EASTERN CARIBBEAN SUPREME COURT
GRENADA

IN THE COURT OF APPEAL

HCVAP 2010/012

IN THE ESTATE OF ENA OLIVE PAYNE DECEASED

BETWEEN:

[1] ANNE-MARIE MAC LEISH
[2] LYNETTE ROOKER

Appellants

and

AVISON ALBERT "BERT" MARRYSHOW

Respondent

Before:

| | |
|---|---|
| The Hon. Mde. Ola Mae Edwards | Justice of Appeal |
| The Hon. Mde. Janice M. Pereira | Justice of Appeal |
| The Hon. Mr. Davidson Kelvin Baptiste | Justice of Appeal |

Appearances:

Mr. Leslie Haynes, QC, instructed by Henry, Henry & Bristol
with Ms. Denise Haynes for the Appellants
Dr. Francis Alexis, QC, with Mr. Ian Sandy for the Respondent

_____

2011: July 21;
2012: May 14.

_____

*Civil appeal – Wills – Probate – Validity – Testamentary capacity – Suspicious circumstances – Whether the testatrix possessed a sound and disposing mind and memory at the time of the making of the 1995 Will*

On the death of the testatrix, Ena Albertine Olive Payne, it was discovered that she had made two Wills; the first Will having been executed on 14th December 1982. The second Will was prepared by an attorney at law, Mr. Ashley Bernardine, and was executed on 6th September 1995 before both Mr. Bernardine and his secretary Ms. Jean Frederick. Both Mr. Bernardine and his secretary were present when the deceased gave instructions for the second Will. The notes containing these instructions which Mr. Bernardine took were not retained by him. At the time of the taking of the instructions the deceased testatrix did not make mention of her 1982 Will or the way in which she distributed her assets in that Will.

The 1982 Will bequeathed all her assets absolutely in equal shares to her nieces, the appellants, and appointed them to be the Executrices of that Will. However the 1995 Will, in which the testatrix revoked all former wills, codicils and or testamentary dispositions, bequeathed all her assets to the her first cousin and god-son, the respondent. The respondent, along with Mr. Bernardine, were appointed the Executors of this 1995 Will. This second Will was probated and the Supreme Court granted probate to the respondent with power reserved to make a like grant to Mr. Bernardine.

The appellants filed a claim for revocation of the said probate and for the Court to pronounce against the validity of the 1995 Will. The appellants contended, amongst other things, that the deceased who was 80 years old at the time she executed the 1995 Will, was exhibiting signs of senility and was suffering from Alzheimer's disease and that she was at the material time in such a condition of mind and memory as to be unable to understand the nature of the act and its effects, or the extent of the property of which she was disposing, or to comprehend and appreciate the claims to which she ought to give effect. The appellants further claimed that the deceased did not execute the Will as the signature on the Will, purporting to be that of the deceased, is not hers as the signature differs significantly and radically from other signatures previously made by the deceased and appearing on official documents signed prior to 1994. The appellants alleged that there were suspicious circumstances surrounding the execution of the1995 Will and requested inter alia that the Court pronounce in solemn form for the true last Will of the deceased dated 14th December 1982.

The respondent denied the entirety of the appellants' case. He put the appellants to strict proof of their pleaded suspicious circumstances. Both the appellants and the respondent had expert witnesses who testified on their behalf. The trial judge preferred the evidence of the respondent and his witnesses and found that the 1995 Will was the last true Will and Testament of the deceased testatrix. The appellant appealed on various grounds which included that the learned trial judge erred in finding that the 1995 Will was not a forgery; that the learned trial judge erred in holding that the testatrix, at the time of her alleged execution of the 1995 Will, had the necessary testamentary capacity; that the trial judge erred in finding that the respondent had discharged his burden of proving that the testatrix had the necessary mental capacity at the making of the 1995 Will; and moreover, the trial judge erred in holding that there were no suspicious circumstances surrounding the 1995 Will.

Held: dismissing the appeal (Edwards J.A. dissenting) and ordering that the appellants pay the agreed prescribed costs of the respondent in accordance with CPR 65.5(2)(b)(iii) which puts the costs of the claim below at $14,000.00 and the costs in the appeal being two thirds of that sum pursuant to CPR 65.13, that:

1. The testatrix, at the time of making her 1995 Will, must in the language of the law, be possessed of sound and disposing mind and memory. Her memory may be very imperfect, greatly impaired by age or disease, yet her understanding may be sufficiently sound for many of the ordinary transactions of life. Once the court is able to answer whether the testatrix's mind was sufficiently sound to enable her to

know and understand the business in which she was engaged at the time she executed her will, the testatrix is deemed possessed of adequate testamentary capacity. In the present case, there was sufficient evidence which showed that the deceased was aware of the extent of her property over which she had a power of disposition. There was also evidence as to why she would wish to bestow her bounty on her god-son as opposed to her nieces. Wills frequently give rise to feelings of disappointment or worse on the part of relatives and other would-be beneficiaries and this can lead to disputes almost always arising. However, if judges were too ready to accept such contentions, it would risk undermining what may be regarded as a fundamental principle of law, namely that people should in general be free to leave their property as they choose, and it would run the danger of encouraging people to contest wills, which could result in many estates being diminished by substantial legal costs. In light of this, the Court is bound to agree with the finding by the learned trial judge on this issue. (per Pereira J.A. and Baptiste J.A.; Edwards J.A. dissenting).

Gill v Woodall and others [2010] EWCA Civ 1430 applied; Den v Joseph Vancleve (1819) 2 Southard 589 applied; Zorbas v Sidiropoulous (No 2) [2009] NSWCA 197 cited; Marsh v Tyrell and Harding (1828) 2 Hagg. Ecc. 84 applied distinguished.

A court ought not to pronounce in favour of a will that is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testatrix. A court should be satisfied that at the material time of making a will the testatrix had a sound and disposing mind, memory and understanding. A disposing mind and memory is one able to comprehend, of its own initiative and volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing dispositions and the like. The testatrix, at the time of making her 1995 Will, must be possessed of this sound and disposing mind and memory and understood the nature of her act and its effects, the extent of the property of which she was disposing, and understood and appreciated the claims to which she ought to give effect. The testatrix must also comprehend the nature of the claims of others whom by her will she is excluding from all participation in that property. The testatrix, at the time of making the 1995 Will, made no mention of her 1982 Will to her solicitor. The beneficiary under the 1995 Will differed completely from the beneficiaries under the 1982 Will. The question for the Court is not whether the deceased knew, when she executed the 1995 Will that she was giving all her property to the respondent and excluding all her other relations from any share in it, but whether at that time she was capable of recollecting who those relations were; of understanding their respective claims upon her regard and bounty; and of deliberately forming an intelligent purpose of excluding them from any share of her property. Albeit the testatrix had the capacity to communicate her testamentary wishes she had limitations in comprehending that she had to consider the claims of her other relatives and in remembering the existing dispositions she made in the previous 1982 Will. Furthermore, to successfully revoke a former will by a new will it is necessary to prove that the testatrix recollected the general contents of the previous will.

Consequently, the 1995 Will should be deemed invalid. (per Edwards J.A.)

Wintle v Nye [1959] 1 All.E.R. 552 applied; Leger v Poirier [1944] 3 D.L.R 1 applied; Murphy v Lamphier (1914) 31 O.L.R. 287 applied; Marsh v Tyrrell and Harding (1828) 2 Hagg. Ecc. 84 applied; Charles Harwood v Maria Baker (1840) 3 Moore's PCC 282 applied.

2. The revocation clause contained in the 1995 Will effectively revoked any former will, being the 1982 Will. Although the testatrix never made mention of the 1982 Will to her solicitor, it cannot be assumed in the absence of evidence probative of that conclusion that her answer was due to loss of memory. The learned trial judge had evidence before him, which he rightly accepted, and which showed the close relationship that existed between the testatrix and her god-son and also showed that, at the relevant time, the testatrix often spoke of her family and other matters and not the same matter twice. The testatrix also had the presence of mind to make specific mention of her assets in her 1995 Will; in contra distinction to her 1982 Will. Taking all these factors into consideration her failure to either acknowledge or remember the 1982 Will or its contents or benefactors without more, is not sufficient to excite the suspicion of the Court. (per Pereira J.A. and Baptiste J.A.; Edwards J.A. dissenting)

   The respondent as the propounder of the 1995 Will has the burden of proof to remove any suspicion of the Court. The absence of proof that the testatrix recollected the general contents of her 1982 Will was a matter that ought to have excited the suspicion of the court. Though there was ample evidence proving that the deceased had the capacity to communicate her testamentary wishes, this was not sufficient in law. There was no evidence advanced by the respondent before the learned trial judge that showed the reason why the testatrix did not mention her 1982 Will was not due to memory loss, which consequently meant that the testatrix was not possessed of a sound and disposing mind and memory. Thus, it cannot be said that the respondent has discharged his burden of proof in the absence of strong and clear evidence that the deceased's failure to mention her 1982 Will, and deliberately reject the appellants from participating in her estate, was not due to memory loss. (per Edwards J.A.)

   Tyrrell v Painton and Another [1894] P. 151 applied.

3. The application of the Golden Rule assists in the avoidance of subsequent disputes as to capacity. However, where the Golden Rule was not followed, and the court has to resolve a dispute as to capacity, non-compliance with the Golden Rule does not demonstrate a lack of capacity. The issue must be decided by the court by applying the correct legal principles to the court's findings of fact. The issue in the present case was satisfactorily decided as the trial judge applied the relevant legal principles to the facts before him. (per Pereira J.A. and Baptiste J.A.; Edwards J.A. dissenting)

   Leigh Helen Cowderoy v Lionel Steve Cranfield [2011] EWHC 1616 (Ch).

applied.

The substance of the Golden Rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who is seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings. The attorney at law in the present case failed to do either. Compliance with the Golden Rule does not, of course, operate as a touchstone of the validity of a will, nor does non-compliance demonstrate its invalidity. However, at the very least the attorney ought to have kept his notes. In addition the testator's mental defects would have been more apparent to an experienced medical examiner to whom a proper description of the legal test for testamentary capacity had been provided. Owing to the failure to adduce such medical evidence, the respondent has failed to remove the suspicion existing in relation to the deceased's testamentary capacity to make the 1995 Will (per Edwards J.A.)

Kenward v Adams (1975) Times 29 November 1975 applied; In Re Simpson (1977) 121 SJ 224 applied.

4. A trial judge, in keeping with relevant statutory provisions, is entitled to arrive at his own conclusions. He has the advantage of seeing and assessing the demeanor and credibility of the witnesses. The evidence of persons present when the deceased gave instructions for her will or its execution, if they were not merely witnesses called into her presence for a few moments, is of considerable weight and this is so particularly where such persons are unprejudiced. In determining whether Mr. Bernardine and Ms. Frederick were unprejudiced and credible, the lack of motive to fabricate was a very relevant factor the judge was entitled to take into account. While the absence of motive by itself is not sufficient to establish credibility, it would be a relevant factor in determining whether Mr. Bernardine and Ms. Frederick were credible as to the circumstances surrounding the making and execution of the 1995 Will by the deceased testatrix Ena Payne. (per Edwards J.A.)

## JUDGMENT

[1] PEREIRA JA: I have had the benefit of reading the judgment of my learned sister Edwards JA. The background facts as well as a summary of the issues raised in this appeal have been fully set out by her and I do not consider that any useful purpose will be served by regurgitating them. Accordingly, reference should be made to her judgment for placing the issues arising into full context. I am in full agreement with my learned sister's treatment of the facts and the statements of the legal principles which are comprehensively set out therein, from paragraph 10

up to paragraph 64 as well as those extracted from the cases referred to at paragraphs 66, 67 and 68. The trial judge was quite correct in rejecting the evidence tending to suggest forgery advanced by the appellants for the reasons given by my learned sister. The allegation of undue influence asserted by the appellants was not pursued and in my view rightly so, in light of the respondent's pleaded case and the evidence. I differ from my learned sister only in her conclusion that the absence of proof that the deceased recollected the general contents of her 1982 Will was a matter that ought to have excited the suspicion of the Court and the consequential conclusion that the respondent had not discharged the burden of proof. Accordingly, I propose in this judgment to address the sole issue of the deceased's testamentary capacity.

[2] The evidence accepted by the trial judge shows that the deceased read the 1995 Will before signing it. The 1995 Will, like the 1982 Will, contained a revocation clause. The fact that the reading of the 1995 Will with that clause either did not jog her memory or encourage her to talk about her 1982 Will having responded to her solicitor Mr. Bernardine that she had not made a prior will is, to my mind, of no significance. What she did not say is that she had forgotten whether she did or not. It cannot be assumed in the absence of evidence probative of that conclusion that her answer was due to loss of memory. There could be several reasons. She may simply not have wished to speak about it and was content to rely on the express revocation clause which she was inserting in the 1995 Will as invalidating the 1982 Will to all intents and purposes. This is also to be in viewed in conjunction with the evidence of Ms. Frederick which was accepted by the trial judge that around the relevant time the deceased spoke about her family, her religion, and other matters and not the same matter twice. Accordingly, I do not consider that her failure to either acknowledge or remember the 1982 Will or its contents or benefactors without more, amounts to circumstances which should excite the suspicion of the Court.

[3] There is the further evidence referred to in paragraphs 53 to 66 of the judgment of my learned sister which shows that the deceased was aware of the extent of her property over which she had a power of disposition. There is also evidence as to why she would wish to bestow her bounty on her god-son; that she conversed concerning her religion, attendance at church, her travel experiences, family, her wish to make a will. In my view the learned trial judge assessed the evidence and came to the finding which it was open to him to find and is summed up quite succinctly in paragraph 46 of his judgment, which I reproduce:

> "It is common ground that she had enjoyed a close relationship with the Defendant over the years and that his wife had cared for her when she suffered from a skin infection. It's also common ground that this would not be the first time that the Defendant would benefit from her benevolence as she had assisted him to buy land for his home. I find therefore that there are no suspicious circumstances in the execution of the will. I am satisfied that both Ashley Bernadine and his secretary had ample opportunities to assess the testamentary capacity of the deceased who was no stranger to them. I find that having rejected the evidence of Dr. Burkhardt there is no medical evidence of advanced senile dementia existing in the deceased at the material time to deprive her of the necessary testamentary capacity. The lay evidence in that regard is inconsistent, inconclusive and at times aforesaid self contradictory. I find therefore that when she executed the said will she was lucid and was possessed of the necessary testamentary capacity."

In this regard, I refer to the observations of the Court of Appeal of New South Wales in Zorbas v Sidiropoulous (No 2)[1] with reference to medical evidence:

> "Medical evidence as to the medical condition of a deceased may of course be highly relevant, and may sometimes directly support or deny a capacity in the deceased to have understanding of the matters in the Banks v Goodfellow criteria. However, evidence of such understanding may come from non-expert witnesses. Indeed, perhaps the most compelling evidence of understanding would be reliable evidence (for example, a tape recording), of a detailed conversation with the deceased at the time of the will displaying understanding of the deceased's assets, the deceased's family and the effect of the will. It is extremely unlikely that medical evidence that the deceased did not understand these things would overcome the effect of such a conversation."

[1] [2009] NSWCA 197.

It cannot be overlooked that there is evidence to the effect that it is the deceased's own father, a renowned lawyer, who arranged with Mr. Bernardine and with the deceased with regard to the deceased making her will. This evidence was also taken into account by the trial judge. Here there was only, the medical evidence of Dr. Burkhardt stated as it were "ex post facto." The trial judge found it to be unreliable and in my view rightly rejected it.

[4] In relation to the complaint of lack of specificity as to her property in the 1995 Will, the same can be said of the 1982 Will on which the appellants rely. Indeed it may be said that the 1995 Will was more specific than the 1982 Will, which contained only a general devise as follows:

> "I GIVE DEVISE and BEQUEATH all my real and personal property whatsoever and wheresoever unto my said two nieces Lynette Rooker and Ann-Marie Mac Liesh absolutely in equal shares"

There is no mention whatsoever of any specific property. This is to be compared with the 1995 Will, where the deceased, not only made reference to payment of her debts and testamentary expenses, but went on to make reference of specific property: her gold ring with emerald stone, as well as her entitlement to assets under the will of her father Albert Oliver Payne. It also contained a residuary clause. As regards the deceased, there may be said to be some consistency in that her 1982 Will and her 1995 may be said to be equally brief and in simple terms. This renders the complaint of lack of specificity wholly unmeritorious in my view.

[5] The complaint that the deceased gave no regard in respect of the appellants to whose claims she ought to have regard, I find to be similarly unconvincing. The appellants are not in a proximate relationship of, say a spouse or a child of the deceased, where it may be argued that no mention of a spouse or a child may be factored into the consideration of whether a person was of sound disposing mind. The appellants are her nieces. Were that the case then the deceased would have to be concerned with having regard to all her nieces and nephews, in order to

avoid a challenge to capacity based on this ground. Will-making would become a highly technical and onerous task and many of us who may no doubt be considered to be of sound and disposing mind may fail in the task of having our wishes carried out unless we managed to make a well detailed or expansive will. Indeed I venture to say that such an approach would amount to a serious incursion upon the very freedom to make a will. I consider the following passage from the judgment of Lord Neuberger MR in the case of Gill v Woodall and others[2] to be apposite:

> "16… Wills frequently give rise to feelings of disappointment or worse on the part of relatives and other would-be beneficiaries. Human nature being what it is, such people will often be able to find evidence, or to persuade themselves that evidence exists, which shows that the will did not, could not, or was unlikely to, represent the intention of the testatrix, or that the testatrix was in some way mentally affected so as to cast doubt on the will. If judges were too ready to accept such contentions, it would risk undermining what may be regarded as a fundamental principle of English law, namely that people should in general be free to leave their property as they choose, and it would run the danger of encouraging people to contest wills, which could result in many estates being diminished by substantial legal costs.
>
> 17. Further, such disputes will almost always arise when the desires, personality and state of mind of the central character, namely the testatrix herself, cannot be examined other than in a second hand way, and where much of the useful potential second hand evidence will often be partisan, and will be unavailable or far less reliable due to the passage of time. As Scarman J put it graphically in In the Estate of Fuld, deceased (No 3) [1968] P 675, 714E; "When all is dark, it is dangerous for a court to claim that it can see the light." That observation applies with almost equal force when all is murky and uncertain."

[6] I think it convenient here to recite another passage from the case of Den v Joseph Vancleve[3] which in my view sums up the very essence of the test of testamentary capacity. It is in these terms:

> "The testator must, in the language of the law, be possessed of sound and disposing mind and memory. He must have a memory;... But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the

[2] [2010] EWCA Civ 1430 (14 December 2010) at paras. 16 and 17.
[3] (1819) 2 Southard 589.

> persons or the families of those with whom he has been intimately acquainted...and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigour of intellect to make and to digest all parts of a contract, and yet be competent to direct the distribution of his property by will.... The question is not so much what was the degree of memory possessed by the testator? as this: Had he a disposing memory? was he capable of recollecting the property he was about to bequeath; the manner of distributing it; and the objects of his bounty? To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed his will?"

On the evidence accepted by the trial judge it was open to him to arrive at the conclusion (in my view rightly) that the deceased was, at the time of the making of the 1995 Will possessed of adequate testamentary capacity. No convincing reason has been advanced by the appellants for upsetting this finding. This case differs from the case of Marsh v Tyrrell and Harding[4] where the testatrix was found to be under the undue influence of her husband. Indeed here the appellants abandoned their case based on undue influence.

[7] Finally, I wish to add one point in respect of the 'Golden Rule.' In Leigh Helen Cowderoy v Lionel Steve Cranfield,[5] it was stated that the application of the Golden Rule assists in the avoidance of subsequent disputes as to capacity. However, where the Golden Rule was not followed, and the court has to resolve a dispute as to capacity, non-compliance with the Golden Rule does not demonstrate a lack of capacity. The issue must be decided by the court by applying the correct legal principles to the court's findings of fact. In my view, the trial judge did not err in his application of the relevant legal principles to the facts as found by him and for this reason too, I would not disturb his conclusion.

[8] For the foregoing reasons, I would dismiss the appeal and affirm the decision of the trial judge. I would also order that the appellants bear the costs of the

[4] (1828) 2 Hagg. Ecc. 84.
[5] [2011] EWHC 1616 (Ch). para. 137.

respondent on this appeal. The parties are agreed that costs should be on the prescribed basis in accordance with CPR 65.5(2)(b)(iii) which puts the costs on the claim below at $14,000.00. I would accordingly award two thirds of that sum on appeal, pursuant to CPR 65.13.

Janice M. Pereira
Justice of Appeal

[9] BAPTISTE JA: I have read the judgment of my learned sister Edwards JA, and also the judgment of my learned sister Pereira JA. I am quite satisfied and concur with the findings of the trial judge that the deceased was possessed of testamentary capacity. Accordingly, I agree with the judgment of Pereira, JA and for the reasons which she gives, I also would dismiss the appeal and order that the appellants bear the costs on this appeal.

Davidson Kelvin Baptiste
Justice of Appeal

[10] EDWARDS JA: This is an appeal against the decision of the learned trial judge who dismissed the appellant's claim for the revocation of a probated Will. The appellants are the nieces of the deceased Ena Olive Payne who died on 22nd October 2005 at the age of 93 years. The respondent is the first cousin and god-son of the deceased who was 20 years his senior, and whom he called "Aunt Ena". On the death of the deceased it was discovered that she had made two Wills.

[11] The first Will was made on 12th December 1982. In this Will she bequeathed all her real and personal property to the appellants absolutely in equal shares and appointed them to be the Executrices of the Will.

[12] Her other Will which was prepared by Mr. Ashley Bernardine, Attorney at law, was executed by the deceased on 6th September 1995 in the presence of Mr. Bernardine and his secretary Ms. Jean Frederick. In this Will the deceased appointed Mr. Bernardine and the respondent to be executors. In this Will she revoked all former Wills, Codicils and/or Testamentary dispositions formerly made and devised as follows:

> "After all my just debts and Testamentary expenses are paid I leave the remainder of my estate to my God-son Avison Albert "Bert" Marryshow of Westerhall St. David's (aforesaid)
>
> MY REAL AND PERSONAL ASSETS CONSISTS OF THE FOLLOWING:
>
> (1) My gold ring with Emerald Stone;
> (2) Two Insurance policies with the Law Firm of Renwick and Payne;
> (3) All my assets which I am entitled to under the Will of my father Mr. Albert Oliver Payne.
>
> All my assets which I currently own real and personal and which is to come into my estate from the bequest of my father; I leave to my God-son Avison Albert "Bert" Marryshow of Westerhall, St David's."

[13] The second Will was probated on 17th November 2005 and the Supreme Court granted probate to the respondent with power reserved to make a like grant to Mr. Bernardine the other named executor.

## Background Facts

[14] The appellants filed a fixed date claim in 2006, and an amended claim form on 18th January 2007 claiming revocation of the said probate, and for the Court to pronounce against the validity of the alleged 1995 Will. The appellants also requested: that the Court pronounce in solemn form for the true last Will of the deceased dated 14th December, 1982; that the proceeds of any administration already achieved by the executor of the alleged Will and the account thereof be surrendered to the executors of the Will of the deceased; and for further or other relief.

[15] The basis for the relief claimed by the appellants was that there were suspicious circumstances surrounding the execution of the alleged Will. The appellants pleaded: (1) that the deceased who was 80 years old at the time she executed the alleged Will, was exhibiting signs of senility and was suffering from Alzheimer's disease; (2) that the respondent frequently visited the deceased between 1994 and 1995 and was sometimes accompanied by an attorney-at-law, Mr. Bernardine who prepared the alleged Will and was an attested witness; (3) that Mr. Bernardine also visited the deceased's home on his own during the same period; (4) that the deceased at the time was not of sound mind, memory and understanding and she was suffering from senile dementia due to Alzheimer's; (5) her memory was so defective and untrustworthy that there was almost total loss of memory of recent events and she frequently exhibited violent and irrational behaviour; (6) she was at the material time in such a condition of mind and memory as to be unable to understand the nature of the act and its effects, or the extent of the property of which she was disposing, or to comprehend and appreciate the claims to which she ought to give effect; alternatively, (7) the deceased did not execute the alleged Will as the signature on the alleged Will, purporting to be that of the deceased is not hers; (8) that the signature varies significantly and radically from other signatures previously made by the deceased and appearing on official documents signed prior to 1994. The appellants claimed:

(1) revocation of the said probate;

(2) that the Court shall pronounce against the validity of the alleged Will;

(3) that the Court shall pronounce in solemn form for the true last Will of the deceased dated 14th December 1982

(4) that the proceeds of any administration already achieved by the executor of the alleged Will and the account thereof be surrendered to the executors of the Will of the deceased;

(5) further or other relief.

[16] The respondent's defence denied all of the pleaded suspicious circumstances. He denied that the deceased was exhibiting any signs of senility or Alzheimer's

disease or that she was incompetent and was not aware of what she was doing at the time she executed the probated Will. The respondent pleaded that there was no medical evidence produced by the appellants to substantiate their allegations, and that the deceased was in possession of her full faculties at the time she made the Will. The respondent pleaded further that between 1994 to 1995 he was not living in Grenada, he visited the deceased only once during that period, and he never ever visited the deceased in the company of Mr. Bernardine. The respondent pleaded that he was in the USA at the time the probated Will was executed and gave the details of the circumstances surrounding its execution in keeping with Mr. Bernardine's testimony. The respondent's defence put the appellants to strict proof of their pleaded suspicious circumstances.

[17] The appellants sought to prove their claim by the testimony of 8 witnesses who knew the deceased very well and two experts including a psychiatrist Dr. Burkhardt. This doctor concluded upon reading two unsigned witness statements prepared for Sister Keans-Douglas and Earl Baptiste, that at the time of the making of the Will in 1995 the deceased was suffering from advanced Alzheimer's disease. There was no medical testimony from any doctor who had seen or attended or treated the deceased during her lifetime. On the totality of the evidence for the appellants' claim that the deceased was suffering from Alzheimer's disease the learned judge made the following observations and findings:

> "[41]. The Claimants speak in general terms of the mental state of the deceased at varying times. Interestingly enough however though they speak of the deceased as suffering from Alzheimer's disease since her return from St Lucia around the years 1994-1995 they both concede that there were times when she was lucid. The first named Claimant who was at all material times resident in Grenada stated that it was not until around 2000 that the memory loss of the deceased became serious. She also stated that after the deceased returned from St Lucia she would go walking to church for a time then afterwards she was unable to do so. She estimated that her inability to do so occurred around the year 2000. I have considered the evidence of the witness Sister Keans-Douglas who by her own admission stated that when she returned from St. Lucia was posted to Grenville and hence did not

see the deceased often. Though she attests to the deceased to be suffering from Alzheimers she did not state with sufficient particularity at what time or in which year she observed the strange behaviour of the deceased. Moreover I find that she incorrectly concluded that because of the closed doors at her home the deceased was in the habit of getting away from home. The unanswered question therefore in Sister Keans-Douglas' evidence is whether this was before or after the execution of the 1995 will. The witness Hermoine Charles testified that on her return from St. Lucia the deceased did not behave like someone who suffered from Alzheimer's and for about a year or so she lived a quite normal life, in stark contradiction to the evidence of Keens-Douglas. It is common ground that she and the deceased resided together at A.O. Payne's residence at the time. Cecil Walker himself testified that the deceased in September 1995 was used to walking up St. John's Street to go to church.

[43] I have considered the evidence of Dr Burkhardt as stated aforesaid the doctor based his opinion on two unsigned witness sworn statements. I find it astonishing that on such material as stated aforesaid he arrived at the conclusion he did. The matter does not end there however as in answer to Dr. Alexis and the Court, Dr. Burkhardt said as follows:

"Q. I know my learned Queen's Counsel friend Mr. Haynes put the question to you but I have to put it to you. Having heard the various, some of the Claimants' witnesses say sometimes she was lucid, even to the extent of playing bridge, the day of her father's funeral, after she made the Will, she was normal; do you still stand by your assessment? I'm not a policeman--

A. If the Court believes that she lived a fairly normal life and she was normal, if that is true then I would come to a different conclusion. If the Court believes that the witness statement I was given to write the report, if the Court believes that that is true, then my assessment is valid.

THE COURT: You said that if the Court believes the evidence of the Claimants' and Herminie Charles about the deceased Ena Payne being normal and lucid, you would come to a different assessment. If however the Court believes what is in the statements of Baptiste and Keens-Douglas, you stand by your report.

WITNESS: Which is true, yes.

THE COURT: What different assessment would you come to?

THE WITNESS: Well if she was not exhibiting the symptoms which were stated by the witnesses then in terms of the staging, she would not have been in an advanced stage of Alzheimers disease.

THE COURT: Yes.

THE WITNESS: And in early stages, as mentioned in my report, the memory losses and symptoms are not that significant that non-professionals would be able to see the impairments, to recognize the impairments, the loss of abilities and function.

THE COURT: So I want to know if, as you said, if I believe and accept what the other witnesses said and I reject what you looked at from Baptiste and Sr. Keens-Douglas, I'm asking you whether you would still conclude, as you did at paragraph 10, that she is not or at the time of the Will she was not in a sound state of mind.

THE WITNESS: I would then have formulated that it cannot be excluded that she was aware of what she was doing."

In considering the totality of Dr. Burkhardt's evidence I find that he effectively resiled from his original opinion and left it up to the court to form its own opinion and make its own conclusion on the mental state of the deceased. Suffice it to say however the Court rejects the opinion of Dr. Burkhardt."

[18] The respondent testified and called 5 witnesses. The judge summarized Mr. Bernardine's and Ms. Frederick's testimony as follows:

"[20] The defence relied primarily on the evidence of Mr. Ashley Bernadine, the solicitor who purportedly drew up the 1995 will, and his secretary who allegedly witnessed the signing of same. Mr. Bernadine testified that prior to the making of the 1995 will he knew both the deceased and her father A.O. Payne. At one time he used to visit A.O. Payne at his home and thereafter they spoke to each other by telephone. He stated that it was the father of the deceased who first instructed him that his daughter the deceased wanted to make a will. He also said that the deceased was

introduced to him by her father. He said an appointment was made for the deceased to visit his chambers and she turned up a his chambers and gave him instructions. He said that she said she wanted a simple will and that all her assets were to be left to her cousin and godson, the Defendant. He prepared the will and about a week or two later she returned. He gave her the will to read and asked her if she wanted to make any alterations or additions. She said it was fine and signed same. She said because of the significance of the document she would sign her full name. He said he also obtained from her a specimen of her signature. The will was signed on the 6th September 1995 and his secretary Jean Fredericks witnessed same. He further stated that after that day the deceased continued to visit his chambers periodically to chat with his secretary and himself until around the year 2001-2002 when he learnt that she had a stroke. He said that she was normal, recollective and in full command of her faculties and never exhibited any signs of Alzheimer's or dementia when he saw her.

[21] Under cross-examination, he said he made notes of the deceased's instructions but did not retain them as he did not consider that to be necessary. He said at the time of her visit the deceased's was wearing an emerald ring which she said she wanted the Defendant to have at her death. She told him of having a bank account, insurance policies which Renwick & Payne handled and she was entitled to part of her father's estate, by being a beneficiary in his will, all of which she wanted to give to the Defendant. He said he did not consider it necessary to have her medically examined even though he felt that she was around the age of 79-80. However in his opinion though she was a senior citizen she was literate, articulate and vivacious. She said that the Defendant was good to her and she wanted to leave what she got from her dad for him. He said the taking of instructions lasted for about fifteen minutes and after that they chatted for a while. She liked to talk about church and gardens. At her request the Defendant and Ashley Bernadine were named as executors.

[22] He was further cross-examined and said he did not consider it necessary to verify the existence of property an elderly person wanted to give away in a will or the reason for the disposition. He said he knew her father and knew he had substantial assets and that her father may have paid for the will. In reexamination he said he met the deceased many times subsequent to the making of the will. At times she would drop in at his chambers on her way to church and this was prior to the making of the will.

[23] Jean Fredericks also testified to having known the deceased prior to the making of the will and subsequent thereto. Under cross-examination she too said the deceased would drop in on her way to church to chat and she regaled her with stories of her travels. She recalls being present when the deceased instructed Ashley Bernadine to make the will. The deceased said that she wanted to give her godson whatever she had coming to her from her father. She also said she had shares, insurance policies, a ring which she wore. She received the written instructions from Ashley Bernadine which was on two pages of a yellow legal pad and made the will. She said the deceased spoke of other family members after she had given instructions about the will, but not pertaining to the will. She said that though she would come and chat with her the deceased never told her the same story twice.

[19] In relation to the evidence of and concerning the respondent's witness Mr. Errol Baptiste the learned judge stated thus:

"[42] I now turn to consider the evidence of the witness Errol Baptiste. It's common ground that he was employed at the home of the deceased up to around the year 2001. He testified under oath that the deceased did not exhibit the signs of dementia spoken of by the other witnesses. He also denies telling Attorney at law James Bristol anything to the contrary. The Claimants sought to rely on the notes taken by Mr. Bristol during his interview of Baptiste. Those notes were not signed or accepted by Baptiste as his own. In fact the evidence is that Baptiste refused or neglected to sign a sworn witness statement prepared by Mr Bristol based on his notes. I do not find the notes to be admissible evidence of anything said by Baptiste. I will make no further reference to them. I accept that Baptiste went to the chambers of Mr Bristol at the invitation of and in company with the Claimants. I find it strange however in light of the evidence of Arnold Hopkin that Baptiste was dismissed for dishonesty, that the Claimants would seek to rely on his testimony in support of their cause. Stranger still is the evidence of the first named Claimant who under cross examination, said that she had trust in the honesty of Baptiste and that he must be credited for saying that some of the things in the unsigned sworn statements were not said by him. Its common ground that the material matters which he denied in the unsigned sworn statements were instances of strange behaviour by the deceased. This is in material contradiction to the essence of her claim."

[20] It is convenient to quote the conclusions of the learned trial judge on the totality of the evidence having regard to the grounds of appeal:

"[44] At the end of the day the Court is left to consider whether the evidence of Ashley Bernadine and Jean Fredericks reaches the evidential threshold to satisfy the Court on a balance of probabilities that the deceased had the necessary testamentary capacity. It is common ground that neither of them stands to gain from the dispositions in the will. There is no longer the issue of undue influence to be considered. There is undisputed evidence that A.O Payne, the father of the deceased spoke to Ashley Bernadine about making a will for his daughter. It must be borne in mind that A.O. Payne himself was not only the father of the deceased' but also a renown solicitor who ought to be aware of the requirement for a testator to have testamentary capacity. The deceased herself went to the chambers of Ashley Bernadine having made an appointment to see him professionally. From the evidence of both Ashley Bernadine and Jean Fredericks this was not the first time she went to those chambers and she clearly was not a stranger to that place as she would drop in to chat with Ashley Bernadine and Jean Fredericks from time to time on her way to church. Their evidence in this regard must be considered with that of Cecil Walker. Walker testified that in September 1995 that the deceased was accustomed to walk up St. John's Street. I find this is compelling evidence that she was not at that time enfeebled or decrepit. The Court takes judicial notice of the notorious fact that St. John's Street is one of the steepest in the town of St. George. Ashley Bernadine testified that though he made notes of the interview he did not retain them as he did not consider it necessary to do so. In the circumstances where A.O Payne had recommended Ashley Bernadine to his daughter to make a will and where the testatrix herself was no stranger to his chambers I accept that Ashely Bernadine would not be put on his inquiry to keep his notes for anticipated litigation.

[45] Both Ashley Bernadine and Jean Fredericks testified that the deceased was clear in her instructions that is that she wanted her godson the Defendant to have whatever she inherited from her father's estate, along with a ring which Ashley Bernadine said she wore and whatever else she had which was insurance policies and a bank account which did not have much. The deceased also insisted on using her full name of Ena Olive Albertine Payne because of what she considered to be the significance of the document.

[46] It is common ground that she had enjoyed a close relationship with the Defendant over the years and that his wife had cared for her when she suffered from a skin infection. It's also common ground that this would not be the first time that the Defendant would benefit from her benevolence as she had assisted him to

buy land for his home. I find therefore that there are no suspicious circumstances in the execution of the will. I am satisfied that both Ashley Bernadine and his secretary had ample opportunities to assess the testamentary capacity of the deceased who was no stranger to them. I find that having rejected the evidence of Dr. Burkhardt there is no medical evidence of advanced senile dementia existing in the deceased at the material time to deprive her of the necessary testamentary capacity. The lay evidence in that regard is inconsistent, inconclusive and at times aforesaid self contradictory. I find therefore that when she executed the said will she was lucid and was possessed of the necessary testamentary capacity.

[47] That how ever is not the end of the matter as the Claimants also allege that the will was a forgery. It is common ground that there was no specimen hand writing or signature with which to compare the signature on the 1995 will. Moreover Sgt. Murphy resorted to the limited and to some extent ancient hand writing specimens of the deceased to arrive at her conclusion. The science of hand writing examination is not an exact one. It is rather surprising that Gordon Renwick who provided known specimen signatures of the deceased did not himself venture an opinion on the signature of the 1995 will nor did he describe it as forgery. I do not in the circumstances accept that evidence of Sgt. Murphy that the 1995 will is a forgery. I have examined the documents and am not myself convinced on the basis on which Sgt. Murphy concluded that the 1995 will is a forgery. I have taken into consideration the fact that very few people knew that the full name of the deceased was Ena Albertine Olive Payne. I find that the only way that Ashley Bernadine could know that is if it was told to him by none other than the testatrix herself. I am also at a loss having carefully perused the evidence in its totality as to why an experienced solicitor and his clerk would wish to embark on such a massive conspiracy as this to forge the will of the testatrix for the sole benefit of the Defendant Indeed it was never suggested to Ashley Bernadine in cross-examination that he either by himself or in a conspiracy with others forged the 1995 will.

[48] In the circumstances I am satisfied on a balance of probabilities having considered the law and the evidence in its totality and having carefully observed the demeanour of Ashley Bernadine and Jean Fredericks that they told the truth when they testified as to the circumstances surrounding the making of the 1995 will. I find that the evidence of the Defendant reaches the legal threshold as laid down in the authorities referred to and mentioned herein. I should add that though I have not mentioned all of the authorities relied on by both Queen's Counsel have

perused and considered same.

[49] The Claimants claim therefore fails and is dismissed. There will be costs to the Defendant."

The Admissibility Issue and Mr. Errol Baptiste's Testimony

[21] Grounds 3.1 and 3.8 challenge the trial judge's ruling concerning the inadmissibility of the notes taken by Mr. James Bristol, attorney at law for the appellant, containing the statements made by Mr. Errol Baptiste to him; and the trial judge's acceptance of Mr. Baptiste's evidence. It is contended that Mr. Bristol gave direct admissible evidence of Mr. Baptiste's statement to him and the signature of Mr. Baptiste was not a prerequisite of admissibility. This calls for a review of the relevant law.

[22] The learned judge dealt with the evidence of Mr. Bristol at paragraph 17 where he mistakenly referred to Mr. Baptiste as Cecil Baptiste instead of Errol Baptiste. At paragraph 42 of his judgment which I have set out at paragraph 19 above, the learned judge made his ruling that Mr. Bristol's notes were inadmissible. During the testimony of Mr. Bristol at the trial, he read the unsigned statement prepared by him for Mr. Baptiste to sign. This unsigned statement was prepared by Mr. Bristol from his handwritten shorthand notes taken at the interview with Mr. Baptiste on 29th February 2006 at his office. Learned Queen's Counsel Mr. Haynes did not tender in evidence the original handwritten notes of Mr. Bristol or the witness statement which was not signed by Mr. Baptiste.[6] Dr. Alexis quite rightly made no objection to this oral testimony as to what Mr. Baptiste told Mr. Bristol. In fact, Dr. Alexis in his cross-examination of Mr. Bristol actually established[7] that there were words in the unsigned statement that were not in Mr. Bristol's original handwritten notes without the handwritten notes being tendered in evidence.

[6] See p. 202 of the Transcript – Volume 1, at lines 21 to 23.
[7] See pp. 205 to 206 of the Transcript – Volume 1.

[23] Dr. Alexis submitted that Civil Procedure Rules ("CPR") 29.5(1)(b) prescribes that only a signed or otherwise authenticated witness statement of an intended witness may be relied on as evidence and that this rule cannot be circumvented by Mr. Bristol giving his own notes of what he presents as the intended witness' statements. Queen's Counsel Mr. Haynes' written submissions were silent on this issue.

[24] It is section 36E of the Evidence Act[8] which governs the admissibility of first hand hearsay statements in civil proceedings. Mr. Bristol heard Mr. Baptiste make statements about the deceased mental state between 1994 and 1995 and Mr. Bristol was allowed to give oral evidence of those statements by apparently reading the unsigned witness statement he prepared without any objection. Section 36E (i) states that in civil proceedings a statement made orally or in a document or otherwise by any person (whether called as a witness in those proceedings or not) shall, subject to section 36G and 36E be admissible as evidence of any facts stated therein of which direct oral evidence by him would be admissible. On the present facts section 36G and the other provisions in section 36E are of no moment.

[25] I am of the view therefore that Mr. Bristol's oral testimony at the trial in terms of what Mr. Baptiste told him was admissible first hand hearsay evidence that the learned judge was obligated to consider in assessing the credibility of Mr. Baptiste's witness statement dated 25th July 2007 and his oral testimony at pages 466 to 468 of the transcript. Whether or not Mr. Baptiste had signed the document that Mr. Bristol prepared as his unsigned witness statement would be irrelevant in my view because this document was not tendered in evidence by Mr. Haynes, Q.C. It is the oral testimony of Mr. Bristol as to what Mr. Baptiste said that was admissible. The learned judge was quite right to rule that the notes were inadmissible. Moreover, the trial judge appears not to have given any weight to the testimony of Mr. Baptiste in evaluating the evidence on the testamentary

[8] Cap. 92, Revised Laws of Grenada 2010.

capacity of the deceased testatrix. At paragraph 46 he stated that "The lay evidence in that regard is inconsistent, inconclusive and at times aforesaid self contradictory." Contrary to the complaint in ground 3.8, the learned judge did not attach any weight to Mr. Baptiste's evidence. I conclude therefore that there is no merit in ground 3.8.

### The Issues Relating to Findings on the Evidence in Proof of Forgery

[26] Ground 3.3 and its 6 sub–grounds complain that the judge erred in rejecting the handwriting expert evidence of Sergeant Murphy that the 1995 Will was a forgery; failed to state the reasons for rejecting this evidence; failed to consider Mr. Gordon Renwick's evidence and accept that there was specimen handwriting and/or signatures of the deceased with which to compare the 1995 Will. There are further complaints that the judge erred in finding that only the deceased could have told Mr. Bernardine that her name was Ena Albertine Olive Payne; and that he erred in inquiring into the motive of Mr. Bernardine and his clerk, and ascribing no motive to them. The appellants also contend that the judge in his findings that the Will was not forged, should not have taken into account this absence of motive, or the absence of any suggestion to Mr. Bernardine that he forged or conspired with others to forge the Will. This calls for an evaluation of the handwriting expert evidence which led the judge to his conclusions.

### The Handwriting Expert Testimony

[27] Sergeant Murphy, a trained Document Examiner since 1990, was commissioned to verify the authenticity of the signature of Ena Payne in the 1995 Will by comparing the Ena Payne signature on the 1995 Will to her signature in certain specimen documents that Sergeant Murphy received. Sergeant Murphy concluded that the 1995 Will was not signed by the deceased and was a forgery, by comparing part of the signature, namely "E. Payne" in a photocopy of the 1995 Will (the questioned document) with the signatures of the deceased in 6 documents which she described in her report as "known specimen". She subsequently saw the original 1995 Will at Court and testified that having examined the original her

conclusions remained the same in relation to this questioned Will. These 6 "known specimen" documents were: three original share transfer documents for ordinary shares in Olivers Investments Limited (Exhibits "NM 2" to "NM4" ); two original Settlement documents tendered as exhibits "NM5" and "NM6" (one to Trustee Jennifer Alexander, signed sealed and delivered by the deceased on an unknown day in 1982 before Mr. Gordon Renwick; the other to Trustee Lynette Rooker, executed by the deceased before Mr Gordon Renwick on an unknown day in 1982 and signed by Lynnette Rooker in the U.S.A. and notarized on 26th January 1983); and the original document of a Conveyance No. 641/1949 dated 16th December 1949 with the Certificate of the witness Lenora Robertson signed by the Acting Deputy Registrar (Exhibit "NM1").

[28] Sgt. Murphy observed that the signatures of Ena Payne in the "known specimen" documents reflect a legible, "mature signature style that has undergone few modifications over time." She noted (at paragraph 8 of her Report) that "at some point during period of 1982 the author of the signature Ena Payne changed the formation of the "Ena" by dropping the letters 'n' and 'a' using the initial letter "E" with the surname Payne. However, pen movements continued to be rapid and fluently executed." Sergeant Murphy examined the questioned signature in the 1995 Will microscopically, and compared it against the "known specimen" signatures of "E Payne". She referred to the copy of her photographic comparison charts which she prepared and attached as part of her Report. She also acknowledged that "There are no truly contemporaneous specimens to compare the disputed signature."

[29] Sergeant Murphy's microscopic examination of the disputed signature revealed the presence of line quality defects in the form of the initial stroke of letter "E". Among the several fundamental differences that Sergeant Murphy found at paragraphs 11 and 12 of her Report were: "a. The name Ena Payne in the questioned document signature is different from the signature of Ena Payne on the specimens of signatures attributed to Ena Payne. b. There is no eyelet on the initial letter "E" on the questioned document whereas there is an eyelet on the

specimen handwriting attributed to Ena Payne… c. The signature "Payne" in questioned document, – Last Will, finishes straight across the baseline whereas the signature Payne in the specimen attributed to Ena Payne finishes in an upward slant in all predated specimen. (Style) d. The formation of letters in Ena Payne on the disputed document and the formation of the signature on the predated specimen is not the same. 12. The quality defects combined with the differences noted above are sufficient to conclude that the author of the predated signatures attributed to Ena Payne did not write the signature of "Ena Payne" on the questioned document Last Will and Testament." Sgt. Murphy also observed that during the period 1949 to 1982 signatures of Ena Payne were written using minimal letters.

[30] Although by exhibited letter dated 29th March 2006 the law firm Henry, Henry & Bristol, on behalf of the appellants, had written to Sergeant Murphy and included in their request that she compare the signature of Ena Payne on the 1995 Will to her signature on the specimen documents which included the 1982 Will, Sergeant Murphy never mentioned the 1982 Will at all in her report. She said at page 80 of the transcript when asked about this: "I have one specimen dated 1982". Her oral testimony both on examination in chief and under cross examination revealed that she was either confused about the question she was asked, or the instructions she received, or she that she was less than frank in accepting that her report makes no reference to the 1982 Will. She testified that modifications or variations in a signature does not preclude an identification; and even though the characteristics or features of the specimen signatures were limited in number there were enough characteristics for a meaningful comparison to be made. She also said that she did not have to have specimens close in the time relative to the questioned document to make a proper comparison. She did not agree with Mr. Parmassar, handwriting expert for the respondent, that the deceased's signature in the Settlement document to Lynette Rooker dated 1982, lacks well formed, almost imperceptible letters and shows marked variations to the other signatures in the documents that Mr. Parmassar examined. She saw no differences in the

specimen signatures. She said that there was a difference between a 'difference" and a "variation. She explained that a "variation" refers to a normal, everyday writing with modifications in either the space, the slant, and the size; while a "difference" is where you have a completely different formation as it relates to what you are comparing. Sergeant Murphy was also requested to indicate if the handwriting of Ms. Jean Fredrick on the 1995 Will is the same as the signature of Ena Payne on the said Will. Sergeant Murphy did not address this at all in her report, neither was this evidence adduced in her oral testimony.

[31] The countervailing handwriting expert evidence came from Mr. Glenn Parmassar, a Forensic Examiner since 1989 with training and experience exceeding that of Sergeant Murphy. Mr. Parmassar was requested to ascertain whether the documents he received were all signed by the same person.

[32] Mr. Parmassar examined the original 1982 and 1995 Wills of the deceased Ena Payne at the Court Registry. He also examined photocopy documents sent to him which were: the photocopies of the said Wills; 2 Share transfers to Lynette Rooker and Jennifer Alexander; and the previously mentioned Settlement documents and 1949 Conveyance which he together referred to as "Questioned Documents".

[33] He opined that the Share transfer documents and the Settlement documents to Jennifer Alexander and Lynette Rooker were photocopies which limited the effectiveness for examination. He concluded from his microscopic examination and inter-comparison tests on the questioned signatures of Ena Payne on the photocopies of all of the "Questioned Documents" that there were "general similarities along with some features which appear to be inconsistencies among the questioned signatures particularly with respect to the first part of the signatures. This is of some significance as five of the questioned signatures are all dated in the same year 1982. Signatures of the same time period should generally display a measure of consistency under the same general conditions." Mr. Parmassar explained his reasons for concluding thus, and said that because of these inconsistencies it is difficult to establish whether all of these questioned

signatures were, in fact, executed by one writer. He stated that since none of the 1982 signatures were in the full name of Ena Payne as the 1995 signature, in order to perform a reliable examination in respect to the 1995 signature, "it would be necessary to make available at least ten specimen signatures, particularly with the entire name written as close as possible to 1995". In his view, the 1982 specimens are dated too far removed (13 years) from the questioned signature in the 1995 Will; and no specimens are available closer to 1995 to establish what changes in writing habits, this writer may have undergone. He testified that the general guideline is that documents should be generally within a five-year time span subject to having specimens dated close in time to the questioned signature. Mr. Parmassar also received a photocopy of the 1949 Conveyance. He examined it, and concluded that it was not possible for the same reasons previously stated to determine whether the variation of the handwriting in the signature of the deceased in the 1949 Conveyance when compared with the signature in the 1995 Will, was due to natural variations of the same writer or to another writer. He regarded the previously stated challenges in his examination of the documents as "severe limitations" which did not allow him to determine whether or not the questioned signatures in...the 2 Share transfers, Settlement document between Ena Payne and Jenifer Alexander, Settlement document between Ena Payne and Lynette Rooker, the 1982 Will of Ena Payne, the 1995 Will of Ena Payne, and the 1949 Conveyance were executed by one writer or more than one writer." (My emphasis.) He asserted that comparing documents dated 46 years apart to determine authorship is not the accepted practice in forensic document examination. He stated finally in his report that in order for a proper, effective and accurate handwriting determination to be made "it would be necessary to make available a set (at least ten or close to ten in each case) of undisputed, contemporaneous (the years 1982 and 1995) and known specimen signatures of the specimen writer (Ena Payne)." In his examination in chief he said that one can use less than 10 specimen signatures if the characteristics allow for it, but with a limited number of specimens those documents should be dated even closer to the questioned document and not 13 to 49 years apart. The

characteristics in the specimens and the disputed document in the instant case did not allow less than 10 characteristics to be used in his opinion because there was too much variation even within the 1982 documents. He said that there is a large measure of variation amongst all of the signatures and without sufficient contemporaneous specimens one cannot tell if those variations are differences and hence done by another writer, or more than one writers, or whether there are in fact variations of the same writer. Mr. Parmassar stated[9] that: "Differences will be attributed to another writer if they can be fully evaluated as being differences. Variations can come from one writer, but again one would have to be able to determine if the features are differences or not by an evaluation of sufficient specimen signatures that are also contemporaneous."

[34] Under cross-examination, Mr. Parmassar looked at the original 1949 Conveyance. He agreed with Sergeant Murphy's opinion that there is an eyelet on the initial letter "e" in the 1949 Conveyance specimen handwriting signature. He agreed that there was no eyelet on the initial letter "e" in the questioned signature on the 1995 Will. However, he was quick in pointing out the 49 years difference in the dates of the documents.

[35] Mr. Parmassar, while agreeing also with Sergeant Murphy that the signature "Payne" in the 1995 Will finishes straight across the base line while the signature "Payne" in all the predicted specimens finishes in an upward slant, further pointed out that it was a limited signature in the specimens as opposed to a totally full elongated signature with a full name in the 1995 Will.

[36] Mr. Parmassar again agreed with Sergeant Murphy's statement that "the formation of letters in Ena Payne on the disputed document [the 1995 Will] and the formation of the signature on the pre-dated specimen is not the same" where it is assumed that the 1982 documents are specimen documents. On the assumption that the documents Sgt. Murphy referred to as "known specimen" were specimen

[9] See p. 126 of the transcript – Volume 1, at lines 13 to 16.

signatures, Mr. Parmassar also stated that, where you are looking specifically only at the dropping of letters, he was in agreement with Sergeant Murphy's statement that at some point during the period 1982, the author of the signature Ena Payne changed the formation of Ena by dropping letters "n" and "a" using the initial letter "E" with surname "Payne"; and that pen movements continued to be rapid and fluently executed.

[37] The Jennifer Alexander Share transfer document was found by Mr. Parmassar to have significant retracing movements. However, the significance of his finding would be considerably reduced since this was one of the documents that Mr. Gordon Renwick witnessed the deceased execute in my view. Mr. Parmassar agreed that people's handwriting evolve or change with time; that this and other factors could lead to variation;, and such variations could include formation of letters. He stated[10] that: "Depending on the individual and the circumstances, one could get some subtle changes; one could get more pronounced changes. But to determine how much, again you need adequate specimens to make that determination." He said that the significance of the difference in formulation of letters on a comparison of a specimen to a questioned document depends on the situation or the case; and whilst he would take more care in his writing in a formal document, he would probably take less care in the less formal document. Using himself as an example on the invitation of Queen's Counsel Mr. Haynes, Mr. Parmassar stated that he uses both "G-L-E-N-N" Parmassar and "G. Parmassar as his signatures. He agreed that where Sergeant Murphy was using the original specimen documents, she would have been in a better position than he was in judging line quality. Although conceding that where you look at the original the limitations of photocopies would no longer exist, he stated that his opinion was also in relation to the features over time and the numbers of the specimen signatures. Finally, Mr. Parmassar referred to basic textbooks on handwriting examination: Osborne, Harrison, Hilton, Morris of the recent ones as his authority for saying that the guideline calls for 10 specimen signatures or more

[10] See p. 151 of the transcript – Volume 1, at lines 3 to 5.

where there is no contemporaneous specimen.

Mr. Gordon Renwick's Testimony

[38] Mr. Renwick, a retired Solicitor and former partner of the deceased's father's law firm Renwick and Payne, knew the deceased testatrix, and prepared and witnessed her 1982 Will. He also witnessed the deceased execute the Settlement and Share transfer documents which formed part of the "known specimen" documents that Sergeant Murphy referred to. In his oral testimony he stated that he was "very familiar with Ena Payne's signature, many documents, letters et cetera." In the 1982 Will she signed her usual signature, he said. He was shown an Indenture made on 16th day of December 1949 in which Ena Payne was described as "Ena Albertine Olive Payne" and had signed her name as "Ena Payne" in executing it. Mr. Renwick agreed that it looked like her handwriting although he had not witnessed it. Despite this Mr. Renwick insisted that it was unusual for the deceased to be referred to as "Ena Albertine Olive Payne" in formal documents. Mr. Renwick was shown another Indenture between Ena Payne and Agatha Donald dated 1947 in which the deceased had signed her name "Ena Payne" as her signature. He again agreed that the handwriting looked like the deceased's handwriting. There were also two other documents shown to the witness and he admitted that the handwriting with the signature in the name of "Ena Payne" in one of them looked like her handwriting, and that in the other indenture it shows that it was prepared by his law firm Renwick and Payne in 1947. He was also questioned at length about the accuracy of the contents of the Share transfer and Settlement documents he prepared and witnessed. His opinion concerning the handwriting in the signature on the 1995 Will was, strategically it would seem, never adduced or solicited by either of the parties.

[39] Learned Queen's Counsel Mr. Haynes submitted that the trial judge erred in stating at paragraph 47 of his judgment that it was common ground that there was no specimen handwriting or signature with which to compare the 1995 Will. I

agree with this submission. The judge apparently lost sight of the fact that there was no common ground because the two handwriting experts arrived at their individual conclusions from different premises given their individual mandate. Mr. Parmassar[11] agreed that his instructions caused him to treat all the signatures as questioned signatures and so he regarded none of them as specimen writings. He also[12] acknowledged that Sergeant Murphy's report was prepared on the assumption that there were in fact specimen documents. Consequently, despite the criticisms leveled at Sergeant Murphy's findings in his report and examination in chief, Mr. Parmassar eventually agreed[13] under cross-examination that he was required to make what he described as inter-comparisons between all the features of the documents he received amongst themselves; whilst Sergeant Murphy's exercise involved making a comparison between the features in specimen signature documents and the signature in the 1995 Will for which she used a photographic comparison chart. Also, while Sergeant Murphy attached her prepared comparative photographic chart, Mr. Parmassar described all the features he observed in his expert report and apparently did not prepare a chart. Mr. Parmassar made several concessions under cross-examination which served to cancel some of the negative observations concerning Sergeant Murphy's findings and conclusions in his report and examination in chief.

[40] Although Mr. Renwick did testify that he witnessed Ena Payne sign the 1982 Will, there was no evidence from Sergeant Murphy concerning this document. The only other evidence on it came from Mr. Parmassar. It is unmeritorious to submit that the learned judge did not consider Mr. Renwick's evidence. Although he did not summarise Mr. Renwick's evidence as he did other witnesses, the judge specifically referred to the fact that he had provided known specimens of the deceased handwriting and noted the absence of his opinion as to whether the signature of the 1995 Will is a forgery. The judge must have considered and taken into account Mr. Renwick's evidence to make that statement. On reviewing all of

[11] See p. 133 of the tanscript – Volume 1.
[12] See p. 142 of the transcript – Volume 1.
[13] Ibid.

Mr. Renwick's testimony I have great difficulty understanding how it could have assisted the judge in determining whether the 1995 Will was forged, apart from establishing the authenticity of the deceased's signature on the specimen documents and the 1982 Will, and that at different periods prior to the 1995 Will she signed her name either as "E. Payne", or "Ena Payne" but never as "Ena Albertine Olive Payne" on other Indentures shown to Mr. Renwick.

[41] The judge, it appears, relied on his observations about the absence of an opinion from Mr. Gordon Renwick on the signature of the deceased on the 1995 Will, as a basis for rejecting Sergeant Murphy's conclusions. Dr. Alexis, Q.C. accepted this in his submissions.

[42] Mr. Renwick's opinion would have been relevant to the opinions of the Sergeant Murphy and Mr. Parmassar. Section 44 of the Evidence Act states that:

> "Facts not otherwise relevant are relevant if they support or are inconsistent with the opinions of experts when the opinions are relevant."

Mr. Haynes, Q.C. advanced the reason for the absence of the opinion. He submitted that this comparison by Mr. Renwick could not have been conducted taking into account that the 1995 Will was the only document signed "Ena Albertine Olive Payne" and there were no such other signatures with which Mr. Renwick could have compared it.

[43] However, section 45 of the Evidence Act states that:

> "When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was not written or signed by that person is a relevant fact.
>
> A person is said to be acquainted with the handwriting of another person when he or she has seen that person write, or when he or she has received documents purporting to be written by that person in answer to documents written by himself or herself or under his or her authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him or her."

[44] In my view, though the learned judge was entitled to make that observation, the absence of Mr. Renwick's opinion was not a relevant fact that could support the opinion of either expert. It was an error for the learned judge to have included this as part of the circumstances which propelled him to reject Sergeant Murphy's opinion. The impact of the two errors found will be dealt with later.

[45] It appears that the learned judge did himself examine and compare the documents in forming his conclusions. Section 71(1) of the Evidence Act allowed the judge not only to make the observation previously discussed, but also to make a comparison as Mr. Renwick could have made in the circumstances. This section states:

> "In order to ascertain whether a signature, writing, or seal is that of a person by whom it purports to have been written or made, any signature, writing, or seal, admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared by a witness, or by the Court, or by the jury, with the one which is to be proved, although that signature, writing, or seal, has not been produced or proved for any other purpose."

The learned judge stated that he had examined the documents and was not convinced on the basis on which Sgt. Murphy concluded that the 1995 Will is a forgery. This statement suggests in my view that the learned judge did act in accordance with section 71(1).

[46] The two errors that were made by the trial judge were not material errors in my view for the following reasons. The learned judge was entitled to place little or no weight on Sergeant Murphy's evidence, or reject the opinion of Sergeant Murphy despite the concessions made by Mr. Parmassar. He had the advantage of seeing Sergeant Murphy testify and the transcript shows that at times she was confused and appeared not to be a compelling and impressive expert. Though the judge made no reference to Mr. Parmassar's testimony, he was entitled to accept his evidence on the accepted practice in forensic document examination, and the criteria established by guidelines where the specimen samples were not contemporaneous with the questioned signature. The judge was also entitled to

arrive at his own conclusions, independent of Sergeant Murphy's testimony in keeping with the relevant statutory provision previously referred to.

[47] Mr. Haynes, Q.C. further contended that the learned judge erred in taking into account the absence of a motive for Mr. Bernardine and his clerk to embark on such a massive conspiracy to forge the Will of the testatrix for the sole benefit of the respondent. He submitted that the motive of the solicitor and his clerk was irrelevant in determining whether the Will is a forgery. However, the amended statement of claim alleged that the deceased did not execute the Will which Mr. Bernardine witnessed and the very nature of the pleaded suspicious circumstances strongly suggested that Mr. Bernardine and his clerk were participants in the forgery. The appellant's case depended on circumstantial evidence. In a civil case, the claimant generally need not prove the defendant's motive in doing an act, except for malicious prosecution which requires the plaintiff to prove that the defendant was motivated by malice. However, Mortimer and Williams on Executors and Administration and Probate (1970)[14] points out that the evidence of those present when the deceased gave instructions for her will or its execution, if they were not merely witnesses called into her presence for a few moments, is of considerable weight and this is so particularly where such persons are unprejudiced. In determining whether Mr. Bernardine and Ms. Frederick were unprejudiced and credible, the lack of motive to fabricate was a very relevant factor the judge was entitled to take into account in my view. While the absence of motive by itself is not sufficient to establish credibility, it would be a relevant factor in determining whether Mr. Bernardine and Ms. Frederick were credible as to the circumstances surrounding the making and execution of the 1995 Will by the deceased testatrix Ena Payne in my opinion. The other statements of the judge in paragraph 47 which are the subject of the complaints in the sub–grounds, directly impact on his findings as to the credibility of Mr. Bernardine, Ms. Frederick, and the respondent. In my opinion ground 3.3 should not succeed.

[14] pp. 141-142.

Did the Learned Judge err in his Findings on the Deceased's Testamentary Capacity?

[48] Ground 3.4 and its 10 sub-grounds include allegations that the learned trial judge erred in holding that the deceased was not a stranger to Mr. Bernardine at the material time the will was made, and in finding that he had ample opportunities to assess the deceased's testamentary capacity. There are also allegations that the judge failed to take into account the fundamental inconsistencies between Mr. Bernardine and Ms. Frederick's evidence; and he further failed to fully consider the duty of a solicitor to assess the testamentary capacity of a previously unknown testatrix. These complaints give rise to the issue as to whether the evidence established on a balance of probabilities circumstances of suspicion relevant to the making and execution of the will. The grounds challenge the manner in which the judge applied the "Golden Rule" in evaluating the evidence of Mr. Bernardine. It is contended that since Mr. Bernardine failed to make any enquiries to assess the testamentary capacity of the deceased, failed to produce his notes or instructions, failed to obtain a mental status examination of the 80 year old deceased previously unknown to him, failed to enquire as to any previous wills executed by the deceased, and failed to make sufficient enquiry as to the existence and/or location of the property the deceased was bequeathing in the Will, the learned trial judge failed to appreciate the scope and depth of a solicitor's duty; and therefore erred both in fact and law in finding that the respondent had discharged his burden of proving that the deceased had the necessary mental capacity and a sound and disposing mind and memory and understanding. These grounds also allege that the learned judge erred in taking into account the physical capacity of the deceased, failed to take into account that the deceased testatrix purported to bequeath and devise property which had been disposed of prior to the making of the 1995 Will and which she did not possess.

[49] Ground 3.6 contends that the respondent did not plead that the deceased was lucid at the time of making the 1996 Will, and in the absence of that pleading, the trial judge erred in so finding. Grounds 3.2 and 3.7 allege that the judge's decision was against the weight of the evidence, and his finding that that there were no

suspicious circumstances was an error in fact and in law.

The Findings of the Trial Judge and the Law

[50] The relevant evidence in relation to these grounds are contained in paragraphs 20, 21, and 22 of the judge's judgment, previously set out at paragraph 18 above. The relevant findings of the trial judge are in paragraphs 44 to 47 of the judgment, which have been reproduced at paragraph 11 above.

[51] Learned Queen's Counsel Mr. Haynes contends that the evidence adduced by the respondent to prove that the deceased Ena Payne had testamentary capacity did not satisfy the threshold and principles established by case law. The following principles are relevant to the issues at hand.

(i) The Court should be satisfied that at the material time of making the 1995 Will the testatrix had a sound and disposing mind, memory and understanding, understood the nature of her act and its effects, the extent of the property of which she was disposing, and understood and appreciated the claims to which she ought to give effect.[15] The testatrix must also have the capacity to comprehend the extent of her property and the nature of the claims of others whom by her will she is excluding from all participation in that property.[16]

(ii) The mere capacity to communicate her testamentary wishes is not sufficient to discharge the burden of proof. There may be "testamentary incapacity accompanied by a deceptive ability to answer questions of ordinary and usual matters: that is, the mind may be incapable of carrying apprehension beyond a limited range of familiar and suggested topics. A "disposing mind and memory" is one able to comprehend, of its own initiative and

[15] Banks v Goodfellow (1869-1870) L.R. 5 Q.B. 549 at 565 per Cockburn, C.J.
[16] Murphy v Lamphier (1914) 31 O.L.R. 287 at p. 318; affirmed (1914) 32 O.L.R. 19, 20 D.L.R. 906 S.C (App

volition, the essential elements of will-making, property, objects, just claims to consideration, revocation of existing dispositions and the like…"[17]

(iii) The principle emerging from the cases Pendock Barry Barry v James Butlin,[18] W. Scott Fulton et al v Charles Batty Andrew et al,[19] and Wintle v Nye[20] is that wherever a Will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testatrix, the Court ought not to pronounce in favour of it unless the suspicion is removed. This principle is not confined to the single case in which a Will is prepared by or on the instructions of the person taking a large benefit under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the Will to remove such suspicion of the Court; and prove affirmatively that the testator knew and approved of the contents of the document. It is only where this is done that the onus is thrown on those who oppose the Will to prove fraud or undue influence or whatever else they rely on to displace the case made for proving the Will.[21]

---

Div.)

[17] Leger v Poirier [1944] 3 D.L.R. 1 at pp. 11-12.

[18] (1838) II 2 Moore, P.C. 480.

[19] (1874-1875) L.R. 7 H.L. 448 at pp. 471-472.

[20] [1959] 1 All.E.R. 552.

[21] See Davey, L.J. in Tyrrell v Painton and Another [1894] P. 151 at p. 157. In that case the testatrix, a widow with no issue, after making 2 wills in favour of the defendant who was a friend and trustee of her marriage settlement, made complaints against him to her solicitor and then made a new will leaving her property to the plaintiff her cousin whom she appointed sole executor. The defendant's son subsequently prepared another will in his handwriting by which the testatrix purportedly devised and bequeathed nearly the whole of her property to the defendant, and accompanied by a young friend took it to the testatrix who was very ill in bed. The will was executed by the testatrix in the presence of this son of the defendant who with his young friend were the attesting witnesses. The defendant's son took possession of the former will and left with it. The existence of the purported will remained a secret until after the death of the testatrix. The Court found the circumstances under which the purported will was executed to be strange and suspicious, leaving Lindley, L.J. in the greatest doubt whether she knew the effect of the document she was signing.

(iv) While the question whether or not the testatrix has capacity must be determined at the time the Will is executed, evidence about the testatrix's circumstances, her assets, her family and her relationship to her family, as well as her capacity subsequent to the making of her Will, is relevant and admissible if and to the extent that it assists the Court in determining capacity at the time her Will was executed. The weight to be given to such evidence depends on the circumstances of each case. Facts antecedent to the actual preparation of her Will may throw light on the circumstances under which it was executed and are relevant to removing or confirming suspicion.[22]

(v) The Law imposes a heavy burden on a solicitor confronted with circumstances where an aged or seriously ill testatrix, or a testatrix with failing memory is giving him instructions, to prepare a will, or change the previous disposition in an existing will, or to make sweeping change from an earlier will. In the United Kingdom, Templeman, J., in accordance with the guidance in well known cases and academic texts, stated in Kenward v Adams,[23] and In Re Simpson[24] that in the case of a testator who is elderly and/or seriously ill and/or at the point of death, the making of a will by such a testator ought to be witnessed and approved by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and makes a record of his examination and findings. The guidance from the Law Society that Templeman, J. urged the Law Society to afford to practitioners and students has resulted in what has come to be well known in the profession as the "Golden Rule". The

[22] Eady et al v Waring 2 O.R.(2d) 627; 1974 Ont. Rep. LEXIS 484 (Court of Appeal Canada, February 1 1974) per Arnup J.A.. at pp. 639 to 641.
[23] (1975) Times 29 November 1975.
[24] (1977) 121 SJ 224; Approved in Buckenham v Dickinson [2000] W.T.L.R. 1083; Hoff v Atherton [2005] W.T.L.R. 99; Cattermole v Prisk [2006] 1 FLR 697, and Scammell v Farmer [2008] EWHC 1100(Ch).

substance of the Golden Rule is that when a solicitor is instructed to prepare a Will for an aged testator, or for one who is seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings.

(vi) The profession is warned on numerous occasions that the fact that an elderly person suffers from a form of dementia, and has lost capacity, may not be immediately apparent to those who are not closely associated with her. The point is made succinctly in Williams, Mortimer and Sunnucks, on Executors, Administrators and Probate (17th edition, 1993) at page 163: "The personality of old people is often well preserved and, at a casual interview, they may give every appearance of being capable of making a will although, in fact they lack capacity."[25]

(vii) In Ontario, "any solicitor drawing a will should make full docket entries in regard to all details thereof. Especially is this so in the case of an elderly testator…Chancellor Boyd, at p 321 of Murphy v Lamphier said "Nor is it a counsel of perfection to suggest that a memorandum of results, apart from the formally expressed will, should be jotted down and preserved." It has also been stated that it is the most elementary of teaching in regard to drafting of wills that the draftsman should preserve his notes of the testator's intentions.[26]

(viii) From the testamentary capacity case law in Ontario, it appears that the common errors by solicitors that have been either the subject of criticism by the courts or the basis of liability for

[25] Per Charron J.A. in Hall v Bennett Estate et al 227 D.L.R. (4th) 263, 270; 2003 D.L.R. LEXIS 171 at para. 21 (quoting Cullity J. in Scott v Cousins (2001) 37 E.T.R. (2d) 113 (Ont. S.C.J.) at paras 71 and 73).

professional negligence in the preparation of a will include: the failure to obtain a mental status examination; the failure to interview the client in sufficient depth; the failure to properly record or maintain notes; the failure to ascertain the existence of suspicious circumstances; the failure to react properly to the existence of suspicious circumstances; and failure to take steps to test for capacity.[27]

(ix) Mr. Justice Briggs in Richard Key and another v Jane Frances Key and another[28] states that: "Compliance with the Golden Rule does not, of course, operate as a touchstone of the validity of a will, nor does non-compliance demonstrate its invalidity. Its purpose, as has repeatedly been emphasized, is to assist in the avoidance of disputes, or at least in the minimization of their scope. As the expert evidence in the present case confirms, persons with failing or impaired mental faculties may, for perfectly understandable reasons, seek to conceal what they regard as their embarrassing shortcomings from persons with whom they deal, so that a friend or professional person such as a solicitor may fail to detect defects in mental capacity which would be or become apparent to a trained and experienced medical examiner, to whom a proper description of the legal test for testamentary capacity had first been provided."

The Physical Capacity of the Deceased

[52] I do not agree with Mr. Haynes, Q.C. that the judge erred in taking the physical capacity of the deceased into account. Her ability to walk up St. John's Street indicated to the judge that she was not feeble or decrepit. On the authority of

[26] Per Shapiro, Surr. Ct..J. in Maw v Dickey 6 O.R. (2d) 146 at p. 161, 52 D.L.R. (3d) 178.
[27] See Hall v Bennett Estate et al. supra note 19, at paras 24 to 26.
[28] [2010] EWHC 408 (Ch) at para. 8.

Eady et al v Waring,[29] this is a fact that would throw light on the circumstances under which the 1995 Will was executed. This fact was relevant to removing or confirming suspicion in my opinion.

The Evidence of Mr. Bernardine and Ms. Frederick

[53] The evidence was that in September 1995, when the deceased gave Mr. Bernardine instructions, that was the second time he saw her. Mr. Bernardine first met the deceased when her father at his home where the deceased Ena Payne resided, introduced the deceased to Mr. Bernardine, and she then went on her way. Their first meeting would have been probably about or before September/October 1994 as Mr. Bernardine said he last visited Mr. Payne about one year before his death in October 1995. However, Ms. Frederick's evidence was that the deceased frequently visited Mr. Bernardine's chambers prior to September 1995 on her way to or from church where the deceased attended noon mass daily, and that she met and chatted with Mr. Bernardine on such occasions.[30]

[54] Mr. Bernardine described the deceased[31] as lucid, quite coordinated, quite literate, articulate and vivacious. Subsequent to the execution of the 1995 Will, Mr. Bernardine testified[32] that his views about the deceased were formed from "Her interaction with me, yes, and subsequent meetings after that. We developed a relationship after that. She was in and out of the office."

[55] Mr. Bernardine contradicted himself when he gave the following testimony at pages 449 and 461 of the transcript:

> "Q…. I'm putting this to you, Mr. Bernadine: Apart from Ms. Ena Payne looking as you described it, she was lucid, literate, cooperative and vivacious, you made no inquiries into her mental capacity?
> A. No.
> Q. No --

[29] Supra note 16.
[30] See p. 352 of the transcript.
[31] See pp. 425-426 of the transcript – Volume 2.
[32] See p. 446 of the transcript – Volume 2.

A. Let me -- where my office is located, Ms. Payne used to pass up my office almos twice or three times a week on the way to church. She would drop in, she would say hi, she would talk, she would appear, and to walk up St. John's Street back and forth at times, and she'll speak, she'll talk to people in the road and go back down, you know. She'll come with a passage sometimes, she'll read it and we'll chat. What you want more normal than that. And she did it all on her own, without the aid of anybody. She'd drop in to see my secretary; she'll bring a little something with her, refreshment or so as the case may be, and she came in and she said she was passing by, she's going to the noon day service, she is going to Convent for tea. And she'll come down St John's Street, go across the -- she doesn't live far. My office is not far from where she lives. But she has energy to walk; she walked very well and unaided, and spoke and smiled; people called out
to her, she called out to people, and so forth. Do I need to go beyond that to test her lucidity?"

[At page 461] RE-EXAMINATION

"Q. Mr. Bernadine, I think you told the Court when you were making the will that was the second time only that you were meeting Ms. Ena Payne?

A. Yes, but I met her many times subsequently.

Q. Subsequently?

A. Yes.

Q. I think you were explaining that you didn't have to make inquiries into her testamentary capacity because Ena Payne used to pass by once or twice a week, she would drop in, say hi, wave and chatted?

A. Yes, that's correct. And she chat most times with Ms --

Q. Was that before you made the will for her?

A. She used to chat with my –

Q. Was that before you made the will for her?

MR. HAYNES: Sir, I don't see the ambiguity, sir, but if my friend wants to proceed, it's fine.

MR. BERNADINE: Yes

Q. What is your answer?

A. Yes, yes.

Q. So then, was it the second time you were seeing her when you made the will?

THE COURT: Dr. Alexis, I think you're cross-examining your witness –"

[56] Notwithstanding the inconsistencies in Mr. Bernardine's evidence, the learned judge apparently regarded Dr. Alexis' attempts at rehabilitating Mr. Bernardine a success. He made no mention of the inconsistency, and he treated both the

evidence of Ms. Frederick and Mr. Bernardine as having established that the deceased was not a stranger to Mr. Bernardine's chambers as she would drop in to chat with Mr. Bernardine and Ms. Frederick from time to time on her way to church prior to the day she gave Mr. Bernardine instructions for her 1995 Will. I therefore reject Mr. Haynes' contention that the judge misspoke in finding that "From the evidence of both Ashley Bernardine and Jean Frederick this was not the first time she went to those chambers."

[57] Emerging from the evidence of Mr. Bernardine and Ms. Frederick would be evidence that in September 1995 at the time of taking instructions the deceased apart from not being feeble and decrepit, also had the ability to converse rationally and ordinarily on every day usual matters concerning her religion, attendance at church, her travel experiences, family, her wish to make a will, and who she wished to bequeath her property to and why. She also had the ability to satisfy the need to refresh herself on the days she was attending church, and she appreciated that she could expect to inherit property from her father's estate whenever he died. The question however is was this enough?

[58] Mr. Bernardine prepared the Will after taking instructions in September 1995 and the deceased returned to execute the Will about a week later on the 6th September, 1995. Having regard to the law which states that the material time for assessing the deceased's testamentary capacity is at the time of making and execution of the Will, Mr. Bernardine's opportunity to assess the deceased's testamentary capacity prior to the existence of the 1995 Will would not have been limited only to the day he received instructions from her, and at the time she executed the Will. The amplitude of the opportunity to assess the deceased's capacity has to be judged on Mr. Bernardine's rehabilitated evidence, and his testimony as to what took place when he took instructions and when she executed the Will. According to Ms. Frederick, there were about 15 minutes of instructions taking in Mr. Bernardine's office, and then a conversation took place after about the deceased's various family when she mentioned about her nephews. Ms. Frederick also stated that she left Mr. Bernardine's office while the deceased was

in there with him. Mr. Bernardine admitted that the informal chat with the deceased in his office after taking instructions lasted for about 15 minutes. Dr. Alexis submitted that the evidence concerning the taking of instructions demonstrates that Mr. Bernardine was correct in his assessment of the capacity of the deceased to make her Will though he may have departed from the guidelines established by the Golden Rule.

The Extent of the Deceased's Property

[59] Queen's Counsel Mr. Haynes submitted that the evidence of the instructions that Mr. Bernardine received which is summarized by the trial judge at paragraph 20 of his judgment is insufficient to satisfy the requirement for the deceased to have a sound and disposing mind, memory and understanding. There was also evidence that since the death of the deceased there was no inquiry concerning the ring. The respondent refuted this, he said that he had made enquiries but the ring has not been found. Contrary to Mr. Haynes's assertions, both the respondent and Mr. Bernardine did make enquiries also about the deceased's two insurance policies after her death. Mr. Haynes contended further, that prior to the death of her father in October 1995, her father had divested himself of his properties, except household furniture and a lot of land at Peggy's Whim. Mr. Haynes submitted that when the deceased made the 1982 Will she had already divested herself of her 100,000 shares in Oliver Investments Limited to the second appellant and Ms. Alexander. There was documentary evidence in the Annual Return of Oliver Investments Limited showing that Ena Payne was the registered owner of 31,000 shares. Despite this, the deceased had failed to instruct Mr. Bernardine about the shares which were her most valuable assets, he said.

[60] Mr. Haynes submitted that this was evidence that the deceased did not understand the extent and nature of her property that was available for disposition in her 1995 Will. This evidence also showed that Mr. Bernardine's conclusions as to her capacity were inaccurate.

[61] Queen's Counsel Dr. Alexis submitted that the deceased did not dispose of assets she did not have. Though her 1995 Will did not specifically refer to the shares, the final clause covered all her assets which would have included the proceeds of any existing bank account,[33] whatever shares she then had remaining in Oliver Investments Limited, and what she expected to inherit under her father's will. I agree with Dr. Alexis. Her expectations to inherit any property at all under her father's Will were not farfetched, having regard to the letters exchanged between Mr. Bernardine and Mr. Bristol in February and March 2006 concerning the inheritance of Ena Payne under her father's Will. Although Ms. Frederick gave no evidence about the deceased wearing any rings when she came to give instructions, Mr. Bernardine testified that she was wearing 2 rings and said she wished to give the gold ring with the emerald stone to the respondent. This ring has not been found since the death of the deceased. There was no evidence that she never had the 2 insurance policies at the time of making her 1995 Will. I accept these submissions of Dr. Alexis, Q.C. Accordingly, I would conclude that she was aware of the extent of the property that she should dispose of.

The Nature of the Claims of Others

[62] Mr. Haynes, Q.C. submitted that the contents of the 1995 Will does not disclose that the deceased illustrated the requisite understanding of the claims she ought to have given effect to. She was not asked, and did not discuss who her relatives were. She made no mention of the beneficiaries under her 1982 Will to Mr. Bernardine. She had prior to the 1995 Will negotiated and made the down payment for the respondent's land at Westerhall where he now lives. She had subsequent to the 1982 Will given shares to the second appellant Ms. Rooker, and she provided for the respondent in the 1995 Will, but did not provide at all for the first appellant Ms. Mac Leish.

[33] See pp. 349 to 350 of the transcript where Ms. Frederick stated that Mr. Bernardine asked if she had any bank account and she said yes but gave no specific details about it apart from mentioning Royal Bank of Canada. Mr. Bernardine at p. 427 said that the deceased said she had nothing much in the bank account, it

[63] Queen's Counsel Dr. Alexis submitted that since the appellants had abandoned their claim relating to undue influence, the learned judge correctly accepted the reason why the deceased would wish to bestow her bounty on the respondent who was sympathetic towards her for which sympathy she was grateful. The respondent had looked after her eczemas, his mother brought up Ena from a child to womanhood, Ena played the piano and liked his piano style, she was his first cousin and they were close friends.

[64] Mr. Bernadine testified that at the time he took instructions he had asked the deceased whether she had made a Will before and he was sure that she told him she made no Will. He subsequently learnt of the 1982 Will from Ms. Blackburn at Renwick & Payne. He requested to see it without success. He contended that there was nothing in his observations of and conversations with the deceased to indicate that he needed to exercise caution. He admitted that he was unaware of the Golden Rule guidelines.

[65] Mr. Bernardine was not questioned as to why he inserted the clause revoking all former wills codicils and other testamentary dispositions when the deceased said she had made no Will. What is quite clear is that not only did Mr. Bernardine read this clause to the deceased, but she apparently read it for herself when Mr. Bernardine gave her the Will to read. It is apparent from the evidence that the revocation clause did not jog her memory, or stir her to talk about the 1982 Will. Neither Queen's Counsel for the parties, nor the learned trial judge turned their attention to this important aspect of the evidence. The deceased approved this clause without mentioning the 1982 Will. This, to my mind, would give credence to the appellants' pleadings that the deceased was suffering from some memory loss.

[66] There was no evidence that the deceased prior to making the 1995 Will had specifically discussed with anyone, or compared and weighed the claims of her nieces the appellants, and had made a purposeful deliberate decision to reject

---

was just what she got from her dad and left with expenses there would be nothing much in the account.

them both in favour of the respondent. However, she did have the capacity to talk generally about her family with Ms. Frederick before and at the time she gave instructions. Also in her informal discussion on the very day after giving instructions she displayed capacity to talk about family members. Neither Ms. Frederick nor Mr. Bernardine disclosed the nature of the conversation she had with them about her family. The appellants both resided abroad and apparently hardly kept in touch with the deceased. The question for the Court is not whether the deceased knew, when she executed the 1995 Will that she was giving all her property to the respondent and excluding all her other relations from any share in it, but whether at that time she was capable of recollecting who those relations were, of understanding their respective claims upon her regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of her property. That was the question formulated by the Board of the Privy Council in Charles Harwood v Maria Baker.[34] The Board thereafter stated that if the testator had not the capacity required, the propriety of the disposition made by the will is a matter of no importance.

[67] In Den v Vancleve[35] the Court stated that: "By the terms "a sound and disposing mind and memory" it has not been understood that a testator must possess those qualities of the mind in the highest degree; otherwise, very few could make testaments at all; neither has it been understood that he must possess them in as great a degree as he may have formally done; for even this would disable most men in the decline of life; the mind may have been in some degree debilitated, the memory may have become in some degree enfeebled; and yet there may be enough left clearly to discern and discreetly to judge, of all those things, and all those circumstances, which enter into the nature of a rational, fair and just testament. But if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of sound and disposing mind and memory."

[34] (1840) 3 Moore's PCC 282; [1840] EngR 1087; (1840) 3 Moo PC 282; (1840) 13 ER 117.

[68] Also, in Marsh v Tyrrell and Harding[36] the testatrix made a new Will at a time when her faculties were impaired. She was found to have been under the undue influence of her husband, who under that Will took her estate absolutely subject only to some small legacies. Under the previous Will of the testatrix the principal objects of her bounty were quite different. It was held that to successfully revoke a former Will by a new Will it was necessary to prove that the testatrix recollected the general contents of the previous Will.

[69] The learned judge accepted the respondent's rationale why the deceased bequeathed her property to him. He obviously rejected the evidence of the appellants and their witnesses that the respondent's 1995 Will may have been procured by the respondent. He accepted the evidence of the respondent and Mr. Bernardine that the respondent never participated in any instructions concerning the Will. The judge was entitled to do so having had the advantage of assessing the demeanor and credibility of the witnesses. However the judge erred in his approach to the evidence relating to the capacity of the deceased. The absence of proof that the deceased recollected the general contents of her 1982 Will was a matter that ought to have excited the suspicion of the Court. Though there was ample evidence proving that the deceased had the capacity to communicate her testamentary wishes, this was not sufficient in law. It cannot be said that the respondent has discharged his burden of proof in the absence of strong and clear evidence that the deceased's failure to mention her 1982 Will, and deliberately reject the appellants from participating in her estate was not due to memory loss.

The Golden Rule and Retention of Will-making Instructions

[70] I refer to paragraph 51 (v) and (ix) above where the nature of the Golden Rule guidelines are discussed. In the case at bar, compliance with the Golden Rule would have been useful to the respondent in rebutting the presumption raised by the decision in Marsh v Tyrrell and Harding in my view. Dr. Alexis, Q.C.

---

[35] (1819) 2 Southard 589.
[36] (1828) 2 Hagg. Ecc. 84.

submitted that Mr. Bernardine was not in doubt on the deceased's capacity. In my opinion the deceased obviously had the capacity to communicate her testamentary wishes, but she had limitations in comprehending that she had to consider the claims of her other relatives and in remembering the existing dispositions she made in the previous 1982 Will. These are essential elements in will-making. Mr. Bernardine failed to detect these defects in her mental capacity which would have been more apparent to an experienced medical examiner to whom a proper description of the legal test for testamentary capacity had been provided. The elementary principle for the solicitor to retain his/her instructions taken for will-making should in the future commend itself to all legal practitioners who in the course of their practice may have to face a law suit for professional negligence in the preparation of a will. These guidelines are geared to provide legal practitioners and their clients with the most satisfactory description of proof by which the testamentary capacity of deceased testators may be established in Court. The Court would naturally look for such evidence. In some cases it might be impossible to propound a will without it, though it is not a mandatory requirement in every case.

## Conclusions

[71] I would therefore conclude that the respondent has failed to adduce medical evidence to remove the suspicion existing in relation to the deceased's testamentary capacity to make the alleged Will. In the premises I agree with the contention in grounds 3.2 and 3.7 that the learned judge's decision and finding that there were no suspicious circumstances were errors in fact and in law. Consequently, I would allow the appeal, set aside the decision in the court below pronouncing in favour of the 1995 Will; make a decree pronouncing that the alleged 1995 Will is invalid; and order the revocation of the grant of probate of the alleged 1995 Will.

[72] I would also remit the matter to the Court below since that Court is in a better position to pronounce on the claims made at paragraphs (3); (4); and (5) in the

appellants' amended statement of claim

[73] I would order that the respondent do pay the prescribed costs of the appellants in the court below in accordance with CPR 65.5 (2)(b)(iii) and Appendix B; and the costs in the appeal being two thirds of the prescribed costs below in accordance with CPR 65.13(b).

Ola Mae Edwards
Justice of Appeal