions. *Re Morris (deceased), Lloyds Bank Ltd v Peake and others* [1970] 1 All ER 1057 was a case involving a will which the testatrix sought to amend by way of a codicil. Her solicitor made a mistake in the codicil and it appeared that, although the testatrix executed the codicil, it was unlikely that she had done more than cast her eye over it.

75. The court admitted the codicil to probate with the omission of the error. It held, inter alia, that although the fact that a testator read and executed a document raised a prima facie inference that he knew and approved its contents there was no rule precluding the court from considering all the evidence in order to arrive at the truth, whether fraud was suggested or merely a mistake.

76. The case of *Brisco v Baillie Hamilton and others* [1902) P 234 dealt with a case in which a will was executed but, it was claimed, the Testatrix did not know of or approve the inclusion of certain words in the will and did not understand their meaning and effect. The court found that:

> *"... if it can be proved that a will has been really brought to the mind of a testator or testatrix, and has been duly executed, it is difficult – perhaps – impossible – in law to hold that anything contained in the will is a mistake But .... The question is*

still left open whether the will was or was not really brought to the notice of the testator or testatrix."

77. The court found that a mistake had been made by the insertion of the words in question, revoked the original probate and decreed a fresh grant of probate with the omission of those words.

78. Ms Reid also referred to *Wintle v Nye* [1959] 1 All ER 552 and *Re Roberts (deceased), Roberts v Roberts* [1978] 3 All ER 225, the latter case dealing with the English equivalent of section 13 of the Wills Act. Neither case adds anything further to the Plaintiff's case.

79. I do not regard the inclusion of paragraph 10 in the Will as evidence that either the Testator did not understand or had not read the contents of the Will or that he was coerced into doing so. The evidence is that the Testator said that had read the Will a "hundred times". The Defendant stated in evidence that she had read it to him and those attesting to his signature both indicated that they had seen the Testator read at least part of the Will prior to signing it. The previous drafts of the Will included similar language in relation to the Testator's pension, equivalent to that in paragraph 10. Those drafts were prepared whilst the Late Ms Gooding was still alive. That wording did not change materially in the Will itself so I see no basis to suggest that it was included because of the Testator's marriage to the Plaintiff or to seek to deprive the Plaintiff of any benefit in his estate. There is no evidence to support that contention. Why the Testator approached the question of his pension in the way that he did in his draft wills and the Will is unclear. The Defendant says that she told him that paragraph was of no effect but she says that he insisted on including it and was stubborn. I do not need to resolve that particular issue here. Referring back to the *Lindzen* case, there is no evidence to suggest that there was any lack of testamentary intention or capacity and in the absence of any evidence to the contrary I must presume due execution.

80. In my view, the evidence supports the fact that the Testator had read the Will and was aware of its contents. There is no evidence to suggest that there was a mistake in the Will and certainly not one that had not been drawn to his attention. I see no grounds to revoke the grant of probate on that basis.

81. Finally, we come to the question of the date on the Will. Ms Reid submits that it was signed on the 21 March 2020 not the 19 March 2020. Even if it was signed on 21 March but dated 19 March, does that make any difference or affect the validity of the Will? During the course of the hearing I also referred counsel to the case of *Corbett v Newey and others* [1996] 2 All ER 914. This was a case involving a testatrix who had executed a valid will leaving certain assets to her niece and

nephew. She subsequently decided to make inter vivos gifts of those assets to the same family members. She had a new will prepared and initially did not intend to sign it. However, due to delays in the transfer of the assets in question she did execute the new will although she left it undated, believing that it would be of no effect until dated. Although the facts of that case are not directly relevant to this, the English Court of Appeal did confirm that (920 c):

> *"... it is common ground between all parties that there is no requirement in law that a will should be dated. Lack of a date or the inclusion of the wrong date cannot invalidate a will."*

The important question is whether the testator has the necessary animus testandi or testamentary intent when the will in question is signed (*Corbett* 921 b). If there is uncertainty as to the date of a will, then section 27 (3) of the Rules makes expression provision for that to be determined by a judge. It cannot be the case therefore, that as stated in *Corbett,* the lack of a date or incorrect date on a will invalidates it. Based on what I have said above, in my view, the Testator had the necessary testamentary intent when he executed the Will and if the date is incorrect then that, in itself, will not invalidate the Will.

82. In summary therefore, I am satisfied that, based on the evidence before the court and relevant law:

82.1 the will complies with section 6 of the Wills Act;

82.2 the Testator was of sound mind when he executed the Will and did so of his own free will;

82.3 the Testator was aware of the contents of the Will and had read it before he executed it;

82.4 there is no mistake in the Will that would justify the revocation of the grant of probate and its re-issue; and,

82.5 whether the Will was signed on 19 March or March 2020 does not affect its validity.

83. I alluded earlier to the position of the Defendant seeming somewhat counter intuitive. In fact, the position of both parties seems, in my view, counter intuitive. The Plaintiff argues that the Will was signed after the marriage and, contrary to her interests, is not therefore caught by section 13 of the Wills Act. Although she sought to have the grant of probate set aside for the reasons I have explained, I have found against her on that argument. The Defendant argues that the Will was signed before the marriage, so prima facie, and contrary to her interests, it is caught by section 13, unless I find that I have any discretion to disapply that section.

84. The reason for repeating that is because by virtue of how each party has put their case both had an incentive to have put forward or conceded each other's respective factual position in relation to when the Will was signed.

85. I have reviewed the evidence carefully and in particular the oral evidence given at trial and the manner in which it was given by the witnesses.

86. The Defendant says that on 18 March 2020 she received a telephone call from Mr Gooding Jr indicating that the Testator wished to speak with her. She spoke to the Testator who explained that he was due to get married the next day and asked her to make some minor changes to his Will (removing Mr Bush as a joint beneficiary of 17 Mount Pleasant Gardens and adding in words to the preamble referring to his marriage to the Plaintiff). She said that she made those changes and gave the Will to Mr Gooding Jr for the Testator to sign. Mr Gooding Jr said that the Testator telephoned him on 18 March and asked him to collect the Will from the Defendant, which he did. It seems from the evidence that Mr Gooding Jr and the Defendant both expected the Testator to sign the Will that day, which he did not because he was too tired.

87. What strikes me as odd about that evidence is that the Will has a typed date: "*19th day of March 2020*". I do not understand why, if the Defendant expected the Will to be signed on the 18 March 2020, she would have typed in the following day's date. Therefore, I approach the question of when the Will was executed by discounting the relevance of the typed date. Just because that is the date on the document does not necessarily conclude the issue of when it was signed.

88. The Plaintiff is adamant that the Testator could not have signed the Will on the day of their wedding. Her evidence and that of Ms Hintzen and Ms Wheatley is that the car carrying Mr Gooding Jr and the Testator left for the wedding chapel shortly before they did. The Plaintiff says 5 – 10 minutes before. Ms Wheatley estimated that it took 20 – 25 minutes for them to get to the wedding chapel and that when they arrived the Testator was already there waiting for them. Mr Gooding Jr said that after he had arrived at Mr Walton Gooding's house they were there for 10 – 15 minutes and that they then took 20 – 30 minutes to get to the wedding chapel. When listening to Mr Walton Gooding I was struck by the vagueness of his evidence, I was surprised that he did not recall that the Testator was dressed for a wedding or that he was, in fact, getting married that day. Apparently the Testator was happy and excited that he was getting re-married, it should have been a memorable day. Mr Walton Gooding was equally vague about how long the Testator was at his house but did say that he was not in a hurry. I felt that Mr Gooding Jr and Mr Michelin were

also somewhat vague in terms of their recollection of the events at Mr Walton Gooding's house. I was left with the feeling that it was more likely than not that the Will had in fact not been executed on the Testator's wedding day.

89. The Plaintiff says that the Testator went out with Mr Gooding Jr on 21 March 2020. Mr Gooding Jr agrees but says that he took the Testator to sign other documents and not the Will and not at Mr Walton Gooding's house. The Plaintiff's evidence is that the Testator said that he went to Mr Walton Gooding's house that day, had to climb a set of stairs and was left as a result feeling unwell and in a lot of pain. Apparently for several days, he complained about what happened and was in excruciating pain.

90. It is common ground that, at this point in time, the Testator was seriously ill and frail. I accept the evidence of the Plaintiff, Ms Hintzen and Ms Wheatley that the two vehicles heading to the wedding chapel on 19 March 2020 left closely together. I do not accept that, based on the evidence, it is likely that Mr Gooding Jr had time to drive the Testator to Mr Walton Gooding's house, have the Testator climb a flight of stairs, execute the Will and still get to the wedding chapel before the Plaintiff, Ms Hintzen and Ms Wheatley. In view of the condition of the Testator, having to climb an additional set of stairs prior to the wedding would most likely have left him in such discomfort that it would have been obvious to those at the wedding chapel.

91. I am satisfied that, on the balance of probabilities, the Will was in fact executed on 21 March 2020 at the house of Mr Walton Gooding when Mr Gooding Jr picked him up that day, consistent with the evidence given by the Plaintiff.

92. In conclusion, I find that the Will is valid. I find that it was executed on 21 March 2020 and is not therefore caught by section 13 of the Wills Act. On that basis, I do not need to consider the authorities cited by Mr Murray (*Mayo v Logan* 21 Utah 2d 86, 440 P.2d 881 (1968), *Stewart v Mulholland*, 88 Ky. 38 (1888) and *Wilson v Francis*, 208 Va. 83 (1967)). Section 13 derives from section 18 of the English Wills Act 1837 which was in a similar form. However, that has now been superceded by section 18 of the Administration of Justice Act 1982 which makes express provision for the validity of wills made in contemplation of marriage. There is no equivalent provision under Cayman Islands law. The fact that it has been seen necessary in England to make express statutory provision for such wills suggests that there was no judicial discretion under English law to disapply section 18 of the Wills Act 1837 or, therefore, under Cayman Islands law to disapply section 13 of the Wills Act (2021 Revision). However, I do not need to decide that issue and have not done so.

93. Ms Reid submitted very briefly that, if I find against her client as I have done, I should consider exercising the court's inherent jurisdiction to grant a portion of the Testator's estate to the Plaintiff. She has not provided any authority for the existence of that jurisdiction or in what circumstances it might arise and be capable of exercise so I do not address that point any further either.

94. As mentioned above, at a short hearing on 31 March 2022, I heard from the parties in relation to the question of costs. This is an unusual case with each party having a degree of success with their claims. Having heard counsel, I indicated that my view is that the fairest order is no order as to costs and neither party disagreed with that.

Honourable Mr. Justice Alistair Walters, (Actg.)
Judge of the Grand Court