

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Division

Civil Suit No: 1914 of 2003

BETWEEN:

VIDA INEL ELCOCK

First Plaintiff

YVETTE ONETA ELCOCK

Second Plaintiff

AND

ATHIEL ANDERSON ELCOCK

Defendant

Before:

The Hon. Madam Justice Jacqueline A. R. Cornelius, Judge of the High Court

Appearances:

Mr. Ivan Alert and Ms. Karen A. Perreira, Attorney-at-Law for the Plaintiffs

Mr. Chester L. Sue, Attorney-at-Law for the Defendant

2009: April 16 and 17

2010: April 19 and 20

2010: May 4 and 5

2013: June 12

JUDGMENT

- [1] **Cornelius, J:** Internecine battles over parental estates are not uncommon in the courts, as in life. This is one such case. At issue is the validity of one of two wills, the first largely in favour of the Defendant, and the second in favour of the Plaintiffs, his two sisters.
- [2] Their mother, Edna Earline Elcock (hereinafter sometimes called “the Testatrix”) died in this Island at the age of 74. On her death, she left behind three children and two wills, one will dated March 3, 2001 (hereinafter called “the First Will”) and the other dated September 6, 2001 (hereinafter called “the Second Will”). The existence of two testamentary documents specifying different beneficiaries and executors for the very same estate has unsurprisingly kindled discord amongst the Testatrix’s surviving children. It has also led to this suit in which her daughters are pitted against their only brother.
- [3] Vida Enel Elcock and Yvette Oneta Elcock, named as the Plaintiffs in this matter, are both the daughters of the Testatrix, albeit from different fathers. By her Second Will the Testatrix appointed them jointly as Executrices and Trustees of her estate. The Second Will also named them, as well as their brother, Athiel Anderson Elcock, as the beneficiaries to the estate. The primary assets of the estate appear to be a chattel house and a walled house, both situated in the parish of Christ Church. Under the Second Will, the Testatrix left the chattel house to the Defendant and bequeathed the walled house to the Plaintiffs.
- [4] On November 2, 2001, fewer than 2 months after making the Second Will, the Testatrix passed away. The Plaintiffs then filed an application in the Registry of the High Court for probate of the Second Will. Notice of that application was given to their brother, Athiel Anderson Elcock, who proceeded to lodge a caveat in the High Court Registry against the grant of probate sought by his sisters.
- [5] Accordingly, on October 21, 2003, the Plaintiffs filed a Writ of Summons in which they urged the Court to decree probate of the Second Will of Edna Earline Elcock dated September 5, 2001, in solemn form. Their brother is named as the Defendant.

- [6] In his Defence filed on November 21, 2003, Athiel Anderson Elcock denied that the Last Will and Testament of Edna Earline Elcock, Deceased was the Second Will dated September 6, 2001. He alleged that her last will and testament was instead the First Will that had been executed by the Testatrix on March 3, 2001 and by which the Testatrix not only appointed the Defendant as her sole executor, but named him as the sole beneficiary of her entire estate.
- [7] The Defendant pleaded that at the time of executing the Second Will, the Testatrix was not of sound mind, memory and understanding. In his particulars, he explained that when the Second Will was drafted in 2001, the Testatrix was not only elderly but suffering from senile dementia and diabetes and was in such a mental condition as to be unable to understand (i) the nature of her acts and its effects; (ii) the extent of the property she was disposing by the Second Will; and (iii) to comprehend and appreciate the claims to which she sought to give effect by that Will.

The Evidence Before the Court

- [8] The First Plaintiff, Vida Enel Elcock, gave evidence before the Court in this matter while the Second Plaintiff, Yvette Oneta Elcock, did not do so but was made available for cross-examination at the request of learned counsel for the Defendant. Attorney-at-law, Zarina Khan, who drafted the Second Will and acted as a witness to its execution by the Testatrix also provided evidence at the hearing, as did one Bruce Hall, who described himself as the former employer of the Testatrix and as her friend and confidante.
- [9] To establish his case, the Defendant not only testified before the Court but also called three witnesses, namely (i) Lawrence Bourne, his father, (ii) Mr. Olson Alleyne, the attorney-at-law responsible for drafting and witnessing the First Will, and (iii) Dr. Joy Sue, a medical doctor.

The Evidence of Vida Inel Elcock

- [10] In her evidence before this Court, Vida Elcock categorically denied that she had anything to do with the selection of attorney-at-law, Zarina Khan, to draft her mother's Second Will or that she had ever given Ms. Khan any instructions regarding the preparation of

the Second Will. She further testified that she had not been aware of the existence of the First Will.

- [11] The First Plaintiff maintained that both she and her sister, Yvette, shared a very close relationship with their mother, the Testatrix. She testified that she not only spoke with but saw her mother every day. After all, her mother had only lived 10 minutes away from her. It was her evidence that she took her mother to the hospital when the Testatrix fell ill in September, 2001 and that she visited her regularly during her stay.
- [12] The First Plaintiff asserted that before her death in November, 2001 the Testatrix had been in good health aside from being diabetic and suffering from Parkinson's disease. The Testatrix had visited a private doctor for these conditions. The First Plaintiff denied that the Testatrix had been senile and testified that she was in full control of all of her senses and could participate in rational conversation without difficulty.
- [13] The First Plaintiff also disputed the assertion made by Counsel for the Defendant that she had on August 29, 2001 taken the Testatrix to have a brain scan performed. She stated that her mother had been administered insulin by her daughter when the nurse who normally administered the medication was away but denied that her daughter had failed to administer the insulin as regularly as was medically required.

The Evidence of Yvette Oneta Elcock

- [14] During her cross-examination by Mr. Sue, the Second Plaintiff testified that she was the eldest child of the Testatrix. She indicated that she had lived with her mother but had moved away about 2-3 years before the death of the Testatrix. However, it was her evidence that she had not moved very far and never ceased visiting her mother. Her mother also visited her. She did not deny that although she had left the home which she was sharing with the Testatrix, the Defendant continued to reside there.
- [15] The Second Plaintiff maintained that although she ceased living with her mother before her mother's death, moving away did not mean that she ceased looking after the Testatrix. She confirmed that the Testatrix had been diagnosed with diabetes and required daily dosages of insulin but indicated that she had never been the person to

administer these dosages. She denied that the Testatrix cooked for herself, stating that her sister, the First Plaintiff, did the cooking for their mother.

[16] On being asked whether the Testatrix had ever wandered away, the Second Plaintiff explained that the Testatrix had not wandered away but had gotten lost while she was going to visit Nurse Chase, who administered her insulin. The Second Plaintiff pointed out that the Testatrix was able to give her name and telephone number to a passing lady as soon as she realized that she was lost and was easily accompanied home.

[17] According to the Second Plaintiff, it was not until after the death of the Testatrix that the Second Plaintiff became aware of the existence of the First Will. The Second Plaintiff firmly denied the allegation that she had at any time told the Defendant that she would prevent the Testatrix from bequeathing her walled house to the Defendant and his family.

The Evidence of Zarina Khan

[18] Zarina Khan, an attorney-at-law who had been in practice for over 18 years, gave evidence to the Court that she was familiar with the Testatrix because the Testatrix consulted her at her chambers sometime in August, 2001 regarding a will she wished to be drafted in order to replace her earlier will. At that meeting, the Testatrix informed Ms. Khan that she owned a walled house and a chattel house. According to Ms. Khan, the Testatrix explained that her son lived with her in the chattel house but that she was having difficulties with him. Her son obtained rental income through the leasing of the walled house that she owned but did not use this income towards her maintenance and she was forced instead to rely on her daughters. The Testatrix therefore expressed a desire to devise the walled house to her daughters and leave only the chattel house for her son.

[19] Ms. Khan testified that she duly prepared a will according to the instructions given to her by Testatrix and that the Testatrix subsequently met with her on either September 5, 2001 or September 6, 2001. On this date the Testatrix was shown a draft of the Will which she confirmed as being in accord with her instructions. The Will was then executed by the Testatrix in the presence of Ms. Khan and Ms. Khan's secretary, Ms. Brewster. Ms.

Brewster and Ms. Khan both then signed the Will as witnesses to its execution. A copy of this Will was duly entered into evidence as *Exhibit "VIE 1"*.

[20] Ms. Khan described the Testatrix as being, in demeanor, quite calm and collected. She indicated that the Testatrix was not hesitant in any way and was able to express herself quite clearly. To Ms. Khan the Testatrix appeared to be in relatively good health, although the Testatrix had mentioned that she was in her 70s and that she was suffering from Parkinson's. Ms. Khan depicted her physical appearance as being a little frail and her hands a little weak but insisted that although frail and shaking the Testatrix was able to hold a pen steady in her hand so as to be able to execute the Second Will without any difficulty. She maintained that the signature on the Second Will was the signature of the Testatrix and no other person.

[21] Ms. Khan was unable to recall whether the Testatrix had come to her office alone or whether she had been accompanied by any other person. She testified that she had spoken to the First Plaintiff after the death of the Testatrix but was unable to say with any measure of certainty whether she had spoken to her prior to that. She insisted, however, that she had never met or spoken to the Second Plaintiff.

The Evidence of Bruce Hill

[22] The final witness for the Plaintiffs was Bruce Hill, who testified that he was familiar with all of the parties as their mother, the Testatrix, had been employed by him for about 2 decades as a domestic. He asserted that he spoke to the Testatrix regularly and that she trusted and confided in him.

[23] According to Mr. Hill, the Testatrix had mentioned to him that she desired to make a will as she wanted to leave her estate to her children. He had recommended Zarina Khan to her for this purpose and then asserted that he had nothing more to do with the matter. He had never given instructions to Ms. Khan on behalf of the Testatrix nor had he been present when the Testatrix gave instructions. Neither was he present when she executed the will nor had he ever seen the testamentary document ultimately prepared for her.

[24] Mr. Hill maintained that when the Testatrix discussed making a will with him she understood what she was doing and knew exactly what she wanted to do and why she

wanted to do it. She had not at any time appeared forgetful. Moreover, he indicated that from his discussions with her, it did not appear to him that she wished to disinherit her daughters.

The Evidence of the Defendant

- [25] The Defendant admitted to having been aware of the existence of both the First Will and the Second Will. He testified that he had accompanied the Testatrix to the office of the attorney-at-law who drafted the First Will but claimed that he had not been present when the Testatrix actually signed it. He asserted that the Testatrix had been shaking badly at this time but then amended his testimony to say that she was shaking but not too badly. He testified that he had not accompanied her to the attorney who had drafted the Second Will.
- [26] During the course of his evidence, the Defendant claimed that his mother was hospitalized immediately prior to her death and that during that period of hospitalization he was informed by her doctor that she was suffering from not only diabetes, but from Alzheimer's as well. He alleged that when he visited her at the hospital she did not appear to recognize him, although he had an extremely close relationship with her and spoke to her daily.
- [27] The Defendant further claimed that his mother had an acrimonious relationship with his sisters. He described them as being very disrespectful towards her and asserted that they would take advantage of her when they were living at her house. In the same breath, he also testified that the First Plaintiff came by to take the Testatrix to a brain specialist when his mother had started wandering and getting herself lost.
- [28] In his evidence the Defendant sought to provide examples of behavior engaged in by the Testatrix that either pointed towards her lack of mental competence or raised concerns about it. For example, he asserted that the Testatrix was often wandering around the St. Patrick's area unable to find her way home and he had therefore been required on more than one occasion to find her and bring her home. The Defendant claimed that such behavior commenced before 2001. He was, however, unclear as to when precisely it

started, mentioning at one point that one incident had occurred in November, 2001. The Defendant had died early in November of 2001.

[29] The Defendant also claimed that the Testatrix's worrying behavior had occurred while she was still working with Mr. Hill, possibly in 2001, although he could not recall whether it was actually 2001. According to the Defendant's evidence, Mr. Hill had even called him to tell him that his mother was not normal anymore and was ready to fight with another lady that was in his employment. Mr. Hill, of course, made no mention of any such incident in his evidence nor was such an incident put to him in cross-examination. Indeed, his evidence was unchallenged.

[30] Other behavior by the Testatrix to which the Defendant made mention was her inability to recall whether she had cooked, which he claimed led to her cooking 2-3 times a day. Such behavior, he asserted, was not normal. According to the Defendant, the Testatrix had once even put a pot on the stove and forgotten about it, causing him to arrive home to find it in flames. He further testified that she washed her money in the sink and disposed of it in the stuff bin. Like the other behavior cited by the Defendant, the Defendant was unable to state when this behavior had commenced or even occurred. He was aware that his mother had been visiting a private doctor who had an office in Maxwell, Christ Church, but claimed that he did not know what had become of him and had therefore been unable to get any information from him.

The Evidence of Lawrence Bourne

[31] The Defendant's father, Lawrence Bourne, claimed to have known the Testatrix for a very long time. He asserted that he had enjoyed a relationship with her that lasted for over 40 years. The Defendant was the product of his union with the Testatrix.

[32] According to Mr. Bourne, the Testatrix had regularly cooked for him and his son, the Defendant. She had also taken care of the Defendant's two children while he was at work. These children apparently lived with the Defendant in the Testatrix's house. Their mother/s lived elsewhere.

[33] Mr. Bourne corroborated the evidence of the Defendant concerning the relationship which the Testatrix had with her daughters, asserting that they were of no use and did

little to help the Testatrix. He alleged that the Testatrix and the First Plaintiff, in particular, had not gotten along well for a very long time. According to Mr. Bourne, the Testatrix had confided in him that she intended to leave her property to her son and not her daughters and had also informed him in confidence that her daughters had threatened to fight the Defendant for everything.

[34] Although Mr. Bourne alleged that the Testatrix did not get along with her daughters and that her daughters provided no assistance in caring for her, he also alleged that 2 weeks before the Testatrix had been admitted into the Hospital the First Plaintiff had taken the Testatrix to visit a brain doctor and had returned “*quicker than a snow cone*”, causing him to request 1 week later that she take her back to the doctor, who, he says, then had the Testatrix immediately admitted into the Hospital.

[35] This witness also attempted to corroborate the evidence of the Defendant concerning the mental state of the Testatrix prior to her death, but took the level of mental deterioration even further. It was his evidence that the Testatrix started to lose her senses and that she often began walking away from home, cursing. He indicated that she got progressively worse until she was doing nothing but sitting and staring and had to be fed by her granddaughter. The shaking, he stated, had started over a year earlier but had become constant and unrelenting until she was unable to hold nothing steady in her hands.

[36] The Court was not impressed with the evidence of this witness, who was entirely unclear as to narrative he was attempting to establish and whose evidence the Court found lacked logical coherence. Like his son, he was particularly unreliable as it regarded the dates on which certain conduct by the Testatrix had allegedly been performed and the date and rate of her alleged deterioration.

The Evidence of Olson Alleyne

[37] The evidence and cross-examination of Mr. Olson Alleyne was brief and to the point. Mr. Alleyne testified that he had first met the Testatrix in 1990 and had been her lawyer since then. According to him, it was some 10 years after he met her that the Testatrix instructed him to draft a will for her. Mr. Alleyne testified that the will he drafted for her, which was the First Will, was duly executed on March 3, 2001 and a true copy of this

Will was entered into evidence as *Exhibit “AE1”*. It was also his evidence that after drafting the First Will he conducted no further business for or on behalf of the Testatrix.

- [38] Mr. Alleyne was unable to recall whether the Testatrix had been accompanied by any other person when she arrived at his office to give instructions and/or execute the will. He was also unable to say how old she had been when she had executed the Will but asserted in cross-examination that when she came to give instructions for her will and to execute it, he had not believed it necessary to call in medical evidence to satisfy himself as to her competence.

The Evidence of Dr. Joy Sue

- [39] The evidence of Dr. Joy Sue, who was a qualified medical doctor and psychiatrist, was, in the Court’s opinion, of very limited value. Dr. Sue had not examined the Testatrix prior to her execution of either the First Will or the Second Will or, in fact, at any time at all. She could not therefore provide the Court with her medical opinion as to the mental competence of the Testatrix. Accordingly, in her evidence to this Court she could only speak quite generally about the two medical conditions from which the Testatrix is said to have suffered prior to her death.
- [40] One of the conditions with which the Testatrix was afflicted was Parkinson’s disease, which Dr. Sue explained was a degenerative disorder affecting the central nervous system whose symptoms included tremors and impaired muscle co-ordination. She characterized the disease as a neurological condition with neurological sequelae that could lead to a mental condition known as dementia.
- [41] The doctor defined dementia as impairment in mental capacity that was severe enough to impair functions in social situations. She indicated that dementia could cause memory loss of which the inability of a person to recognize or find their way from familiar surroundings could be a presenting symptom, as could be their inability to recall what they had just done.
- [42] Dr. Sue agreed that not all patients suffering from Parkinson’s disease developed dementia; only approximately a third did so. She accepted that most of those affected were over the age of 60 but insisted that the presence of dementia was not easily

discernible to a layman, particularly where the condition was present only in a mild form or was in its early stages. Medical tests were therefore required in order to determine the level of cognitive impairment.

- [43] In her evidence the doctor further indicated that a person suffering from dementia could experience lucid moments when they possessed a clear perception of surroundings despite being in the midst of mental disease. In her opinion, a lucid moment had to be delineated by a psychiatrist and could not be determined by a layman.
- [44] Dr. Sue also discussed diabetes which she described as a metabolic condition resulting from impaired glucose regulation. She explained that insulin had to be taken by persons experiencing Type I diabetes or those with Type II diabetes whose blood sugar was not controlled. It was her evidence that if insulin was not administered as required, it could cause either hyper/hypoglycemia but a hypo/hyper glycaemic individual may still possess mental competence. She accepted that it was possible that a person suffering from a combination of these medical conditions i.e. dementia, Parkinson's and diabetes, may not be competent, but stated that it depended entirely upon the individual in question.
- [45] In cross-examination by counsel for the Plaintiffs, Dr. Sue agreed that diagnosis of Parkinson's was not necessarily a disability. She reiterated that not all patients diagnosed with Parkinson's developed dementia and that she could not say whether the Testatrix had developed it. She also accepted that there were many conditions that could cause disorientation including sleep deprivation, drug effects and poor nutrition.

Issues

- [46] It is clear to the Court, both from the evidence of attorney-at-law Zarina Khan and the copy of the Second Will, which was entered into evidence, that the Second Will has satisfied the formal requirements of due execution stipulated under *section 61* of the *Succession Act, Cap 249 of the Laws of Barbados*. The Defendant has not alleged otherwise.
- [47] Accordingly on the basis of the pleadings, legal submissions and evidence presented before me, it appears that the primary issue for my determination is whether the Testatrix in this matter had the necessary testamentary capacity to give instructions for the

preparation of her Second Will, the Last Will and Testament dated September 6, 2001, and whether she had the requisite testamentary capacity to execute this Will on September 6, 2001.

[48] In so doing, I am also required to consider whether the Testatrix knew, understood and approved of the contents of that Second Will at the time of its execution.

[49] Although the Defendant has alleged that the last will and testament of the Testatrix was the First Will dated March 3, 2001, he has not applied for probate of the First Will and the Court is not therefore required to make any determination as to the validity of the First Will, although it may take its contents into account in determining the issues outlined above.

Submissions to the Court

[50] Mr. Ivan Alert, who appeared as counsel for the Plaintiffs, accepted that under common law the Plaintiffs, as the party propounding the Second Will, had to satisfy the Court that the Testatrix had the requisite testamentary capacity and knew and approved of the contents of this will. He submitted that under the *Succession Act of Barbados* extrinsic evidence was admissible to show the intention of the Testatrix and to assist in explaining any contradiction.

[51] Mr. Alert relied on the test of testamentary capacity established by the leading case of *Banks v Goodfellow (1870) LR 5 QB 549*, as explained by **Parry and Clark, the Law of Succession (Ninth Edition)**, and submitted that the totality of the evidence adduced by the Plaintiffs clearly supported the conclusion that the Testatrix had the capacity to execute the Second Will at the time that she made it. The evidence showed that she had understood the effect of the will and the extent of the property she was disposing.

[52] While Mr. Alert accepted that the legal burden of proving testamentary capacity rested upon the Plaintiff as the party seeking to propound a will, he submitted that it was possible for the evidentiary burden to shift from one party to the other. He argued that where a duly executed will was rational on the face of it, this created a rebuttable presumption that the testator possessed the requisite testamentary capacity to make the

will. In support of these submissions he relied, *inter alia*, on the English cases of *Waring v Waring (1848) 2 Moo P.C. 480* and *Boughton v Knight (1873) LR 3 P & D 64*.

- [53] According to Mr. Alert the presumption applied to this case as the Second Will had been duly executed in accordance with *section 61* of the *Succession Act* and was rational as to its contents. The Defendant had failed to provide any evidence to rebut the presumption. He had not disclosed any medical report or called any medical professional who had actually attended to the Plaintiff to give evidence. There was therefore no medical evidence before the Court to indicate that the Testatrix had been suffering from senile dementia or Alzheimer's or any other mental condition that prevented her from possessing the requisite testamentary capacity when she executed the Second Will.
- [54] Mr. Alert also relied on *Barry v Butlin (1838) 2 Moo P.C. 480* and *Cleare v Cleare (1869) LR 1P& D 655* to further submit that once it had been proved that a testator had the requisite testamentary capacity and had duly executed his will, a rebuttable presumption also arose that the testator knew and approved of its contents at the time of execution and the evidential burden shifted to the party opposing the will. He contended that the Defendant had once again failed to adduce any evidence to rebut this presumption.
- [55] Mr. Alert accepted that the presumption did not apply where the will was prepared or executed under circumstances that created a well grounded suspicion that it did not express the mind of the testator and where the circumstances created such a suspicion, affirmative proof of the testator's knowledge and approval was required.
- [56] While Mr. Alert did not in any way agree with Counsel for the Defendant that there was a well-founded suspicion in this case, he pointed out that affirmative proof included evidence that the testator had given instructions for the will and it was prepared according to those instructions and evidence that the will was read over by or to the testator and he understood what was read. Such evidence, he submitted, had been provided by the Plaintiffs.
- [57] Learned Counsel appearing for the Defendant, Mr. Chester Sue agreed with Mr. Alert that the legal burden of proof rested upon the Plaintiffs as the persons seeking to

propound the Second Will to prove that the testator of the will possessed testamentary capacity at the time of its execution.

[58] While Mr. Sue appeared to accept the presumption of testamentary capacity, he submitted that this presumption did not apply where the will had been prepared in circumstances which excited the Court's suspicion. He directed the Court to *Non-Contentious Probate Practice in the English speaking Caribbean (Second Edition)* by Karen Nunez-Teshira in which the author had listed some of the circumstances that could potentially arouse the Court's suspicion.

[59] It was the submission of Mr. Sue that, in this case, the suspicious circumstances existing during the execution of the Second Will included:

- (i) A marked departure from previous testamentary dispositions: Mr. Sue contended that the Plaintiffs stood to obtain “*the lion's share*” of the estate under the Second Will and the dispositions in this will were not supported by the evidence adduced as to the relationship which the Testatrix had with her children. He submitted that the natural affection and ties of her close relationship with her son had been disregarded.
- (ii) Secrecy surrounding the execution: According to Mr. Sue, there was secrecy surrounding the execution of the Second Will as the Testatrix had not confided in Mr. Bourne about her intentions to prepare it and, further, neither the Plaintiffs nor Ms. Khan could say how the Plaintiff arrived at the office of Zarina Khan to give instructions on the will and then to execute it, although it was clear that she was in no state to travel there on her own.
- (iii) Absence of independent advice: It was the submission of Mr. Sue that there was doubt as to whether the Second Will was drafted and executed by the Testatrix of her own free will as, according to him, there was evidence that she had been taken to the lawyer's office by the Plaintiffs under a pretence that they were travelling elsewhere.
- (iv) Shaky or materially different signature of the testator: Counsel for the Defendant pointed out that while the Testatrix had been described by the attorney-at-law drafting the Second Will as having been frail and shaking, the

attorney-at-law nonetheless testified that the Testatrix had signed the Second Will unassisted by any person. Mr. Sue submitted that when the signature of the Testatrix on the Second Will was compared to that on the First Will there was cause to doubt that the signature on the Second Will was of her free will. He indicated that the Signature on the First Will had been slanting upwards while that on the Second Will had been entirely and perfectly horizontal. As the condition of the Testatrix had to deteriorate over time, he argued that this deterioration had to be reflected in the later signature and, since it was not, it could only be concluded that the signature on the Second Will had been made with assistance. He also argued that the differences between the signature on the First Will as compared to that on the Second Will was so material as to arouse the Court's suspicion.

[60] Counsel also pointed out that where a testator was elderly and infirm it was the established practice to have their will witnessed by a medical practitioner who had satisfied himself as to the capacity and understanding of the testator. In connection with this submission, he cited the West Indian cases of *Alvarez v Chandler (1962) 5 WIR 226* and *De Nobriga v De Nobriga (1967) 12 WIR 342*. He contended that the failure to follow this practice at the time of the execution of the Second Will, particularly where the Defendant was suffering from Alzheimer's and diabetes, should be treated by the Court as a suspicious circumstance.

[61] Mr. Sue concluded that there were sufficient suspicious circumstances surrounding the execution of the Second Will to justify a finding by the Court that the Testatrix lacked the requisite testamentary capacity. The Plaintiffs, he asserted, had also failed to adduce evidence of testamentary capacity. Their evidence as to the mental competence of the Testatrix at the time of execution was irrelevant as they had not been present when the Second Will was executed and they had also not offered any medical evidence as to her mental capacity.

Findings of Fact

[62] I have carefully watched and listened to all of the witnesses as they were giving evidence in this matter and have also reviewed their testimonies and have generally found the

evidence of the Plaintiffs and their witness to be more coherent and persuasive than that of the Defendant and his father. On the basis of all the evidence before me I make the following findings of fact.

- [63] First, it is clear from the evidence of both sides that the Testatrix had lived a long life and was advanced in age. She had been diagnosed with Parkinson's disease and diabetes and the treatment of the latter required daily injections of insulin. This treatment was given to her by Nurse Chase and in the absence of the said nurse, her granddaughter and grandson.
- [64] The Defendant alone contends that the Testatrix also suffered from Alzheimer's, but the Court is unable to accept his evidence on this point over that of the other witnesses, in the absence of any supporting medical evidence.
- [65] The Court accepts the medical evidence of Dr. Sue that a diagnosis of a medical practitioner was required to determine whether Parkinson's disease manifested itself in the Testatrix in the form of dementia, which Dr. Sue indicated only occurred with approximately one-third of all patients. The Court is unable to find the Testatrix was included in the group that suffered from dementia.
- [66] While I accept that the Testatrix may, given her advanced age, have been at times forgetful and certainly experienced trembles, I am unable to accept that her mental condition had deteriorated to the level described by Mr. Bourne or even to the lesser level alleged by the Defendant. The Defendant's evidence does not correspond with that of his father as the latter alleges that she was in almost catatonic state towards the end while the Defendant, who lived with her, did not give any evidence of this but only of her forgetfulness. Both witnesses were confused as to the timeline and their evidence lacked coherence. I therefore find it to be unreliable and prefer the evidence of the Plaintiffs on this point. In fact, the Court notes that all of the evidence presented by these two witnesses as to the mental state of the Testatrix could easily be used to impugn the First Will.
- [67] I am also not persuaded by the evidence of the Defendant and his father that the Testatrix shared a strained relationship with her daughters and had not intended to include them as beneficiaries of her estate. Mr. Hall, who has no interest in this matter, and who gave his

evidence in a forthright and honest manner has testified otherwise. The Court accepts his evidence, which is supported by the evidence of Zarina Khan as to the instructions given to her by the Testatrix.

[68] The Court finds the assertion of Mr. Bourne that the First Plaintiff had taken the Testatrix to Zarina Khan under the pretence of taking her to the doctor speculative at best.

[69] Zarina Khan is the attorney-at-law responsible for preparing the Second Will. The Court is satisfied that she prepared the Will pursuant to the instructions given to her by the Testatrix, who wished to divide her estate between her children. I find that the Testatrix was aware of her actions and their consequences when she gave these instructions to Ms. Khan and further find that the Testatrix read over the Will in the presence of Ms. Khan and then signed it before Ms. Khan and her secretary.

[70] For what it is worth, the Court also accepts the evidence of Mr. Olson Alleyne relating to the preparation and execution of the First Will, although there is no question before it as to the validity of this Will.

Law and Analysis

[71] The legal principles applicable to this matter are not disputed by the parties and are easily and quickly outlined.

Testamentary Capacity

[72] Under *section 60 (1)(b)* of the *Succession Act of Barbados*, as under the common law, a will shall only be valid if made by a person who is of sound mind.

[73] The mental competence required under *section 60(1)(b)* is not that the testator must have sound mind and memory to the highest possible degree but that the testator must (i) be able to understand that he is by will giving his property to one or more persons of his choice; (ii) have the capacity to comprehend and recollect the extent of the property of which he is disposing; and (iii) appreciate the nature of the claims of any persons who are excluded: *Banks v Goodfellow [1870] L.R. 5 Q.B. 549 at 567 per Cockburn, CJ; Halsbury's Laws of England (Fourth Edition) Volume 17(2) para 309.*

- [74] The requisite degree of mental competence must exist at the time that the will was executed by a testator, but where a will was prepared in accordance with the instructions of the testator, the measure of testamentary competence need not be as complete at the time of execution as it was at the time of giving instructions: *Halsbury's Laws of England (Fourth Edition) Volume 17(2) para 310*.
- [75] In every case, the onus of proof rests upon the party seeking to propound the Will in question and this party must, to use the words of Blenman, J., “*satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator*”: *Melbourne Smith et al v Elridge Brown (Unreported) High Court of Antigua and Barbuda Claim No. 268 of 2004, Decision of September 30, 2008*.
- [76] While the legal burden of proof rests upon the party propounding the Will, the evidential burden of proof may shift from one party to another during the course of the proceedings. There is a general legal presumption that a will, which not only appears to be rational on the face of it, but which is also shown to have been signed and attested in the manner prescribed by law, is presumed, in the absence of any evidence to the contrary, to have been made by a person possessing the requisite testamentary capacity: *Symes v Green 164 ER 785*.
- [77] Where this presumption operates, as in this case, the evidential burden shifts to the party pleading the absence of testamentary capacity who must then adduce evidence to demonstrate this.
- [78] The contents of the Second Will were *ex facie* rational. Despite Mr. Sue's submission to the contrary, the contents of the Second Will accord with the natural affection and duty of the Testatrix and, in fact, appear to do so far more than her First Will in which only her son was listed as beneficiary. The Defendant is not disinherited, as might have been expected; he is given a reasonable share in his mother's estate.
- [79] The Will was also signed and attested in the manner required by the *Succession Act, Cap 249 of the Laws of Barbados*. This is evident from the testimony of Ms. Khan, which the Court had no reason to disregard and which in this aspect is, in fact, unchallenged by the Defendant. The evidentiary burden of proving the absence of testamentary capacity

therefore shifted to the Defendant and the Court has to consider whether the Defendant has discharged this onus.

- [80] It is ironic that Counsel for the Defendant has submitted that the layman perspective offered by the Plaintiffs as to the mental capacity of the Testatrix was not sufficient and medical evidence was necessary to establish the requisite testamentary capacity because he simultaneously sought to persuade the Court as to the absence of mental competence on the part of the Testatrix by relying upon the evidence of 2 lay persons – his client and his client’s father.
- [81] The Court has already found that it is unable to accept the somewhat contradictory evidence of these two witnesses regarding the alleged mental incompetence of the Testatrix. As I mentioned before, the evidence, if believed would incline the court to question the mental competence of the testatrix when she executed the first will, and therefore, contradicts the Defendant’s case.
- [82] The Defendant’s sole medical expert, Dr. Sue, could not provide a medical opinion as to the competence of the Testatrix as the Testatrix had never been her patient, but this witness did stress in her evidence that dementia could not be easily diagnosed by laypersons. The Defendant has not presented the Court with any medical records or other evidence illustrating the mental condition of the Testatrix, although he has testified that the Testatrix was not only seen by the staff at the Queen Elizabeth Hospital prior to her death, but was also the patient of a private medical practitioner. Such medical evidence, had it been adduced, would have carried great weight: *Halsbury’s Laws of England (Fifth Edition) Volume 103 para 893*.
- [83] Given the absence of such medical evidence, however, the Court, although finding that the Testatrix had likely been suffering from Parkinson’s Disease and diabetes at the time of the execution of the Second Will, has no credible evidence on which it could find that the Parkinson’s Disease from which the Testatrix had been suffering had progressed to such a level as to cause the symptoms of dementia in the Testatrix so as to prevent her from possessing the requisite testamentary capacity required to make and execute a Will.

[84] The Court is also satisfied that although the Testatrix relied on daily dosages of insulin for the treatment of her diabetes, there is no evidence before it, aside from the speculation of the Defendant and his learned counsel, that the Testatrix was denied her regular medication and that this denial affected her mental faculties on the date at which she consulted Ms. Khan about the Second Will and the date on which she eventually executed the Second Will.

Knowledge and Approval

[85] As the Court has concluded that the Testatrix had the requisite mental capacity to execute the Will, the Court now has to consider whether she understood and approved of its contents.

[86] It is a fundamental principle of probate law that a testator must not only have the testamentary capacity to make a will but must also know and approve of its contents at the time of its execution: *Guardhouse v Blackburn (1866) LR 1 P & D 109*. Where the will was prepared by a lawyer in accordance with the instructions of the testator and the testator understood, at the time of execution, that he was executing a will for which he had given instructions, knowledge and approval of the instructions given by the testator is sufficient: *The Estate of Wallace (1952) 2 TLR 925*.

[87] A rebuttable legal presumption as to the knowledge and approval of a testator arises where the testamentary document in question has been executed and attested by a competent testator in accordance with the provisions of the law: *Williams on Wills (Ninth Edition) Volume 1, para 5.1*.

[88] Mr. Sue has correctly pointed out, however, that the presumption does not apply where the circumstances under which the will was prepared and executed raises a well-grounded suspicion that it does not reflect the testator's mind or intention and the Court will then require evidence that the testator understood the nature and effect of the testamentary document before it can pronounce in favor of the document: *Tyrrell v Painton [1894] P 151 at 159, CA, per Davey LJ; Wintle v Nye [1959] 1 All ER 552, [1959] 1 WLR 284, HL*.

- [89] Viscount Simmonds noted in *Wintle v Nye (ibid)* that the degree of suspicion created depends upon the facts of a case and varied with each case and the amount of evidence required to satisfy the Court as to the knowledge and approval of the testator in light of these circumstances depended upon the gravity of suspicion aroused.
- [90] Proof of the knowledge and approval of the testator may be established by evidence that the will was read over by or to the testator when he executed it (*Garnett-Botfield v Garnett-Botfield [1901] P. 335*) or that the testator gave instructions for the will and the will was drafted in accordance with those instructions (*Fincham v Edwards (1842) 3 Curt, 63, 4 Moo. PC 198*).
- [91] While counsel for the Defendant has also correctly listed examples of cases where the circumstances were found to have been suspicious, the Court is not persuaded by his contention as to the existence of such suspicious circumstances in this case.
- [92] While the Court accepts that the First Will and the Second Will, which were executed scarcely 6 months apart, had significantly divergent contents, the Court does not accept that such divergence is sufficient in itself to create a well-founded suspicion as to whether the Testatrix truly knew and understood the contents of the Second Will. The Second Will did not leave the property of the Testatrix to strangers nor did it disinherit the Defendant. Indeed, the Court has already noted that this Will accords with the natural bonds of affection and duty affecting the Testatrix. The Testatrix was entitled, at any time before her death, to amend the provisions of her will as she saw fit and the fact that she did so to the detriment of the Defendant, who stood to gain the entirety of her estate under the First Will, is not sufficient evidence of suspicious circumstances.
- [93] The Court found no evidence of secrecy in the execution of the Second Will. Indeed, it notes that the Defendant testified that he was aware of its existence, in contrast to the evidence of the Plaintiffs where they indicated that they had not been aware of the existence of the First Will.
- [94] The Court further finds that there is no evidence before it that shows that the Testatrix did not benefit from independent legal advice before she executed the Second Will. The

evidence of Zarina Khan, which was accepted by the Court, actually establishes that she received independent legal advice.

[95] The Court finds that, contrary to the submission of the Defendant, the signature of the Testatrix does appear to be shakier in the Second Will than in the First Will and further finds the signatures placed on the respective documents were not materially different in form, despite the slant present in the First Will.

[96] The Court accepts, however, that given the age and physical condition of the Testatrix, it would certainly have been desirable, as recommended by the Court in *Re Simpson (1977) 121 SJ 224*, for a medical doctor to be present while the Second Will was being executed by her.

[97] The Court is nonetheless satisfied that any suspicion that may have arisen as to whether the Testatrix had knowledge of and understood the contents of the Second Will from such failure were effectively dispelled by the evidence of Zarina Khan, whose testimony clearly indicated that the will was read over by the Testatrix before she signed it and the Testatrix possessed knowledge of the contents of the Second Will and approved of it. Her evidence also provides that the Second Will was prepared in accordance with the instructions given to her by the Testatrix and this is also implied in the evidence of Mr. Bruce Hill.

[98] Accordingly, I find that the Plaintiffs have discharged their onus of proving that the deceased knew and approved of the contents of her will at the time of its execution.

Conclusion

[99] In the circumstances, the Court is satisfied on a balance of probabilities that the Testatrix was of sound mind and disposition when she executed the Second Will, which was duly executed in accordance with the requirements of *section 61* of the *Succession Act, Cap 249 of the Laws of Barbados*.

[100] The Court is further satisfied that the Testatrix understood and approved of the contents of the Second Will when executing it and that its contents represented her intentions.

[101] Accordingly, the Court therefore pronounces for the force and validity of the last Will and Testament of Edna Earline Elcock, Deceased, dated the 6th day of September, 2001 and orders that this Will be admitted to probate in solemn form.

Costs

[102] Wooding, C.J. stated in the Trinidadian case of *De Nobriga v. De Nobriga 12 W.I.R. 342 at p. 347* that:

“In probate, as in all other actions, costs are always in the discretion of the Court. But unless there is good and sufficient reason to order otherwise, they ought to follow the event.”

[103] The Court finds no good reason to stray from the general rule. Accordingly, the Defendant, Athiel Anderson Elcock, is ordered to pay the costs of the Plaintiffs, Vida Inel Elcock and Yvette Oneta Elcock, certified fit for one counsel, with the costs to be taxed in default of agreement.

Dated June 12, 2013

**Jacqueline A. R. Cornelius
Judge of the High Court**