

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Civil Appeal No. P170 of 2023**

**In the Matter of the Estate of  
Marie Antoinette Nothnagel, Deceased**

**And**

**In the Matter of the Wills and Probate Act, Chapter 9:03**

**Between**

**CHRISTIAN WILHELM NOTHNAGEL  
(Executor named in a Will dated October 28, 2010)**

**Appellant/Claimant**

**And**

**NICHOLAS CHRISTIAN NOTHNAGEL  
VONCILLE FRITZ NOTHNAGEL-GURLEY  
VEILCHEN JULIA NOTHNAGEL-BOOS  
(Executors and Trustees named in a Will dated December 9, 2004)**

**Respondents/Defendants**

**PANEL**

Maria Wilson JA

Ronnie Boodoosingh JA

James C. Aboud JA

**APPEARANCES**

Mr Ravi Heffes-Doon instructed by Ms Christine Ragoobar for the Appellant

Mr Colin Kangaloo SC leading Aaron Bethel instructed by Mrs Danielle Inglefield  
for the Respondent

Date of Delivery: 20 March 2025

## **JUDGMENT**

Delivered by R. Boodoosingh, JA:

1. This appeal involves a challenge to the last will of Marie Antoinette Nothnagel (Mrs Nothnagel) executed on 28 October 2010. She had previously made a will on 9 December 2004. There was no dispute regarding the validity of the 2004 will. Mrs Nothnagel was 92 years of age when she made the 2010 will and 86 years of age when she made the 2004 will.
2. The parties are siblings. Mrs Nothnagel and her husband had five children. The appellant, Christian Nothnagel (Christian), was the main beneficiary and executor of the 2010 will. The five children were to share in the estate equally under the 2004 will. Three of the five children, Nicholas Nothnagel (Nicholas), Voncille Fritz Nothnagel-Gurley (Fritz) and Veilchen Julia Nothnagel-Boos (Veilchen) were the executors of the 2004 will and they are therefore the respondents to this appeal. The fifth child is Hans Nothnagel (Hans).
3. Rahim J identified three issues for determination at the trial. These were:
  - i. Whether Mrs Nothnagel had testamentary capacity at the time of the execution of the 2010 will.
  - ii. If she had testamentary capacity, whether she had knowledge and approved of the contents of the 2010 will.
  - iii. Whether the 2010 will was procured by the undue influence (of Christian).

4. After hearing several witnesses on both sides and taking account of documentary evidence, in particular, email correspondence among some of the siblings in 2010, the judge:

- i. Declared that the 2010 will was not a valid will and testament.
- ii. Pronounced in favour of the 2004 will and ordered probate of it, once the legal requirements were complied with to the satisfaction of the Registrar.
- iii. Ordered Christian to pay the costs of the claim and counterclaim to the executors of the 2004 will amounting in total to \$28,000.00.

5. Having regard to his determination about Mrs Nothnagel's testamentary capacity, the judge considered it unnecessary to make findings on undue influence.

6. The witnesses called by Christian in support of the 2010 will were:

- (i) Himself;
- (ii) Timothy Hamel Smith, attorney-at-law, who took the instructions for the 2010 will in August 2010, prepared the will, and oversaw the execution of it on 28 October 2010;
- (iii) Wendy De Mills, a paralegal in the employ of the firm Hamel Smith, who witnessed the execution of the 2010 will;
- (iv) Diane Marie Leotaud, aged 75, a cousin of the parties who grew up knowing them;
- (v) Dr Nigel Camacho, Mrs Nothnagel's dentist, who she visited for dental care from time to time.

7. The witnesses called by the executors were:

- (i) Leah Mitchell, a secretary at JD Sellier and Company, attorneys-at-law, who gave evidence about the execution of the 2004 will;
  - (ii) Jessie Joseph, at one time, the seamstress for Mrs Nothnagel;
  - (iii) Velda Andrews, one of two caretakers for Mrs Nothnagel;
  - (iv) Nicholas, who gave evidence of Mrs Nothnagel's mental deterioration from about 2006;
  - (v) Veilchen, who assisted in caring for Mrs Nothnagel;
  - (vi) Hans, who also gave evidence of his mother's conduct which reflected her mental state;
  - (vii) Fritz, who was the primary caregiver for her mother until she went to England to live.
8. The judgment was a detailed one, 70 pages in all. The judge reviewed each witness' evidence, including the cross-examination. He made findings about each of them and came to conclusions about the evidence, essentially preferring the evidence of the respondents. The judge also set out the law on testamentary capacity and undue influence.

### **Law on Appellate Review**

9. The appeal court will be slow to overturn findings of fact made by a trial judge who has had the benefit of hearing and seeing the witnesses give evidence. This restraint is based on several clear cases decided by the highest court. Before an appellate court can interfere with a trial judge's factual findings the circumstances stated in the well-known cases of **Beacon Insurance Company Limited v Maharaj Bookstores Limited [2014] UKPC 21 at paras 11 – 17** and **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Services Ltd [2017] UKPC 40** have to be met. The Board quoted Lord Reed in **Henderson v Foxworth Investments Ltd [2014] UKSC 41** who had stated at para 67:

“...in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or of a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.”

### **The Judge’s Statement of the Law**

10. On testamentary capacity, the judge quoted from **Tolley’s Administration of Estates, Part H: Contentious Probate, para H4** citing **Banks v Goodfellow (1870) LR 5 QB 549** as follows:

“The testator must understand the nature and consequences of making a will, i.e. that it can be revoked at any time and operates only on death, the purpose of appointing executors, trustees or guardians and the effect of beneficiaries predeceasing him.

He must appreciate the extent of his property in general terms – that his estate may increase or decrease in value, the effect of lifetime gifts or the change in nature of an asset and if he has assets which may pass outside the will, eg those jointly owned or held in trust. In the absence of a medical opinion obtained when the will was made, this may be difficult to assess especially if the testator was suffering from deteriorating memory loss.

The moral claims of those persons for whom he ought to make provision must be considered by the testator. There may be particular factors influencing his decision to benefit some persons rather than others. These may be important to the testator even though others would consider them to be irrational or eccentric.

He must not be affected by any insane delusion or other mental disorder sufficient to affect his judgement.”

11. At paragraph 142 the judge stated:

“142. “The burden of proving testamentary capacity falls on the person propounding the will, (the party trying to support the Will) but this burden is satisfied prima facie in the case of a rational will by proving that it was validly executed.” (Halsbury's Laws of England, Vol 103 (2021), para 900).

Upon proof that the will was duly executed with the requisite formalities, the propounder is aided by a rebuttable presumption, which casts an evidential burden on those challenging the will.”

12. He identified proof of want of knowledge and approval, suspicious circumstances and loss of capacity between the time of giving instructions and execution as potentially being circumstances which might vitiate an otherwise validly executed will.

13. He then concluded at paragraph 153 the approach he had to take when he stated:

“153. In respect of knowledge and approval the case must therefore be approached in the following manner by the court. Firstly the court must consider whether the Will appears valid on the face of it, having been validly executed as far as the formalities are concerned and whether it appears rational in all of the circumstances. Should this be the case, the evidential burden then lies with the defendants to demonstrate that the testatrix may have been devoid of testamentary capacity to make the Will. Once the suspicion of the court is raised by the circumstances the burden remains on the claimant to demonstrate that testatrix was of testamentary capacity. In relation to undue influence the burden remains with he who alleges such influence in this case the defendants.”

14. There is no suggestion that the judge was wrong in his statement of the law or in identifying the relevant principles of the law which applied to

this case. Mr Heffes-Doon has instead pointed to the judge confusing the concept of testamentary capacity with lucidity when making his findings and he further suggested the judge made errors in construing the evidence.

### **The Judge's Review and Findings on the Evidence**

15. I will now review the judge's findings on the evidence, quoting salient aspects of his findings to demonstrate the process of his analysis of the evidence. The extracts are quoted at length because they explain how the judge arrived at his conclusions. This was a fact driven case and this appeal turns largely on the judge's assessment of the evidence and the conclusions he drew from his assessment.

33: "...It was suggested to [Mr Hamel Smith] that he never explained to [Mrs Nothnagel] the divergence between her instructions in August and what found its way into the Will in relation to the land at the back and he denied same. The court accepts and finds as a fact that he did explain it, whether she is likely to have understood it is an entirely different matter dealt with later in this decision."

16. Regarding an allegation that one night Mrs Nothnagel told her that she was afraid of Christian because he had a gun and he wanted her to change her will, the judge stated: "The court attaches very little weight to this evidence having regard to the fact that the witness could not have been cross-examined.... In the absence of cross examination the court discards that allegation entirely."

17. The judge continued:

"85. The allegation of forgetfulness while not accorded considerable weight is nevertheless accorded some weight as it

appears to be plausible and corroborated by the other evidence of the defendants. It is also on the face of it credible having regard to the length of time that Jessie would have interacted with [Mrs Nothnagel].

154: ...on the face of it the 2010 Will appears to be rational in that [Mrs Nothnagel] appeared to have changed her mind in relation to the gift of the house.

155. The court however finds tremendous discomfort from what appears to be clear evidence of the incapacity of the deceased to have made such a decision, to have understood the effect of such a decision and to have approved of same at the time she gave instructions to Hamel Smith. Even if the court is wrong in that regard it is of the view in any event at the date she executed the Will it is more likely than not that she was unaware and could not appreciate that she was signing a will for which she had given instructions before. In the court's view there is overwhelming evidence that the deceased was not mentally capable of so doing and was prone to periodic memory lapses and hallucinations. To be clear, it is the finding of the court that the deceased did not have the requisite knowledge and approval to give instructions for the 2010 Will and to execute same. The reasons for so finding as are follows.

156. The court accepts the overwhelming and credible evidence of the defendants that the deceased appeared to be experiencing periods of mental instability from time to time. The email correspondence tells an unfortunate and sad tale of the downward spiral of the mental capacity of the deceased. What is telling is the fact that these emails do not appear to be after thoughts neither do they appear to be self-serving statements made up for the purpose of these proceedings. They are in fact emails that were written reasonably contemporaneously with the events and are emails that were copied to the claimant so that he was aware of the problems that his mother had been experiencing at the time.

157. While there is no clear medical evidence of the mental capacity of the deceased, the facts and circumstances as set out in the communication between the siblings show that the nature of the difficulty that the deceased was experiencing has the tendency to affect her perception of reality. These included believing that a plane was a restaurant that her maids had stolen from her, pretending to read the newspaper that Fritz was still residing next door but was refusing to visit her and her obsession with laxatives when in fact she appeared to be having very good bowel movements. A sample of the email written by Fritz on May 1, 2010 demonstrates:

“When she awoke from a sleep on arriving she was completely out of it, heard noises, was terrified to open the door etc but I have assured her no boggie man here etc. She is settling down but the stories. Plenty ‘tories’ and I mean plenty. Today she was asking about the William Tell statue they had in Arima. Talking to me as if it was right there. Then told me Goldie had it etc and she was sure she saw it there. Actually its quite amazing. I was lying next to her upstairs and again giving stories about the Futchie Nothnagels and Helen (my favourite subject) and she was completely unaware it was me next to her. She was talking and saying ‘you should hear Fritz tell you’ and ‘ever since Fritz has’ about this or that .....Talking to me as if I was not next to her. Quite funny.” The email also sets out that she could not follow the news anymore.

158. It is unnecessary to traverse the contents of all of the emails however the court accepts that the cumulative effect is a demonstration that the deceased’s mental capacity was descending. What is even more telling is Fritz’s fascination with her mental state as expressed in the email. The court is of the view that this fascination is supportive of the credibility of the assertions in the email as here was her mother whom she had known to be a strong and in control woman now exhibiting clear signs of being “out to lunch” as she puts it. It must have been that the nature and frequency of the actions on the part of the deceased was so glaring as to cause concern and leave an

indelible impression that something was going seriously wrong with the mental capacity of the deceased.

159. Even if the court was to accept that in relation to the throwing out of the dentures, and thinking that Fritz had not migrated these may have been genuine mistakes, what is left nonetheless paints a dim picture of the mental slide being experienced by the deceased prior to the execution of the Will.

160. The court also finds that prior to the execution of the Will and around the time of same, that the deceased may have had periods of lucidity. It is clear on the evidence of all of the children that she appeared to have been “going in and out”. The court will return to this later.

161. The evidence of Hans, is very telling in the court’s view. He is perhaps the one child with the least interest to serve in these proceedings. The evidence of his concern and care for his mother is pellucid. It is his evidence that after his retirement he felt it necessary to spend more time with her. His evidence bears some repeating. There were times when the deceased did not remember Hans’ name and would call him son or boy. She also asked for her husband who had died. She made unkind statements about the helpers and said they stole from her. She threw away her medicine, was obsessed with laxatives, did not know when the stove was on. The deceased would say dead relatives visited her and thought she was losing her mind. It is his evidence that she was a polite person for all of her life but as her mental state changed her personality began to change. She became obsessed with odd things like laxative which she would take constantly. Even though the deceased was already at home, she asked Hans to take her home. In 2010, she was unaware of time and place. At this point Hans says the deceased would not notice if Hans left the country for four months. He said that in 2009 she was aware to some extent that she was losing her mental faculties because she would begin to tell him the impossible like her siblings were coming to visit with which he would go along. Then she would suddenly go silent as if she had just realized that what she was saying was not possible. She

told him on several occasions that she felt depressed as she realized she was losing her mind.

162. The court places much weight on the evidence of Hans which likewise is demonstrative of the mental slide of the deceased prior to the date of execution of the Will.

163. The evidence of Velda Andrews was highly probative of the issue in the court's view. She struck the court as an independent witness with no interest to serve. Velda was the day shift worker at times the other being Theresa Ali. The night shift caretaker was Heather Marquez. The witness observed that the deceased was becoming forgetful, confused and repetitive. One morning when she arrived at work, she saw the deceased dressed and standing outside her locked home with a packed suitcase. The deceased told her she did not need her anymore as she was going to stay with her sister. Velda called Fritz who came and took her back inside. The deceased kept a packed suitcase with odd items and would often say she was going away, She constantly packed the suitcase with shoes, clothes, handbags and other personal items. Velda supervised the deceased in the kitchen, as she started to forget how to cook simple things like macaroni pie. She often forgot the stove on and forgot how to put on the oven. The deceased would instruct Velda to do something and would then later ask her why she was doing it. She then began to refuse to bathe saying that her mother told her "if you don't feel to bathe don't bathe". She often spoke of her deceased husband coming to speak with her and that she would tell him that she was not yet ready to meet him and he would have to wait. After her sister died in 2008, the deceased would often say that she was going to visit her sister while insisting that she was alive upon being informed of her passing.

164. In March 2008, the deceased accused Velda of stealing a blouse and wearing it to Velda's daughter's wedding. She had forgotten that she had instructed Velda to place it in a cupboard from which it has never been moved. The deceased would take things that did not belong to her and insist they did in fact belong to her. She forgot how to do simple things like changing

the television channel or unlatching the front door and the windows.

165. The evidence of Velda not only makes it clear that the deceased's mental capacity was on the decline but also it supports the credibility of the evidence of the defendants in material particular.

166. It follows that the court does not accept the evidence of the claimant that his mother was in full control of her mental faculties. This simply was not probable in the circumstances of all of the evidence presented. Further as a matter of reasonable inference it is clear that the claimant was aware of the mental difficulties being experienced by his mother and the court so finds.

167. In light of these finding the obvious question then becomes what then of the evidence of the witnesses of the claimant. In relation to the evidence of Dr. Nigel Camacho the court finds that while he may have honestly been of the view that the deceased was mentally capable his view is unreliable. Firstly, there is no evidence as to the precise dates she visited prior to executing the Will and there are no notes that speak to her capacity or his interaction beyond the level of dental work. Secondly, Camacho has not given particulars of the conversations he may have had with the deceased so as to permit the court to determine whether his view was a correct one. Thirdly, it is unlikely in any event that there may have been protracted conversations of the nature required for a person to make such a determination having regard to his functions at the time. Fourthly, it is highly unlikely that in a dental practice Camacho may have had the proper recall of conversations with the deceased so as to conclude that which he did. Fifthly, comparison with his grandmother who suffered from Alzheimer's cannot be useful in the court's view as the evidence in this case is that the deceased appeared to have her good moments and bad moments. The court therefore finds that no reliability can be placed on his evidence in relation to the mental capacity of the deceased.

168. The court does not also consider the evidence of Dianne Marie Leotaud to be reliable and also is unsure as to her credibility. In that regard it is passing strange that she would have had such a close relationship with the deceased but would not have known about the actions of the deceased around 2009 to 2010. These actions are widely accepted even by the claimant either directly or by inference. It may therefore be that this is so because she either did not have a close relationship with the deceased in 2009 and 2010, same having cooled in or around 2008 when visits lessened or she is not being truthful, she having an interest to serve having admitted that she has fallen out with the defendants and no longer speak with them. She could provide no definitive dates in her evidence. The court was therefore unimpressed with her evidence.

169. In that regard and before moving on the court is of the view that this is a good juncture to treat with the submissions of both parties that the other ought to have called the sister of Dianne, Claudette as she was copied on the emails and may have had knowledge that would be useful. They both ask the court to draw an adverse inference against the other on the issue for failure to call Claudette. The court is of the view and finds that it is wholly inappropriate to draw an adverse inference against either party in the circumstances. Claudette's evidence at the highest would have fallen on one side or the other and would have added nothing of useful independent value to either case. In relation to the evidence on the part of the defendants, that evidence is overwhelming without the evidence of Claudette. In the case of the claimant, even if Claudette's evidence was in his favour it most likely than not would have been insufficient to tip the scale. Additionally, it is clear that the emails of Fritz were copied to Claudette so that it is more probable than not that the evidence would have been favourable to the defendants. That is not to say that the court finds that Claudette's evidence is favourable to the defence, that would be pure speculation. The comments of the court are made simply in the context of the potential value of the evidence in relation to an adverse inference being drawn and nothing more.

172. Timothy Hamel Smith is a practitioner with many decades of experience in the area of probate practice inclusive of the taking of instructions on, the drafting and execution of Wills. This is not in dispute. In the context of such tremendous experience, the court has approached his evidence on such a basis. The court is of the view that he was a credible witness but that he fell into grave error in the circumstances of this case with the consequence that his evidence on the mental capacity of the deceased is unreliable.

173. This is so for many reasons. Firstly, Hamel Smith had not interacted with the deceased literally for decades. He was her son's childhood and teenage friend and so would have been more familiar with her during those years decades ago. But he was not close to her for decades after and would not have been in a position to know of the various events that would have occurred surrounding her mental capacity. In the context of the finding of the court that the deceased appeared to have periods of lucidity it may well be that Hamel Smith would have interacted with the 92 year old during one of those periods. But how is a court to trust that this is the case simply on the word of the lawyer who prepared the Will without more. This court certainly cannot and ought not to do so having regard to the evidence in this case. It was incumbent therefore on Hamel Smith to ensure that the deceased was examined by a medical practitioner before her instructions were taken.

174. Secondly, his tremendous experience ought to have vested him with the knowledge that when it came to elderly persons (in this case someone who was on her ninth decade) both common sense and good practice dictated that that she be examined for several reasons. Such actions would first of all provide protection for him both at a professional and personal level in relation to allegations of dishonesty. Secondly, it may have protected the interest of the beneficiary under the 2010 will and of fundamental importance it would have supported the fact that the testatrix had made her decision with full knowledge and approval. This is a step he ought to have taken whether he had reason to suspect that she was incapable or not. This is so as he was not aware of what her home circumstances were but he was aware that she in fact had other children who were not present with her at any of the meetings.

His experience would have also told him that challenges to Wills often arise years after death in relation especially to elderly persons who have bequeathed their only property to one child to the exclusion of others.

175. Thirdly it was clear to him that the claimant who stood to benefit almost entirely from the 2010 will was present with his mother and had literally not left her side during the entire process. This ought to have put him on enquiry as to whether there may have something that was being kept from him. He ought to have spoken to her in the absence of the claimant but he failed so to do. This would have provided a true opportunity to assess the competence of the deceased as far as he could in his experience.

176. Fourthly, there is no evidence that the deceased made him aware of the existence of a previous Will and its terms. Neither did he enquire. The existence of the previous Will was of course highly relevant having regard to the change that was now being made. This is a factor that may have assisted him in his assessment of her knowledge and approval.

177. Fifthly, there is no evidence in an event of the precise nature of any conversation (questions asked and answered) between Hamel Smith and deceased outside of the issue of the Will from which it may have been inferred that she was of sufficient capacity he having determined not to have her medically examined.

178. Of major concern to this court is the absence of notes from the interview with the deceased. It is the evidence of Hamel Smith that he destroyed the notes shortly after preparing the Will. Not only this, but it was also his evidence that he did not ask the deceased to sign those instructions. This appears to the court to shed wide suspicion on the knowledge and capacity of the deceased. It is professionally illogical that notes would be destroyed after the Will was prepared and executed as it is common knowledge that the instructions of a testatrix becomes invaluable should a challenge be made to the Will of that person after death. Once again the existence of not only notes but of signed notes ensures that the practitioner and beneficiary are protected from unjust allegations of want of capacity. This is a

basic principle of practice that is routed quite frankly in common sense. It is also a worthy practice in relation to the instructions for the preparation of deeds of conveyance. The court therefore would be failing in its duty if it did not frontally say that the absence of notes (and signed instructions) raises the level of suspicious circumstances to a much higher level.

179. The court found earlier on that Hamel Smith appeared to be of the view that when he transmitted the information about the separation of the back lot for the purpose of the Will and it having to be omitted from the Will, to the claimant he spoke to the deceased and explained to her. The court also understands his evidence to be inferentially that he explained this to the deceased on the day of execution before execution. Having regard to the court's finding on the mental capacity of the deceased, the court finds that even if this had in fact been done both by the claimant and the defendant it is more likely than not that the deceased would have been unable to understand and approve those instructions.

180. Additionally the court is of the view that the time spent with Hamel Smith on both occasions would not have afforded a sufficient opportunity for him to have made a reliable assessment of her capacity. In that regard the evidence is clear that she had good and bad moments. In that regard the claimant has not fulfilled the burden placed on him to prove that she was lucid at the material time.

181. Before leaving the evidence of Hamel Smith there is another piece of evidence that has caused some disquiet in the courts' mind. The claimant testified in his evidence in chief that in early 2010 Hamel-Smith visited the deceased at her home in order to have her swear an affidavit verifying birth certificates of some relatives. This of course, should it be true would have meant that Hamel Smith would have had at least one other interaction with the deceased prior to the taking of instructions. This may have aided his assessment of her capacity. However, it is passing strange that Hamel Smith speaks absolutely nothing of this visit. Nor has the claimant attempted to put into evidence the alleged affidavits that she swore in favour of his older cousins on that occasion. This must be because either

Hamel Smith did not visit the premises for that purpose or did visit but did not use the deceased to swear the affidavits. Of course the other possibility although the most unlikely was that Hamel Smith simply forgot his visit. Unlikely because that visit would have been highly relevant to the issue before the court.”

### **Analysis of the Judge’s Findings**

18. The judge found the 2010 will to be rational. It can be noted that the 2004 will was also determined to be rational. It had provided for the estate to be shared equally among the five children.

19. However at paragraph 155 the judge found that:

(1) There was clear evidence that Mrs Nothnagel lacked capacity to have understood the effect of her instructions and to approve her instructions when she gave them to Mr Hamel Smith.

(2) At the date she executed the will Mrs Nothnagel was more than likely unaware and could not appreciate she was signing a will for which she had given instructions.

(3) She was not “mentally capable” of knowing she was signing a will.

(4) She did not have the requisite “knowledge and approval” to give instructions for the 2010 will and to execute it.

20. The judge’s reasons for these conclusions were stated in paragraphs 156 to 180.

21. These reasons, in summary, were:

- i. The judge accepted the “overwhelming and credible” evidence of the respondents that Mrs Nothnagel was experiencing “mental instability” from time to time: para 156.
- ii. The judge accepted the contemporaneous email correspondence among family members as telling the story of the “downward spiral” of her “mental capacity”: paras 156, 157, 158.
- iii. The emails demonstrated her “mental capacity was descending”: para 158.
- iv. Mrs Nothnagel “may have had periods of lucidity” prior to executing the will: para 160 (this was another way of saying she had other periods when she was not lucid).
- v. The judge decided to give much weight to the evidence of Hans, noting he was not an executor of either will: paras 161 and 162.
- vi. The judge considered Velda Andrew’s evidence to be “highly probative”. She was an “independent witness”: paras 163, 164, 165.
- vii. Velda’s evidence supported the respondent’s evidence: para 165.
- viii. The judge did not generally accept the evidence given by Christian’s witnesses: para 166.
- ix. The judge found Dr Camacho’s evidence to be “unreliable” because of the limits of his inability to give precise dates of Mrs Nothnagel’s visits to him; there were no particulars of the conversations they had; it would be unlikely there would be protracted conversations; comparisons with his observations of his grandmother were not useful: para 167.
- x. The judge did not find Diane Leotaud to be reliable. He found that she did not have a close relationship with Mrs Nothnagel in 2009 and 2010 and she had fallen out with the respondents and could not give definitive dates in her evidence: para 168. It was pointed out to us that the judge made an error when he stated she did not give definitive dates in her evidence about some of the matters. While this was an error, the judge, overall, did not accept her evidence and gave other reasons for not doing so.
- xi. The judge found Mr Hamel Smith was an experienced probate practitioner and found him to be a credible witness. Notwithstanding this, however, he “fell into grave error in the

circumstances of this case with the consequence that his evidence on the mental capacity of [Mrs Nothnagel] is unreliable”: para 172. The judge went on to give detailed reasons of the failings or omissions of Mr Hamel Smith in the performance of his duties as an attorney which led him to conclude that his evidence on her mental capacity was unreliable. I will return to this later.

22. There were two other aspects of the evidence which the judge had regard to. The judge accepted the evidence in the witness statement of Jessie Joseph that Mrs Nothnagel had become forgetful. She had not been cross-examined, however, and the judge felt he could not rely on her evidence in relation to an allegation that Mrs Nothnagel had complained to her at some stage that she was fearful of Christian because he had a gun and he had wanted her to change her will. This was because it was a serious allegation and there was no cross-examination on it so he thus considered he had to reject it. Her evidence that Mrs Nothnagel had become forgetful was consistent with and supportive of other evidence to that effect.

23. The other aspect was a brief medical report of Dr Jacqueline Sabga, a general practitioner, which stated that Mrs Nothnagel had been her patient for some years and specifically during the period 30 September into October 2010. This was in reality a short letter and not a detailed report evidencing a detailed assessment. At paragraph 9 of the judgment the judge stated:

“9. There is limited contemporaneous medical evidence of the deceased’s mental capacity at the relevant time but there is substantial direct evidence of her behaviour. The Defendants filed a report of Dr. Jacqueline Sabga, a general practitioner who stated that the deceased was her patient for “some years” and specifically during the period September 30, into October 2010. She had cause to visit the deceased at home and found her to be confused with some memory displacement. On October 30, 2010 Dr. Sabga recommended an MRI scan for unexplained acute memory loss and confusion. In a letter dated

November 20, 2020, Dr. Sabga stated that she requested blood tests and an MRI scan of the brain. The results of those tests showed that her thyroid stimulating hormone was quite low, indicating a subclinical hyperthyroidism. However, due to flooding in her office, Dr. Sabga could not provide further information from the deceased's file. Dr. Sabga was unavailable to give evidence at trial but her request for the MRI is an agreed document."

24. Mr Heffes Doon submitted that this document was an agreed document as to its "authenticity" but not as to its "contents". A document can be admissible by agreement. It is agreed because the party to whom it is disclosed can agree it is to be allowed into evidence without the need to formally call the maker of the document to put it into evidence. This does not take away the right of that party to argue that the judge should give no weight to it because the witness has not been called to give evidence. Once the document has been admitted, however, the judge can be addressed on what, if any, use the document ought to be put. It is then up to the judge to determine what weight he or she will attach to the document.
25. The judge did not specifically say what weight he was attaching to it, but he did say the use he was putting it to by stating: "There is limited contemporaneous evidence of [Mrs Nothnagel's] mental capacity at the relevant time but there is substantial direct evidence of her behaviour". The judge, it appears, used the report to support the evidence of the respondents as to her behaviour. The report had noted "she was confused with some memory displacement". Two days after the will was executed an MRI scan of the brain and blood tests were ordered "because of unexplained acute memory loss and confusion". Although this assessment was made after the will was executed, it was close in time to it. This was another bit of evidence consistent with the evidence from the respondents about the mental decline of Mrs Nothnagel.
26. The judge found Mr Hamel Smith's evidence to be unreliable for several reasons:

- i. While he had known the Nothnagel family for decades, he had not interacted with Mrs Nothnagel in the later years: para 173.
- ii. He did not have her examined by a medical practitioner even though she was 92 years of age, whether or not he had reason to suspect she was incapable: paras 173 and 174.
- iii. Christian was present at the execution of the 2010 will even though he was the main beneficiary. He did not leave her side during the entire process. The judge found that Mr Hamel Smith ought to have spoken to Mrs Nothnagel in Christian's absence: para 175.
- iv. Mr Hamel Smith did not enquire into the contents of the 2004 will. He found he ought to have done so as this would have assisted him in assessing her: para 176.
- v. There was no evidence of the precise conversation between Mr Hamel Smith and Mrs Nothnagel outside the issue of the will that would have helped him to assess her testamentary capacity: para 177.
- vi. The notes of the interview were not produced because Mr Hamel Smith had destroyed them. The judge found this to be "professionally illogical". This raised the level of suspicion to a "much higher level": para 178.
- vii. Mrs Nothnagel was unable to understand and approve the instructions regarding the back lot: para 179.
- viii. The time spent by Mrs Nothnagel with Mr Hamel Smith was insufficient for him to make a reliable assessment of her capacity: para 180.
- ix. Mr Hamel Smith did not give evidence of a previous interaction with Mrs Nothnagel to swear an affidavit verifying the birth of a relative: para 181.

## **Discussion**

27. The judge gave somewhat full summaries of the evidence of the witnesses in their witness statements and cross-examination before he came to his findings. His summary of the evidence went from paragraphs 9 to 139.

The judge then went on to state that he preferred the respondent's evidence to that led by Christian. He stated why he did so. He specifically stated why he found Mr Hamel Smith's evidence to be unreliable.

28. Mr Heffes Doon has urged us to conclude that the judge was inconsistent to reject Mr Hamel Smith's evidence for unreliability when he determined him to be a credible witness. Respectfully, I am unable to agree. A credible witness can be unreliable and there is no inconsistency between the two findings. The judge determined that given Mr Hamel Smith's long time as an attorney-at-law during which time he was very experienced in probate matters including drafting and executing wills, he was, *prima facie*, a credible witness. However, in this case, having regard to what he listed as Mr Hamel Smith's errors or failures, he found him to be unreliable in being able to give evidence of Mrs Nothnagel's testamentary capacity in relation to the 2010 will.
29. It is similar to a specialist surgeon giving expert evidence in court. The surgeon may be well qualified and experienced and the court would thus ordinarily consider him or her to be a credible witness in the field in which evidence is being given. However, faulty methodology, lack of sufficient investigation into the specific case and failure to follow standard practices may lead to the conclusion that the surgeon's evidence cannot be relied upon.
30. Further, the judge's reservations about Mr Hamel Smith's evidence were firmly grounded. Given the judge's finding that Mrs Nothnagel was suffering from deteriorating memory loss, this would likely have become apparent if there had been fuller interviews and the details of them provided by Mr Hamel Smith. Had there been such fuller interviews, Mr Hamel Smith would have likely seen the need for a medical report to be commissioned. Second, Mr Hamel Smith had rather unusually "destroyed" his notes. The importance of preserving a record of the client's instructions is paramount especially in cases like these where a challenge cannot be ruled out. The judge was entitled to conclude that this heightened the court's suspicion. Third, Mr Hamel Smith had known the family including the older siblings of Christian. There is no evidence

that he enquired of Mrs Nothnagel about the other children. He had not enquired about the contents of the previous will. That would have led to an inquiry as to why the change was being made. The judge was entitled to consider this as an important omission. Fourth, the judge was also entitled to consider that the lack of details of the interview showed that insufficient time was spent by Mr Hamel Smith with Mrs Nothnagel to properly assess her testamentary capacity. None of the judge's conclusions about Mr Hamel Smith's evidence can properly be faulted. They certainly cannot be considered to amount to an unreasonable evaluation of the evidence sufficient for the appeal court to disturb them.

31. The judge pointed to a number of errors and omissions made by Mr Hamel Smith. These included: failure to ask about the contents of the previous will, not requiring a medical report for a 92 year old testatrix, lack of sufficient interaction with her for him to make an assessment on testamentary capacity, the presence of Christian at the execution, and the lack of notes. All of these were legitimate matters identified by the judge. There is nothing in his evaluation of Mr Hamel Smith's evidence that can be considered as unreasonable, and I agree with the judge's observations.
32. Having seen and heard the other witnesses for both sides, the judge was entitled to prefer one set of witnesses over the other. The judge justified why he gave weight to Hans' evidence and the evidence of Velda. There was no reason to disregard the doctor's note that she had sent Mrs Nothnagel for an MRI to be done because of what she observed about her. The judge stated why he gave less weight to Dr Camacho's evidence and that of Ms Leotaud. Again, there is nothing flawed with his analysis, apart from minor errors in recounting the evidence, that would allow an appeal court to intervene. I will discuss these minor errors below.
33. In fact, overall, the judge's analysis was careful and thorough and based on the evidence as a whole, I agree with it.

34. Another feature of the evidence is that the other siblings were not made aware of the will until after Mrs Nothnagel's death, which took place five years later.
35. Mr Heffes Doon also pointed to some errors on the evidence made by the judge. These included statements about whether Mrs Nothnagel knew that Fritz was abroad; whether helpers were stealing and the events leading to her dentures going into the bin. He submitted that the judge took these into account to show descending mental capacity and there were explanations for these.
36. While I accept that there were, arguably, a few errors, they were not sufficiently significant to undermine the judge's overall conclusions and the otherwise careful attention he gave to the evidence. The evidence was lengthy in cross-examination and assuming the judge made the few errors which were pointed out, it is, however, very clear from the judgment that the judge formed the view that Mrs Nothnagel lacked the testamentary capacity to make the 2010 will. Moreover, his analysis demonstrated why he accepted the evidence he did and why he preferred the evidence of the respondents to that led on Christian's behalf. These bits of evidence were unlikely to have influenced the judge significantly to arriving at his otherwise fully articulated views.
37. One significant plank of the evidence was the emails passing among the family members which gave a clear indication of what was occurring with Mrs Nothnagel. Mr Kangaloo pointed to approximately 17 emails covering the period 1 May 2010 to 24 October 2010. These were contemporaneous with the lead up to the making of the 2010 will. They were also sent with none of the parties being aware that a will was being contemplated or made so they can be regarded as having been sent without any interest to serve. The respondents found out about the will after her death. These were ordinary conversations passing among siblings about their mother. These emails reflected commentary about the mother's condition, but also included various examples of that conduct. A sample of these included confusion while on a plane; continuous talks about a laxative; her being confused; mistaking where

she was on occasions; her wanting to go home, when she was at home; packing a suitcase, but not travelling anywhere; her making statements about they selling the house; among others. There were references to confused conversations on the phone and her being “out to lunch”. Of some significance, there was a 24 October 2010 email from Fritz to Veilchen referring to their mother speaking about “Hamel Smith and co” and “someone wanting to sell her house”. This suggested she knew there was some activity taking place involving Hamel Smith and company relating to the house. However, the reference did not suggest she appreciated it was a will she was making.

38. The judge was entitled to attach significant value to these email communications. They represented a record of the interaction of the siblings among each other in relation to their mom in the weeks leading to this will. This interaction was in the context of other topics. No doubt there would also have been phone conversations as well. In contrast, the evidence Christian relied on, more centred on memory and recall evidence.

39. In a keynote speech given on 12 October 2022, “At a Glance Conference”, entitled, **“Would you believe it? The relevance of demeanour in assessing the truthfulness of witness testimony”** (Speech available on UK Supreme Court website) Lord Leggatt, of the UK Supreme Court, made this point:

***“The reduced role of witness testimony***

Traditionally, calling witnesses to testify orally to what they have themselves observed has been regarded as the primary - and often the only permissible - method of proving facts at a trial. In the heyday of this approach, any other source of information was branded as “hearsay” and was either excluded altogether or was considered an inferior form of evidence when exceptionally it was admitted. Before I come to my main topic, it is worth noting the revolution in how facts are proved at trials brought about by developments in technology. In an age when

more and more information is recorded, often electronically, the best evidence in most cases is now hearsay evidence. Documents (using that term in its broadest sense to include any kind of record of information) generally provide more contemporaneous and reliable evidence than the assertions of witnesses testifying in court, often several years after the relevant events. I have no doubt that the displacement of witness evidence by documentary evidence is a trend that will continue with further technological advance.”

40. He noted this was consistent with a point he made in **Rogers v Hoyle [2013] EWHC 1409 (QB) at para 54** when he stated:

“54. The hearsay rule was developed in an age when comparatively little information was written down or otherwise recorded and the best evidence of disputed facts was generally the evidence of eye witnesses stating their recollection of events in court. A statement made out of court, if tendered as evidence of its truth, had the disadvantages that it was not first hand and could not be tested in cross-examination. However, in the modern age when vast amounts of information are recorded, the best evidence of relevant events in most civil cases is hearsay evidence. Notes, memoranda, transcripts, photographs, emails, text messages and many other forms of recording provide contemporaneous or more nearly contemporaneous and generally more reliable evidence than the recollections of witnesses testifying in court, often several years after the events in question.”

41. While this was a case involving the admissibility of an Air Accident Report prepared by the UK Department of Transportation, there is no good reason in principle why in a case like this, significance could not be attached to email correspondence. The judge was perfectly entitled to rely on this evidence and it was not unreasonable in the circumstances for him to do so.

42. This approach of looking at contemporaneous documents was taken in the case of **Leonard v Leonard [2024] EWHC 321**, a will case from the England and Wales High Court, where Mrs Justice Smith stated:

“143. It was no doubt the availability of these documents combined with the very different perception of each side’s witnesses as to Jack’s mental capacity at any given time which led the Claimants to submit that the court might wish to have regard to the oft cited guidance of Leggatt J, as he then was, in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [15]-[22] as to the fallibility of human memory and the importance of focussing on the contemporary documents as a means of getting at the truth. The Defendants did not disagree with this suggestion.

144. Whilst this is not a commercial case involving many thousands of documents, nevertheless I accept that, in general terms, the witness evidence must be tested against the contemporaneous documents (in so far as that is possible) and a determination reached as to the weight it should carry. Undisputed contemporaneous documents are likely to provide a better guide to the truth than oral testimony, which, as I have already said, is inherently unreliable, particularly where witnesses claim to be able to recall events or conversations which took place many years ago and where their recollection of events is necessarily overlain with events that have happened since and their willingness (unconscious or otherwise) to support one side or the other (see *Wrangle v Brunt* [2021] EWHC 368 (Ch) per Michael Green J at [22]).”

43. There was nothing wrong in principle, in the context of these observations from English cases, with the judge giving some weight to the emails which passed among the family members as providing a running commentary, as it were, of the conduct of Mrs Nothnagel in the weeks leading up to the 2010 will.

44. Mrs Heffes Doon urged us also to conclude the judge confused “lucidity or mental capacity” while his focus should have been “testamentary capacity”. When the judgment is read as a whole, it is clear that the judge used the term mental capacity and testamentary capacity interchangeably and as he stated in paragraph 153, he was focused on the task he was required to undertake.

45. The English Court of Appeal case of **Julia Hawes v Elizabeth Burgess and Another [2013] EWCA Civ 74** was relied on by both sides. There were some similar features of that case with the present one. There had been two wills, a 1996 will and a 2007 one. The second one essentially cut out one of the siblings who had been included in the previous will. An experienced solicitor had taken the instructions and prepared the second will in question. At the trial, the judge found that there was a lack of testamentary capacity and knowledge and approval of the will was not established. The Court of Appeal doubted the judge’s findings on lack of testamentary capacity, but upheld the judge’s findings on want of knowledge and approval of the contents of the will. In arriving at their conclusion the Court of Appeal in **Hawes** expressed this view:

“57. That said, it is, in my opinion, a very strong thing for the judge to find that the Deceased was not mentally capable of making the 2007 Will, when it had been prepared by an experienced and independent solicitor following a meeting with her; when it was executed by her after the solicitor had read through it and explained it; and when the solicitor considered that she was capable of understanding the will, the terms of which were not, on their face, inexplicable or irrational.”

46. The court also expressed the view that there is a “strong prima facie case for the validity of a will drafted by an independent solicitor who oversaw its execution”: para 54.

47. A material difference between that case and the present is that the solicitor in that case had his near contemporaneous notes. These notes

were “clear about his views on the capacity of the Deceased to make the 2007 Will”: para 55. Another difference was that the testator there was about 78 years of age at the time even though she had several medical conditions. Of some significance, in that case, Julia, who benefitted from the 2007 will similarly to Christian here, made the arrangements for the will with the solicitor and she remained in the room throughout the discussions about the will and when execution was taken. Ultimately, the court accepted the trial judge’s determination of want of knowledge and authority in circumstances where:

“62. In my judgment, the judge properly directed herself on the law. The 2007 Will was made in circumstances that justified the court’s insistence on affirmative evidence that the Deceased knew and approved its contents. Peter took a share of the residuary estate in the 1996 Will. Although Julia and Peter fell out, the Deceased and Peter did not fall out. They remained close down to her death, yet she never told him about the new will, even though she did tell him about making gifts to her daughters which she did not make to him. Although the Deceased had told Julia in the summer of 2006 that she wanted to revise her will with regard to burial directions and the involvement of her Pastor, no mention was made of cutting Peter out of the residuary gift and no finding was made that the Deceased had expressed that to be her intention.

63. The involvement of Julia not only in making the arrangements to see the solicitor but also in relation to instructions for the contents of the will, including misinformation emanating from her, is another circumstance on which the judge was entitled to be satisfied affirmatively that the Deceased knew and approved the contents of the 2007 Will. Julia made contact with Woodfines in December 2006, made the appointment, took the Deceased to the firm’s offices and remained in the room with the Deceased throughout the discussions that took place with Mr Webster when he took instructions and when the will was executed. That all happened without the knowledge of Libby and Peter at a time when there was a rift between Peter and Julia. Julia was found to be the “controlling force” (see [120]) and “the driving force” (see [117]) behind the instructions given for the drafting of the 2007 Will,

and, in particular, was the source of inaccurate information supplied to Mr Webster about sums paid or to be paid by the Deceased to Peter in his lifetime and about where the Deceased would be living. Further, the Deceased had not had an opportunity to check and approve the contents of the draft will before she went to Mr Webster's office to execute it.

64. Those particular factors, in addition to the judge's findings on the deteriorating state of the Deceased's physical health, her mental state and her diminishing capacity, were, in my judgment, sufficient to support the judge's overall conclusion on the Deceased's want of knowledge and approval of the contents of the 2007 Will."

48. In the present case the judge correctly directed himself on the law. His findings were detailed and careful. He demonstrated a good grasp of the evidence and he made clear conclusions about the various witnesses. In particular, he relied on the contemporaneous emails among the siblings and pointed to weaknesses in Mr Hamel Smith's handling of the case. He undertook that process of weighing the evidence that a trial judge must engage in. The judge engaged in the very same weighing exercise that the quoted paragraphs from the **Hawes** case above showed. Some of the findings were in favour of Christian and some were in favour of the respondents. For example, he accepted Mr Hamel Smith's evidence that he went through the contents of the will with Mrs Nothnagel. However, on the other hand, he found the time spent was insufficient for him to form a view on her testamentary capacity. Wendy de Mill's evidence was supportive of Mr Hamel Smith about the process he engaged in. This, however, did not alter the judge's reservations about the overall process undertaken by Mr Hamel Smith. The judge's suspicion was aroused because of the lack of notes. He accepted that Mrs Nothnagel had periods of lucidity. But he was not satisfied that she had testamentary capacity at the time of execution of the will and he had reservations about her knowledge and approval of the contents of the will.

49. In any case like this involving multiple witnesses, a judge in dealing with the evidence will be entitled to accept parts of a witness' evidence and reject other parts. He can accept some of the witnesses on one side and

reject others. He can determine that one witness was more impressive than another and conclude that one would likely have been more independent. The judge can find a prima facie credible witness to be unreliable in the circumstances of the case. Once the judge has properly explained his overall findings, the appeal court is limited in how and when it may intervene to overturn those findings.

50. The standard of proof was the civil one of balance of probabilities. The judge was not required to be sure that Mrs Nothnagel lacked testamentary capacity nor of her want of knowledge and approval of the 2010 will. In his weighing of the evidence, therefore, he quite appropriately grappled with the evidence and was entitled to place reliance on particular parts of the evidence. Ultimately, he came to his conclusion and the case of **Hawes** acknowledged that: "It would be contrary to well established principles applied by the Court of Appeal for this court to interfere with her [the trial judge's] conclusions simply because it would have attached greater weight or less weight to the evidence than she did": para 56.

### **The Cross Appeal**

51. The respondents cross-appealed on two aspects of the judge's statement of the law. The first related to the golden rule point. The second was on whether the judge ought to have gone on to consider the issue of undue influence since it had been pleaded and it provided a separate basis to impugn the 2010 will.

### **The Golden Rule**

52. The first point of the cross-appeal related to a statement by the judge at paragraph 170 of his judgment when he stated:

“The golden rule is not a rule of law but an indicator of good practice and is subject to exceptions and reservations. I accept the defendants submission that Hamel-Smith should have followed the golden rule. This might have avoided this litigation. But, it is not a rule of law, and does not help to decide the issues in this case.”

53. In a footnote to paragraph 170 the judge expressed the golden rule thus:

“the making of a will by an old and infirm 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 – See *Cottermole v Prisk* [2006] 1 FLR 693 at [12].”

54. This case reiterated the well known dicta of Templeman J in **Kenward v Adams [1975] CLY 3591**:

“In the case of an aged testator or a testator who has suffered a serious illness, there is one golden rule which should always be observed, however straightforward matters may appear, and however difficult or tactless it may be to suggest that precautions be taken: the making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator, and records and preserves his examination and finding.”

55. The judge did, however, notwithstanding his statement that it did not help to decide the issues in this case, go on to criticise Mr Hamel Smith for not having Mrs Nothnagel examined by a medical practitioner regarding her capacity and understanding.

56. The requirement for a medical practitioner to witness the making of a will of an elderly or ill testator is not a rule of law in this jurisdiction. It is not a requirement of the Wills and Probate Act and has not been established, from our research, by any locally decided case. The judge was correct therefore to hold that it was not a rule of law.
57. As people live longer, and in better health, and with access to better health care, and with the financial difficulties this may pose to some testators, it would probably not be appropriate to lay down such a rule here. There are many persons in their 90s who are fully capable of giving instructions to make a will and to handle their business affairs. Equally, there are persons much younger than 90 years of age who may not be capable of giving instructions to make a will. A legal practitioner may be able to recognise this from detailed and careful questioning. Where there is some doubt about a person's testamentary capacity, prudence suggests that appropriate evidence from a medical practitioner would be not only useful, but strongly advised.
58. A legal practitioner must act prudently in the conduct of his or her responsibilities. An important lawyer-function is to ensure that, as far as possible, a testator's free and unimpaired wishes should be given effect to. This requires that the process involved in the solemn act of preparation and execution of a will should be able to withstand scrutiny. In this case, the judge pointed to various failings by Mr Hamel Smith. The judge also found Mr Hamel Smith had not spoken sufficiently with Mrs Nothnagel to assess her testamentary capacity or to conclude whether she would have had knowledge and approval of the contents of the will. Had he spoken with her sufficiently, and produced his record of his interactions with her, he may have been able to justify his assessment.
59. While no rule can be laid down at this time as to the necessity of having a medical practitioner to certify the testamentary capacity of an elderly testator, there are certain steps that prudence would dictate should be followed. In other jurisdictions there are guidelines by Bar / Solicitors' Associations. For example, the Law Council of Australia has published guidelines in 2023 relating to "Best Practice Guide for Legal Practitioners

on Assessing Mental Capacity”. The Law Society of New South Wales has a similar guide published in 2016. The Law Society of England and Wales also has published guidelines on its website. These provide useful “best practice” advice to legal practitioners on the test for assessing mental capacity and what legal advisers may do to satisfy themselves that testators have the requisite mental capacity at the time of the making of a will. While this is not an exhaustive list, some of the practices regarding elderly testators or persons who are ill, particularly with mentally related ailments, should include:

- i. The attorney should question the person both at the time of taking instructions and at the time of the execution of the will about the person’s orientation as to time, place and occasion. These questions may include the date, day of the week, name, address, age, occupation or previous occupation, knowledge of their spouse and children, where the person is, the purpose of the visit, and so on. General conversation relating to knowledge of common current and past events may also be helpful in being able to assess his or her capacity. Asking open-ended questions is a useful technique as some persons with declining mental capacity may be able to follow along a leading conversation. Asking the same or similar questions on separate visits may be helpful to assess consistency of their answers.
- ii. Enquiry should be made of any previous wills and in particular, any last will made before the present will; who were the beneficiaries; and why any changes are being made. A full enquiry should be made of all of the testator’s assets capable of being bequeathed by will and care should be taken to verify the accuracy of the list of assets identified.
- iii. At some point the attorney should speak with the testator alone, or in the absence of any accompanying family member or person, and should specifically enquire, in language the testator will understand, whether he or she is being influenced or forced to make the dispositions contained in the will. The

will must be genuinely reflective of the testator's free will. Ideally, execution should take place in the absence of beneficiaries. If close family members are being specifically excluded from the will, instructions should ordinarily be taken why this is being done. An attorney should ask questions about any unusual dispositions.

- iv. If after detailed questioning, there is any reason to doubt the testator's testamentary capacity, the attorney should advise that a qualified medical practitioner be consulted to provide a report and should provide guidelines as to the legal requirements which must be satisfied.
- v. Even after any medical report, the attorney should nonetheless engage in his or her own detailed enquiry. In this regard it may be useful to get information from family members or carers about the person's background so you can ask appropriate questions.
- vi. A careful note should be taken of the questions asked and answers given; the instructions; any special reasons for changing a previous will; and the process utilised for the execution of the will, including whether the testator read it or whether it was read over to the testator before.
- vii. These notes should be preserved at very least until after probate of the will has been granted. A prudent lawyer will note that in this jurisdiction applications are sometimes made after probate has been granted for the grant of probate to be set aside. Preservation of notes is therefore highly desirable for some time even after probate has been granted.

60. Adherence to these basic practices will go a long way to ensuring that a testator has testamentary capacity. They will also allow the practitioner

to give helpful evidence about the process utilised in the making of the will if called upon to do so. This will, in turn, allow the court to make a proper decision on whether a challenged will should be upheld. Ultimately, it will help to give effect to the testator's last published wishes. Additionally, they are consistent with the practices that are expected to be adopted by a competent legal practitioner in the discharge of his or her duties to the client, beneficiaries and the court in keeping with the **Legal Profession Act**.

### **Undue Influence**

61. The judge set out the law on undue influence, but did not go on to consider whether this operated on the testator at the relevant time. It would have been useful to have the judge's views on this matter as it provides a separate basis on which the court could decide not to pronounce in favour of the 2010 will. This is particularly relevant in circumstances where the previous three executors were removed in the 2010 will and all of the arrangements that were made by Mr Hamel Smith were done through Christian. Christian took his mother to the office of Hamel Smith to execute the will and he was present throughout. He also substantially benefitted from the change in the will. There was also clear evidence that she had been, at the very least, suffering from memory loss. Further, none of the other four of Mrs Nothnagel's children knew of the 2010 will until some five years later when she died.
62. Having said this, however, it is difficult for the Court of Appeal to undertake any assessment of whether undue influence operated on Mrs Nothnagel without having the benefit of seeing and hearing the witnesses give evidence and being cross-examined. There were certain specific aspects of the evidence bearing on this issue which were contested. Examination of the printed record, by itself, is insufficient in the determination of a contested, fact driven issue such as this. I would only observe that there was some evidence relating to undue influence which the judge could have appropriately considered. If the Court of Appeal is wrong in upholding the judge's decision, this nonetheless, howsoever

undesirable it may be, will leave open the issue of undue influence to be interrogated afresh.

### **Order**

63. Having regard to our reasons above, the appeal is dismissed. Bearing in mind the views expressed above, the cross-appeal is also dismissed. We thank the attorneys on both sides for their scholarly and helpful submissions in this appeal. We invite submissions on the costs of the appeal.

Ronnie Boodoosingh

Justice of Appeal

I have read the judgment of Boodoosingh JA and I agree with it.

Maria Wilson

Justice of Appeal

I too have read the judgment of Boodoosingh JA and I agree with it.

James C. Aboud

Justice of Appeal