IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

IN THE COLONY OF

MONTSERRAT

(Civil)

CASE NO: MNIHCV2012/0004

BETWEEN:

LOLA VERONICA HARRIS	**Claimant**
AND	
JERMAINE BRAMBLE	**1st Defendant**
JERMAINE BRAMBLE (Sued as Executor of Purported Will of Rose AMELIA DALEY)	**2nd Defendant**

Appearances:

Mr. David Brandt for the Claimant
Mr. Kharl Markham for the Defendants

2015: November 23
2016: March 04

Judgment

[1] **Redhead, J. (Ag):** On the 9th May 2011, the testatrix, Rose Amelia Daley made a Will. She instructed Ms Chivone Gerald, Attorney-at-Law to do so. Unknown to Ms Gerald, according to her (Ms Gerald's) evidence, she was unaware that the testatrix had made a

previous Will in 2002. In the previous Will of 2002, I reproduce that Will in its entirety hereunder:

"**This is the last Will and Testament of me ROSE AMELIA DALEY of Hope Salem, Montserrat which I make this 22nd day of January 2002.**

1.0 **I appoint SARA DALEY BONELLI, the niece of my deceased husband to be my sole Executrix of this my Will.**

1.1 **I devise my land and premises at Salem, Montserrat including my shop and all stock in trade unto Veronica Harris absolutely.**

1.2 **I devise my parcel of land in the ghaut at the end of the road below my shop premises unto my sister Mrs. Ann Martin.**

1.3 **From the portion of lands I own at Nanse's River I devise one (1) task to Ethan Edwards and the balance, believed to be about two (2) tasks unto LOLA VERONICA HARRIS absolutely.**

1.4 **I desire my funeral and testamentary expenses to be met from my account at the Royal Bank of Canada and I bequeath the balance to be divided in equal shares between my stepson Nicholas Daley and Lucinda Ryan Daley of Friths Village, Montserrat.**

1.5 **I devise and bequeath my dwelling house at Hope Road Montserrat and all contents unto Sarah Bonelli who resides in St. Thomas USVI absolutely."**

The witnesses to that Will were Sheryl Markham and Jenny Lewis.

[2] I now reproduce hereunder the Will made by the testatrix on 9th May 2011.

In that Will she devised as follows:

"**This is the Last Will and Testament of me ROSE AMELIA DALEY of Salem, Montserrat made in respect of my real and personal property**

1. **I HEREBY REVOKE all Wills and Testamentary dispositions heretofore made by me AND DECLARE this to be my Last Will and Testament.**
2. **I HEREBY nominate and appoint my grandnephew JERMAINE DAVERN LEBASTRO BRAMBLE OF SALEM, MONTSERRAT to be the Executor of this my LAST WILL**
3. **I GIVE, BEQUEATH AND DEVISE the following to JERMAINE DAVERN LEBASTRO BRAMBLE**
   (a) **My shop in Salem, Montserrat**
   (b) **All proceeds in my accounts in any financial institutions in Montserrat or elsewhere, and those of which I may have interest;**
   (c) **My land and dwelling house thereon in Salem, Montserrat and**
   (d) **All my other lands in Salem, Montserrat and elsewhere in Montserrat, and any interest in properties**
4. **I GIVE BEQUEATH AND DEVISE any such residue of my estate, properties and effects belonging to me, whether movable or immovable, wheresoever situated and of whatsoever nature to JERMAINE DAVERN LEBASTRO BRAMBLE."**

The Will was witnessed by Marlon Meade and Kwame Ryan.

[3] There is no doubt that the terms of the last Will were radically different from the terms of the former.

[4] In the former Will the Claimant stood to benefit Land and premises at Salem including the testatrix shop and stock in trade. The testatrix devised her dwelling house and its contents unto Sarah Daley Bonelli and funds deposited in Montserrat Building Society.

[5] The testatrix also bequeathed the balance of the funds after her funeral and testamentary expenses were met, in equal shares between her stepson Nicholas Daley and Lucinda Ryan Daley of Friths village, Montserrat.

[6] In the latter Will of 9th May 2011, none of the above persons is mentioned. The sole beneficiary of her estate under that Will is the defendant, her grandnephew.

[7] The claimant alone challenges the validity of the Will on the ground that "the deceased at the time that the said Will purports to have been executed was not of sound mind, memory and understanding."

[8] The claimant in her particulars alleges as follows:
"At the time the deceased executed the Will she was of the age of 89 years suffering from Senile dementia. Her memory was so defective and untrustworthy that there was almost total loss of memory of recent events. She was at the time of the execution of the said alleged Will in such a condition of mind and memory as to be unable to understand the nature of the act and its effects, the extent of the property of which she was disposing or to comprehend and appreciate the claims to which she ought to give effect"

[9] The death certificate shows that Rose Amelia Daley was 87 years at the time of her death. The Will was executed on 9th June 2011.

[10] The deceased had no children. The claimant is now about 44 years old. Her mother died when she was about three (3) years old. The deceased was her godmother. The claimant began living with the deceased when she was about three (3) years old and lived with the testatrix until 1997 when she was about 28 years old.

[11] In her witness statement the claimant says that after she had stopped living with the deceased she had a close relationship with her up until her death. When the deceased fell ill, she bathed and cared for her as far as possible. The claimant said that when the deceased got her foot damaged, she the claimant took the deceased to Antigua to get a scan done. The claimant also said that while living with the deceased she was alert, well

dressed especially when she attended church. The claimant said that the deceased always kept herself and her surroundings in an immaculate condition. She was always cleaning her house because the testatrix did not like to see anything untidy or unclean. The claimant also said that the deceased was always clean and her clothes were always well cared for. She washed her hair weekly and always had it neatly combed.

[12] The claimant said in about the year 2010 she noticed a marked change in the deceased. When she visited the deceased, the deceased would have torn house dress and old shoes. Her hair would be uncombed. She would put on the same outfit for more than one day. Ms Lola Harris stated that the deceased had good clothes and shoes to wear but somehow chose to wear old torn clothes. The claimant said that when she spoke to her about her choice of clothes, she did not find anything wrong with the clothes or shoes.

[13] In her witness statement the claimant said that the deceased was hospitalized, as a result of a sick foot, from 23 March to 10 April 2006. She also said that the deceased also had surgery on her foot between 15th June – 30th June 2006. During that period the only relative who lived with her was Cecil "Caesar" Robinson. He lived with her from 1st July 2003 to July 2007.

[14] When the deceased was discharged from hospital and returned to her home and was recovering from surgery, Mr. Robinson gave her breakfast in the mornings. For the duration of that period, on work days the claimant according to her statement drove from her job at Brades to Salem where the deceased lived, cooked her lunch, fed her, gave her medication and then returned to work. I make the observation that this is quite a feat, if it is accepted that the normal lunch break is one hour.

[15] In the evenings the claimant said that she prepared her supper, fed her, gave her medication and settled her down for the night. The defendant lived with the deceased after Cecil Robinson left in 2007.

[16] The claimant said that during the recuperation from her surgery, she arranged for "meals on wheels" to provide food for the deceased. The deceased never operated her shop after surgery on her foot. She did not clean the house. She never cooked heavy meals during the last years which led up to her death. I suppose the claimant meant to say the deceased never cooked heavy meals during the last years leading up to her death, because as it is worded by the claimant, In my view it is suggested that the lack of cooking heavy meals led up to her death. The death certificate does not support that contention. i.e. lack of consuming heavy meals was the cause of the death of the deceased. However, in my view, this does suggest that the deceased cooked light meals up to the time of her death. Cooking in my view requires some level of consciousness and concentration, a level of mental alertness e.g. when to turn on the stove/cooker, when to turn it off, when to put on pot/pan to cook, ingredients to put in the cooking. All these activities, in my considered opinion require some level of consciousness and concentration.

[17] The claimant's assertion that the deceased "cooked" up to the time of her death, in my view is supported in some measure by the evidence of Ms Chivone Gerald who said that when she visited the deceased, she was in the kitchen.

[18] The pride the deceased had in her personal hygiene was not "like" before. At times the claimant said when she questioned the deceased about when she took a bath, she would say for example today, Monday but it would be Friday. She lost sight of the days of the week. She would say "I bathe already and I don't need to bathe again". Her hair would need combing but she would insist that her hair was already combed when it was not and could not tell who combed it.

[19] Finally the claimant would say that food is in the house but the deceased would not cook. At times she would tell the claimant that there was no food in the house. The claimant said but when she opened the freezer and cupboards, there was food in them. The claimant

said that when she asked the deceased, "how you say you do not have any food in the house?" She would say immediately, "I did not say so." In my considered opinion that would have been considered an immediate response to the question posed to the deceased. It can be argued, however that that response showed a lack of appreciation of what went on before. And therefore could be classified as lack of memory.

[20] In my view, lack of memory by itself cannot be the basis for setting aside a testatrix Will which would otherwise be valid. In my considered opinion it must be shown that the testatrix mind was so defective at the time of making the will and did not have a sound mind and memory and was unable to understand the nature of the act and its effects or the extent of the property which she ought to give effect.

[21] Yvonne Harris in her witness statement said that from 2002, she lived next to Rose Amelia Daley until her death. She described the deceased as a fun loving person who liked to dress properly. The deceased went to church every Sunday except when she was sick. She owned a grocery shop which was always well stocked.

[22] Yvonne Harris said that in about 2010 she noticed the deceased would dress about 3 times a week to go to church, at times well dressed, at other times in her house clothes and tennis shoes. Sometimes she would see the deceased coming down the step of her house and she, Yvonne would ask Rose Amelia Daley, "Miss Rose where are you going?" She would answer "to church". Yvonne would say to her "today is not church" and Rose would ask her what day it was. Rose would respond "Oh my" and go back and sit on her gallery.

[23] In her witness statement, Yvonne Harris said that Miss Rose would tell her about something that happened over and over again from beginning to end in the same conversation. Yvonne Harris also said in her witness statement that when Rose got ill, the

defendant was living with her. He used to leave the house about 7am and return about 8pm.

[24] In her witness statement Yvonne Harris said that in her presence and hearing the defendant used to ask the deceased "When are you going to give me the house and land?" Miss Rose would answer "Boy move from there". I do not accept that the defendant would say anything like that in the presence of Yvonne the neighbor of the deceased for the reason that it is established by the evidence that this witness and the defendant were at loggerheads because Yvonne Harris accused the defendant on numerous occasions of enticing her boyfriend to seek the favours of other females. This Yvonne resented and this resentment was known to the defendant. In other words, to put it in local parlance; there was no love lost between the defendant and Yvonne Harris. As a result, I doubt very much that the defendant would make such a statement in the presence and hearing of Yvonne Harris

[25] Yvonne Harris said in her witness statement that later that night (i.e after she claimed she had seen Ms Gerald enter Miss Rose's house) the defendant came over to the house in which she lived with her partner and in her presence and hearing said "When Ada come from America and think she have everything covered Miss Rose already will everything to me." It seems to me that the defendant at the time he was alleged to have said the above, did not know Ada. He was asked by his Counsel if he knows Ada. He replied "I know an Ada after Miss Rose died. I went home one day, there were 3 persons in the house… A woman approached me. She introduced herself to me. She said she is Miss Rose's daughter. Ms Rose did not have any children.

[26] In addition, Yvonne Harris said in her witness statement:

"Miss Rose was well sick in her bed one day. I heard a car pulled up and I saw the defendant pulled up and I saw the defendant with a young lady entering Miss Rose's

house. I later found out that the young lady's name was Chivone Gerald, the same lawyer who drew up the Will."

[27] Miss Chivone Gerald in her cross-examination indicated that she had visited the testatrix on 6th May 2011 and took instructions from her. She returned on 9th May 2011 with the printed Will. Miss Chivone Gerald said in her witness statement, when she arrived at the testatrix house on 6th May 2011, the deceased was in her kitchen. Unfortunately, Miss Yvonne Harris in her witness statement did not say when or the date or the day the testatrix was ill in her bed. If it was on the 6th of May 2011. I reject Miss Yvonne Harris' assertion that the testatrix was "real sick" in bed for the simple reason that I prefer Ms Gerald's testimony for the reason that Ms Gerald has nothing to gain from giving that testimony. I regard her as being a totally independent witness. Whereas Yvonne Harris I do not regard as totally independent witness for the same reason as stated above. I do not accept Yvonne Harris' witness statement that later that night (i.e after the visit of Ms Chivone Gerald) "the defendant came over to the house in which I lived with my partner and said in my presence and hearing "when Ada come from America and think she have everything covered Miss Rose already will everything to me."

[28] Mr. Brandt, Learned Counsel for the claimant in his written submissions argues that in order for the purported Will of 2011 to be immune from attack it has to satisfy the requirements of section 7 of the Will Act of Montserrat[1]

"**S7 No Will shall be valid unless it shall be in writing and executed in the manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof, by the testator or by some other person in his presence and by his direction and such signature shall be made, or acknowledged, by the testator in the presence of two or more witnesses present at the same time and such witness shall attest and shall subscribe the will in the presence of the testator but no form of attestation shall be necessary."**

[1] CAP 03.08 of the Act of Montserrat

[29] There can be no doubt that the impugned will satisfies the conditions as laid down by Section 7 of Wills Act of Montserrat. I agree with Mr. Markham, Learned Counsel for the defendant that the issues that are to be determined are (1) whether the deceased Rose Amelia Daley had the necessary testamentary capacity to make her will of 2011. (2) Whether the will was made as a result of the defendant's undue influence.

CAPACITY

[30] Mr. Brandt Learned Counsel for the claimant contends that the mere capacity to communicate her testamentary wishes is not sufficient to discharge the burden of proof (i.e. she had testamentary capacity) but 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 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 disposition and the like. This has to be recognized in many cases"[2]

[31] Mr. Brandt refers to –

Pendock Barry v James Butlin[3]

W Scott Fultone et al v Charles Butty Andrew et al [4] and

Wintle v Nye[5]

He then submits that the principle from those cases is that whenever a will is prepared under circumstances which show a well grounded suspicion (my emphasis) 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

[2] [1994] S.C.R. 152 @ P.161
[3] [1838] 11 2 Moore P.C. 480
[4] [1874-1875] L.R 7 HL 448 at pp 471-472
[5] [1959] 1 ALL ER 552

prepared by or on the instructions of the person, a large benefit under it, but extends to all cases in which circumstances exist which excite the suspicion of the court, and prove affirmatively that the testator knew and approved of the contents of the documents. It is only when this is done that the onus is thrown back 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.

[32] I tried very hard to find or detect any suspicious circumstance let alone a well-grounded suspicious circumstance surrounding the making of the Will of 2011, I can find none.

[33] In **Tyrell v Painton 8 ors**[6] . In that case the testatrix made a will on 7th November 1892 mainly in favour of the plaintiff. On 9th November she executed another will which substantially revoked the former and gave the bulk of her property to John Painton. Thomas Panthon drew up the will of 9th November, Lindley L.J at page 156 opined "The circumstances under which it [the will of 9th November] was executed are strange and suspicious that I am in the greatest doubt whether she knew the effect of the document she was signing. Nobody knows what took place except Thomas Painton, and he calls in Peter Rowland a young friend of his, to be an attesting witness. Thomas appears to have found out that the will of 7th had been made and what was its nature, and there is some evidence that he said it was a shame to turn his father out. This he denies; but it is clear that he knew enough to make him angry. What is there to show that the testatrix had changed her mind between the 7th and the 9th? We have nothing but Thomas Painton's evidence, supported by that of Peter Rowland. There is strong evidence to show that Mrs. Bye [the testatrix] complained of Thomas Painton's having brought a strange young man into her room. If she had been consciously making a Will on 9th, she would not have complained of a stranger being brought to her room, nor would have afterwards referred to her former Will in the way she did. Thomas Painton took the Will away. He had no right to the possession of it. He says the testatrix told him to take it away. But we have only his

[6] [1894] p 151

word for that. Can we doubt that Mrs. Bye did not know what she was doing when she executed the Will?"

[34] Continuing Lindley LJ referred to **Barry v Butlin [Supra]** "Parke B delivering the opinion of Judicial Committee said 'The rules of cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two: The first that the onus probandi lies in every case upon the party propounding a Will of a free and capable testator. The second is that if a party writes or prepares a Will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court and also calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true Will of the deceased ….."

[35] The rule in **Barry v Butlin** (supra) **Fulton v Andrew**[7] , **Brown v Fisher**[8] is not, in my opinion confined to the single case in which a Will is prepared by or on the instructions of the person taking large benefits under it but extends to all cases in which circumstances exist which excite the suspicion of the court; and wherever such exist and whatever their nature may be, it is for those who propound the Will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the Will to prove fraud or undue influence.

[36] First of all, I say there can be no suspicious circumstance surrounding the making of the Will of 2011 except if one is to regard the mere making of a second Will to be considered a suspicious circumstance. That cannot be because if this was the case, every second Will would be subject to challenge.

[7] Law Rep 7 H.L. 448
[8] 63 L T 465

[37] I accept Ms Gerald's testimony that it was Miss Rose Amelia Daley the testatrix who gave her instructions to prepare the Will. The defendant in cross-examination said he had a conversation with Ms Gerald. As a result, Ms Gerald visited Ms Rose in 2011. He transported Ms Gerald to the home of Ms Rose; having done that he left. He was not allowed to remain in the house while she took instructions from the testatrix.

UNDUE INFLUENCE

[38] The evidence of Yvonne Harris to the effect that the defendant in her presence and hearing used to ask Ms Rose "when are you going to give me the house and land?" Ms Rose would answer: "Boy move from there"; cannot in my considered opinion support an issue of undue influence. I see no other evidence which could remotely raise such an issue.

[39] I say that that evidence cannot support such an issue for the following reasons; first of all, I reject that evidence. Even if I did not, I agree with Mr. Markham's written submission that the court is concerned with actual undue influence and not presumed undue influence. The latter is applicable to inter vivos transactions and does not apply to testamentary dispositions. Even if Ms Harris' evidence is to be believed that the defendant asked the deceased when was she going to leave the house and land to him; the fact that the deceased told the defendant, "Boy move from there" clearly demonstrated that the deceased's free will was not invaded. Moreover, there is no evidence if that statement was made and when it was made.

[40] Learned Counsel Mr. Markham in his written submissions contends that undue influence in the making of a Will means coercion. It is only when the Will of a person who is a testator is coerced into doing that which he does not desire that it is undue influence. Mr. Markham also contends that of course, coercion does not simply cover physical violence; it extends

for example, to talking to a sick person who is seriously ill in such a way that the person may be induced for quietness sake to do anything. (See **Wingrove v Wingrove**[9]**)**

[41] The onus is on the claimant to prove undue influence. She has come nowhere close to establishing that proof.

[42] Having decided that the testatrix gave instructions to Ms Gerald to make the Will of 9th May 2011 (the second Will) and having decided that there was no undue influence, I turn once again to determine the testamentary capacity of the testatrix at the time she gave instructions to Ms Gerald to make the Will and the time the Will was executed.

[43] Mr. Brandt in his Skeleton Arguments refers to **Harewood v Baker**[10] and contends that: "A testator must not only be able to understand that he is by his will giving the whole of his property to one object of his, but he must also have capacity to comprehend the extent of his property, and the nature of the claims of others."

[44] Mr. Brandt in his Skeleton Submission contends that these statements were cited with approval by Cockburn C.J at pp 568 and 569 but he failed to mention the case. I therefore take it that his quotation is correct.

[45] Mr. Brandt then went on to submit that that would prove the requisite capacity, but there will often be no such evidence and the court must then look at all the evidence to see what inferences can be drawn as to capacity or properly be drawn as to capacity, such evidence may relate to the execution of the Will but it may relate to prior or subsequent events. It would be absurd for the law to insist in every case on proof of actual understanding at the time of execution

[9] [1885] 11 P. D 8 at page 82
[10] 4 Moo P.C 282 at page 291

[46] I now refer to the witness statement of Josephine Lee. She said that she had been trained as a home carer and has been practicing that profession since 1998. She had known the testatrix for all of her life. Ms Lee said that there was a time when she became the testatrix' carer. On behalf of the Old People's Welfare Association, she began to take care of Miss Rose in January 2011 for two hours a day. Her nails were especially long and curving over. She had to cut them. She had to bathe her, wash and comb her hair. She had to cut them. Ms Lee made breakfast for the testatrix. She said that the condition of the sheet on the bed told her "that she was not the person she knew."

[47] Ms Lee said in her witness statement that if she got to Ms Rose at 10:00am she would be in her bed with the curtains 'closed up'. There was a clock in her room (not working) that showed 6:30 and whenever she got to the house, she would say to her "Ms Rose get up". She would say to me "It is only half past six". "I would tell her, it is not half past six". Ms Lee also said the deceased had a pale in which she urinated in the night. She would leave it there with the urine. When she would draw it to her attention, she would take it up, pass the toilet and empty it in the yard.

[48] Mr. Brandt, Learned Counsel for the Claimant in his skeleton arguments submits that although Ms Lee is not a medical doctor but having regard to her training, the length of time she spent with the deceased as her carer, she was in a position to observe the deceased.

[49] Mr. Brandt submits that there is no evidence of actual understanding in that Ms Gerald did not have the opportunity to assess the deceased testamentary capacity prior to taking instructions for the 2011 Will and at the time she executed the Will. According to her evidence, she did not know the deceased before the date when she was first taken by the defendant to the deceased to take instructions regarding the Will. Further, there is no evidence when Ms Gerald was brought back by the defendant to execute the Will she had

any contact whatsoever with the deceased until her death. Ms Gerald said she spent 15 – 20 minutes when she took her instructions.

[50] Is there any evidence that can properly be drawn as to the capacity of the testatrix? I think there is.

[51] Ms Chivone Gerald in her witness statement said that when she visited Rose Amelia Daley on 6th May 2011, She, Ms Gerald, explained to the testatrix the process of making a Will. Ms Gerald said that she asked the testatrix about her property and who she wanted to leave her property to after her death. Ms Gerald said that the testatrix told her at the time of giving instructions to her. Miss Gerald said: "the deceased mentioned the claimant and indicated that she had already given the claimant what was for her which was property at Nanse's River".

[52] This to my way of thinking is powerful evidence from which I draw the inference of testamentary capacity for the following reasons: There could have been no prompting by Ms Gerald because she said that she did not know that the deceased owned lands at Nanse's River. She also said that she did not know that the deceased had made a former Will. So it is beyond doubt that Ms Gerald would not have known the terms of the first Will. By Clause 1.3 of that Will the testatrix had devised as follows **"From the portion of lands I own at Nanse's River I devise one (1) task to Ellen Edwards and the balance believed to be about two tasks unto Lola Veronica Harris."**

[53] Of course the Will of 2011 would have revoked the former Will of 2002. In the meantime an interesting thing happened. On 30th of August 1999, Rose Daley, the testatrix, transferred the land referred to in Clause 1.3 of the Will of 2002 to Ellen Edwards and on 9th August 2002 Ellen Edwards transferred Block 11/2 Parcel 7 to the Claimant.

[54] I draw the inescapable inference that the transfer of the land to the Claimant must have been done on the instruction of the testatrix or at least she knew about the transfer to the claimant of that land which belonged to her in order for the testatrix to state boldly that the Claimant had already been given what was for her. Ms Gerald could not have known at the time of the transfer unless the testatrix told her.

[55] Ms Chivone Gerald at the time of her two meetings with the deceased and taking instructions from her to prepare the Will to dispose of her property said that the testatrix did not appear delusional. The deceased was very knowledgeable of the property she had and whom she wished the property to pass to after her death. There was no doubt that the deceased was capable of making a Will to dispose of her property and was prepared to act on that knowledge.

[56] Mr. Markham, Learned Counsel for the defendant submits that there are many cases in which a testator suffered from mild or moderate dementia, or short term memory loss and / or episodes of confusion, but was found to have retained sufficient testamentary capacity. In **Hoff v Atherton**[11] the testatrix suffered from "mild to moderate dementia" when she made her Will. However, she was found to have had capacity. There was evidence that the testatrix had capacity to understand the nature and extent of her estate: She had for instance, discussed financial and business matters with her accountant in a competent fashion not long before the execution of the contested Will.

[57] Mr. Markham argues that the discussion with Ms Gerald and the deceased demonstrated that she had capacity to understand, without any prompting the deceased told Ms Gerald that Lola (the Claimant) got what was for her already.

[58] Mr. Brandt in his Skeleton arguments said that the last Will of the deceased was made about two weeks before the death of the testatrix. The Will in fact was made on 9th May

[11] [2004] EWCA CIV 1554

2011. The testatrix died on 11th June 2011, in my reckoning that was about 32 days that the will was made prior to the death of the testatrix.

[59] Finally, Mr. Brandt referred to the 'Golden Rule' and submitted that the substance of the 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. The attorney in the present case failed to do either, compliance with the Golden Rule does not of course operate as a touch stone of validity of a Will, nor does non-compliance demonstrate invalidity. However, at the very least, the attorney ought to have kept notes.

[60] Mr. Brandt also referred to an article by **M.M Litman and G.B Robertson**[12]. With reference to special circumstances, the article says inter alia:-

"In the context of testamentary capacity cases serious illness in a testator, especially where the testator is elderly and his illness is capable of affecting his mental state, is one of the most extreme of suspicious circumstances. Few other circumstances demand of the solicitor greater care and caution."

[61] I reject entirely that the testatrix was seriously ill when she gave her instructions to Ms Gerald to make her Will. As I said above I accept Ms Gerald's evidence that when she arrived at the home of the Ms Rose Amelia Daley, she was in the kitchen. Significantly, that supports my finding that the testatrix prepared light meals up until the time of her death. I reject outright Yvonne Harris' testimony that Ms Rose was "real sick in her bed" when Ms Gerald went to her home on 6th May 2011.

[12] (1984) 62 Ca. Bar Review 457

[62] I turn now to consider the important case in our jurisdiction: **In the Estate of Ena Olive Payne (Deceased). Between (1) Anne-Marie MacLeish, (2) Lynette Rooker and Avision Alber "Bert" Marryshow.**

Pereira JA (as she then was) considered the passage in the judgment of Lord Neuberger MR in the case of **Gill v Woodale and Others**[13] to be opposite – "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 persuade themselves that evidence exists, which shows that the Will did not, could not or was unlikely to represent the intention of the testator, or 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 Will, which will result in many estates being diminished by substantial Legal Costs." This fundamental principle of English Law is also expressed in terms of freedom of testamentary disposition.

[63] Continuing PEREIRA JA quoting from Lord Neuberger:-

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 be often partisan and will be unavailable or far less reliable due to the passage of time. As Scarman J put it graphically in the **Estate of Fuld (deceased) no 3**[14] "where all is dark it is dangerous for a court to claim it can see the light. That observation applies with almost equal force when all is murky and uncertain."

[64] In my considered opinion the claimant began to show her disappointment even when the testatrix was still alive. The testatrix had a ring and chain which she gave to the defendant

[13] [2010] EWCA 1430 at paras 16 and 17
[14] (1868) P675, 714E

while she was alive. He was wearing the ring and chain one day when he met the claimant. Thereafter he got a call from his father who spoke to him about the ring and chain. His father spoke to Ms Rose about the ring and chain. The issue about the ring and chain was settled. The day of the trial he was wearing the ring in Court. He said the chain was at his home. The inferences to be drawn are quite clear. The claimant saw the defendant wearing the ring and chain. She was not pleased about that. She complained to the defendant's father who cleared up the issue. According to the defendant this was in 2010.

[65] I come to the conclusion that the ring and chain belonged to Ms Rose. She gave them to the defendant and when the claimant saw he was wearing them, she became upset to the extent that she called the defendant's father to complain. In fact, the claimant herself said that she was upset when she understood that Ms Rose made a new Will and gave the defendant property.

[66] The defendant said that he did not regard Ms Rose's memory as defective and untrustworthy. He recalled her as forgetting things. She sometimes forgot for instance dates and days.

[67] Mr. Bramble said that he went home one day (after the death of Ms Rose). There were three persons in the house; the claimant was one of the three persons. A woman approached him, introduced herself as Ada Daley. She told him she is the daughter of Ms Rose. Ms Rose he said had no children. Ada told him Ms Rose is dead now and she came to take over now. He has to go. He made a call to Ms Gerald.

[68] Mr. Brandt contends, "that the last Will of the deceased in this case was made about 2 weeks before her death. What could explain the sudden and radical reverse (sic) of her benefits except the condition stated by the Claimant in her affidavit of 18th September 2012…and Yvonne Harris' filed 21st September 2012?

[69] I make the observation, that in my considered opinion, Yvonne Harris' statement is slanted in favour of the claimant e.g in her testimony before the court she said "Jermaine Bramble never assisted Ms Rose while he was living there." I ask rhetorically, How does Yvonne Harris know this when she did not live in the house? Yet she glibly makes that statement. The defendant disputes this. In contrast Yvonne Harris said in her witness statement: "The claimant paid all bills for water, electricity and wash Ms Rose's clothes when Ms Rose fell sick because she could not do it for herself"

[70] Josephine Lee who was carer of the deceased from January 2011 for 2 hours a day, in her witness statement said inter alia: "I have to bathe her, wash her hair and comb it". Jermaine Bramble in his witness statement said: "I am aware that the claimant paid some of the bills if I am not around or if I was away." The claimant has never liked the fact that I stayed with my aunt, and she repeatedly asked Ms Rose to ask me to leave but Ms Rose refused to do so. As a result the claimant and the deceased fell out for an extended period.

[71] At this point, I must say that I prefer the testimony of the defendant to that of Yvonne Harris having seen both of them in the witness box and analysed their testimony. The defendant's testimony is believable e.g he readily admitted that the claimant paid some of the bills when he was away. He readily admitted that at times the deceased forgot the date and did not remember what day of the week it was.

[72] I accept as a fact that the claimant asked the deceased on a regular basis to ask the defendant to leave. She refused to do so and that caused a rift between the deceased and the claimant.

[73] I am fortified in my finding that the Claimant asked the deceased to ask the defendant to leave the house by subsequent event. After the death of Ms Rose, the claimant showed up at the house with Ada and another person. Ada told the defendant that she was the

daughter of Ms Rose. This was of course untrue and asked the defendant to leave. Why would Ada lie about Ms Rose being her mother and then ask the defendant to leave the house. Was she put up by the claimant to do so? In my view, that is not beyond the realm of possibilities.

[74] The answer to Mr. Brandt's query, what could explain the sudden and radical reversal of her (claimant's) benefits? In my view, this may be found in the claimant's repeatedly asking the testatrix to ask the defendant (her grandnephew) to leave. I draw the inference that that must have infuriated the deceased to have caused a rift between the claimant and the deceased. I find support for this by what I regard as the poignant remark to Ms Gerald by the testatrix without prompting that she (Ms Rose) had already given the claimant what was for her.

[75] In my view, notwithstanding the kind and generous nature of the testatrix which nearly all the witnesses spoke about …. The gift of the ring and chain in 2010 by the testatrix to the defendant indicated, to my mind, that the testatrix was showing special favours to her grandnephew.

[76] Having regard to the foregoing I hold that the testatrix had capacity to make the Will of 9th May 2011.

[77] The claimant's claim is hereby dismissed. The defendant is hereby granted the declarations which he seeks

(1) The Last Will and Testament dated 9th May 2011 of Rose Amelia Daley is hereby pronounced in Solemn form.

(2) It is hereby declared that the deceased Rose Amelia Daley was of sound mind at the time she gave instructions to Ms Gerald and at the time of the Execution of the said Will.

[78] It is hereby ordered that a Grant of Probate of the deceased's Estate to JERMAINE BRAMBLE, executor of the said Will be made to Jermaine Bramble.

[79] Costs to the Defendant Jermaine Bramble to be agreed, if not agreed to be assessed by Order for Prescribed Costs.

Albert Redhead
High Court Judge