

CANADA / JUDGMENT

A.P. v. A.F.

2020 BCSC 746

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 746 A.P. v. A.F.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.P. v. A.F.,

2020 BCSC 746

Date: 20200514

Docket: S39532

Registry: Penticton

Between:

A.P.

Plaintiff

And

A.F., Executrix and Trustee Under the Last Will and Testament of B.P., Deceased, and A.F. in Her Personal Capacity, and A.B.F., S.C.F., and P.F.

Defendants

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for the Plaintiff (2016 dates):

V.J. Macdonnell

Counsel for the Plaintiff (2019 dates):

G.T. Behan

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Counsel for the Defendants (2019 dates):

J. Kidston

Place and Dates of Trial:

Penticton, B.C.

August 23-26, 2016

June 3-7, 2019

Place and Date of Judgment:

Penticton, B.C.

May 14, 2020

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Introduction

- [1] This case involves the estate of B.P. (the "testator"). The issue is whether a Will, apparently executed July 25, 2014, is valid and the Last Will and Testament of the testator. If that Will is found not to be the Last Will and Testament of the testator, then a Will dated in 2011 may be the Last Will and Testament of the testator.
- [2] In short compass, the testator's elder daughter, the plaintiff A.P., submits that the value of the estate was intended by the testator to be divided equally between the two daughters of the testator. The younger daughter, the defendant, submits that the Last Will and Testament of July 2014 accomplished that goal, taking into account the gifts from and contributions of the parties to the estate as well as the grandchildren of the testator, who stand to receive \$25,000 each from the estate.

Issues

- [3] The primary issue in this case is whether the 2014 Will is valid and enforceable as the Last Will and Testament of the testator. This raises questions of the testator's capacity, whether he knew and approved of the contents of the Will, and whether he was unduly influenced.
- [4] The plaintiff also claims she is entitled to a variation of the 2014 Will if it is found to be valid. The plaintiff has persistently advanced the proposition that her father was a fair man throughout his life and intended to divide his estate equally between his two daughters. This position creates issues such as how to treat significant unequal gifts to the elder daughter for tuition, support and \$100,000 to purchase a condominium, among other gifts. A similar issue to be considered surrounds the grandsons of the testator. Are the grandsons simply extensions of their mother, or are they persons in their own right to whom the testator might gift a modest portion of his estate?

Background

- [5] The testator was born in 1930. The testator married and he and his wife subsequently had two children. As discussed with the parties at the close of submissions, I will not refer to the parties or the testator by name, but rather will refer to the daughters as the plaintiff and defendant, "elder daughter" and "younger daughter", or by their respective initials. I will also refer to other parties and witnesses by their initials.
- [6] The family of the testator has been described as a close and loving family, a very stable family, living in a home in a good neighbourhood. The testator was involved in a variety of highly public national or governmental positions for a number of years, substantially in Eastern Canada. He was the subject of highest public regard. He retired from the last position he held in the year 2000. Approximately three years later, he moved to a property in

the Okanagan in British Columbia, which now forms a substantial portion of his estate (the "Okanagan Property").

The Parties

- [7] The elder daughter was born in 1957.
- [8] After high school the plaintiff attended universities to obtain a four-year diploma from a college of art (1978), and then two masters' degrees: a master's of fine arts in sculpture (1995) and a master's in sociocultural anthropology (1997).
- [9] The testator paid for a portion of the elder daughter's post-secondary education; in particular, \$15,000 in US funds in 1995 - 1996 (for three semesters) and two semesters the following year, which is assumed to be \$10,000 in U.S. funds, together with monthly support.
- [10] Following graduation, she held a one-year teaching position followed by a five-year teaching position at other universities. In 2000, she began working at a British Columbia university specializing in art and design, on a part-time basis, and was eventually promoted to associate professor in 2008. Presently, she earns approximately \$89,000 per annum from that position and is entitled to a pension upon retirement.
- [11] In 2010, she began living with her partner in a home in Vancouver. Evidence was led that she was not on title to that property; however, she testified that she and her partner were common law partners and have resided together in that home since 2010, when she sold her prior accommodation, a condominium in Vancouver. A basement suite in the home is rented to a tenant. The rental income from that suite is used to pay the property taxes. The plaintiff makes monthly payments of \$660 per month to the line of credit registered on that property and has been making such payments for five years. The property had an assessed value in 2016 of \$2,038,000.
- [12] While the plaintiff may not appear on the title, she would be entitled to an interest therein by operation of law pursuant to the provisions of the Family Law Act, S.B.C. 2011, c. 25, ss. 3(1)(b), 81, and 84(2)(f) and (g), as that home would, on the facts presented, be a "family asset".
- [13] The testator made a \$100,000 gift to the elder daughter on or about November 7, 2006, to purchase a condominium for \$235,000. She later sold the condominium in 2010 for approximately \$305,000.
- [14] The plaintiff had an interest-bearing chequing account at August 5, 2016, with a balance of \$236,275.02, and a U.S. premium rate savings account with a balance of \$452.64. As at December 31, 2015, the plaintiff also held an RRSP account with a balance of \$31,631.74.

- [15] The younger daughter, A.F., was born in 1962, and is five years younger than the elder daughter. A.F., graduated from high school and later attended Lakehead University, where she obtained a diploma in Forest Technology. The testator did not pay tuition for A.F., but did provide her with assistance of \$300 per month for the eight months of her final year of post secondary education, for a total of \$2,400.
- [16] In 2014, the younger daughter worked in three jobs. She worked for the Canadian Postal Service from 4:00 am until 8:00 am and at a local middle school from 8:30 am until 3:00 pm as an education assistant. Each job was five days per week. She had worked for the Postal Service for 10 years, and for the school district for seven years. She will be entitled to a pension from each of these positions at age 65, but the monthly pension payout from the post office is stated to be approximately \$380 per month at age 65. The pension payout for the education assistant position will be a similar amount at age 65. Since 1984, the younger daughter also worked in the forest industry on a contract basis, when available, but received little income therefrom.
- [17] A.F. married P.F. and they originally lived together in a modern rental apartment in Penticton. At the request of the testator, they agreed to assist him to locate a home for him to purchase in the Penticton area. After his retirement, the testator intended to move with his wife to that area. A.F. and P.F. located a property near Penticton, which was also approved by the plaintiff. The testator purchased the Okanagan Property.
- [18] The testator then changed his retirement date. He requested that A.F. and P.F. move into the Okanagan Property and rent it from him with a request that they maintain the property until he decided to move there. A.F. and P.F. moved into the property and paid monthly rent to the testator that was higher than they had paid for renting their apartment. They also paid the cost of heat, light, and cable.
- [19] The couple purchased a building lot in or around 1990, with the assistance of a \$15,000 cash advance from P.F.'s parents.
- [20] Once the younger daughter's family moved out of the Okanagan Property, they managed the Okanagan Property from 1997 until 2002. They located tenants, collected rents for the testator and completed maintenance and necessary repairs. The couple helped with maintenance on the Okanagan Property, which included fixing fences which surrounded the acreage, maintaining the septic system, maintaining cedar siding and removing fallen trees. The testator would pay for the cost of materials such as fencing or siding, but P.F. was not paid for work done unless he took time off from his regular job, which occurred once after the testator moved on to the Okanagan Property. The couple received no compensation for performing these property management activities from 1997 until 2002.
- [21] The younger daughter and her husband have two children, grandchildren of the testator, who are beneficiaries under the Will.

- [22] In 1997, when their eldest son was two years old, A.F. and P.F. moved into a home that they completed. In 2014, the house built by the couple had an assessed value of \$509,000.
- [23] In addition to managing tenants and performing maintenance on the property, A.F. and P.F., at the request of the testator, made changes to the property commencing in 1991. These changes included finishing the lower level of the home on the property and enclosing the garage to relocate and improve the front entrance to the home and create additional space in the home. In addition, P.F. worked with his father to install and finish a full bathroom in the basement of the home, where there had not previously been a bathroom. Work was also done by P.F. on the existing bathroom, and a bedroom was added with insulation, installation of drywall, mudding and taping, adding pine paneling, and other wall finishes as well as wainscoting and stained glass windows. An office room in the home was refinished with linoleum floor, framing of ductwork, drywall and paint. Fences around the property were maintained and when necessary, replaced. Chimneys were cleaned.
- [24] Wooden siding and fascia on the house were damaged by woodpecker attacks and the damage was fixed by replacement of the siding, with staining to match existing siding.
- [25] Concrete sidewalks were placed around two-and-a-half sides of the home. The decking on the upper deck was replaced and a Duradek surface was applied to the deck. P.F. also remodeled the upstairs of the home; replaced wall-to-wall carpet with oak flooring; removed kitchen carpet with linoleum; and replaced old yellow glass panels in windows, and lighting fixtures.
- [26] After the testator moved onto the Okanagan Property, P.F. continued to work on the property, including removing an original wooden retaining wall, replacing it with a 130-foot-long Allan Block retaining wall, installed an in-ground irrigation system, and completed landscaping with river rock, sod, topsoil, shrubs and trees. The irrigation system required repairs regularly. P.F. also created a rock slab staircase to the front door using stone slabs he obtained while conducting forestry projects.
- [27] A design flaw in an overhang above the kitchen, which allowed water pipes above the kitchen to freeze in the cold winter days, was corrected by P.F. with the installation of insulation and heat wrap. New kitchen taps were installed in renovated kitchen counters - in addition to new kitchen lighting.
- [28] P.F. annually provided fire wood. In addition, P.F. also provided regular weekly security inspections while the testator was at his camp in Ontario for four months each year.
- [29] P.F. took a week of holidays and a week away from his regular work to renovate the main bathroom in the home. This work involved moving existing plumbing and removing a sunken Roman bath tub and an eight-foot vanity with mirrors. Then, P.F. framed in a shower and closet and installed a new bath tub, toilet, sink, and shower with custom fabrication of glass doors. P.F. acknowledged that he had rendered a bill for this work in the amount of \$4,000 which was paid by the testator.

- [30] Otherwise, for all of the renovations, new construction, and maintenance work performed particularly by P.F., with assistance from A.F. and P.F.'s father, at and around the home on the Okanagan Property, P.F. was not paid by the testator for his labour. The testator did reimburse P.F. and A.F. for materials installed in the home or for necessary expenditures for landscaping.

Other Assets Divided Upon the Death of the Testator

- [31] The testator named the elder sister and younger sister as equal beneficiaries of a Registered Retirement Income Fund ("RRIF") created from the proceeds of the Registered Retirement Savings Plan funds held by the testator. The RRIF at July 29, 2016, had a value of \$332,949.63, which was used by the testator to provide for his daughters in the event of his death. For a reason that the elder daughter was unable to explain at trial, the document necessary to divide the RRIF was not signed by her as of the trial date.

Testator's Relationship with His Children

- [32] The evidence of both daughters was that they generally had good relationships with their father. The elder daughter would, at the end of her teaching year, travel to the Okanagan after her father moved there, and then together they would drive to Thunder Bay, Ontario, where the family owned property. According to the elder daughter, the father and the elder daughter spent hundreds of hours together lake fishing.
- [33] Both daughters also received periodic gifts from the testator ranging from hundreds to thousands of dollars.
- [34] When the wife of the testator died, no original Will could be located, so the estate was probated as an intestacy. One of the recreational camp properties in Ontario was then given by the testator to his eldest daughter, but the date of that transfer was not provided in the evidence at trial. While there was some discussion about the value of this property, the plaintiff did not produce any evidence of the value or an appraisal.
- [35] Both of the daughters asserted their relationships with their father were close, but not without flaws, and both daughters pointed to shortcomings in the other's relationship with the testator that arose from time to time. On the whole of the evidence, I am satisfied both daughters had loving, positive relationships with their father.

Estate Planning

- [36] The plaintiff asserted in her evidence that in conversations concerning the estate of the testator, the testator confirmed continuously that he was going to divide his estate into two equal halves, "one each to my sister and me".

- [37] Both daughters received a substantial benefit from their father in the provision of a cottage property in Thunder Bay, Ontario on Lake Superior. As noted above, one of the cottage properties was gifted by the testator to the plaintiff and some years later the second cottage property came into the possession of the younger daughter on the death of the testator as she and the testator were registered as joint tenants of that property.
- [38] The evidence of the 2014 Will must also be taken into account in relation to estate planning. The plaintiff asserted repeatedly that her father intended an equal division of his estate between his two daughters. If this position is in support of the 2011 Will, it ignores the fact that the testator had given the plaintiff a significant amount of money which had not been equalized with the younger daughter. This amount was at least \$25,000 in U.S. funds for university tuition and \$100,000 in Canadian funds to help with the purchase of a condominium, not to mention whatever monthly support the testator paid to the plaintiff over the years while she was attending university. \$25,000 in U.S. funds equalled approximately \$33,800 in Canadian funds.
- [39] During cross-examination, the plaintiff agreed with or said she could not remember receiving payments for such items as cash gifts for Christmas and birthdays, a bicycle, a canoe, jewellery, roofing, a sauna, propane installation for her cottage in Ontario, and airfare on numerous occasions, which on a simple calculation from cheque stubs totals \$42,679.
- [40] When the plaintiff was asked if her younger sister had received a similar \$100,000 gift, she provided a long response which finished with "I just don't know". In other words, the plaintiff did not know what her claim to equality meant in terms of the actual disposition of the testator's estate.
- [41] An equal division ignoring the additional substantial gifts to the plaintiff would be patently unfair, and inconsistent with the fairness which the plaintiff attributes to her father.
- [42] While acknowledging that the plaintiff believes the testator executed the 2014 Will while he was allegedly in a state of dementia, which overbore his mental faculties, the contents of that Will must be considered by the court insofar as it informs the question of the estate planning by the testator.
- [43] At Exhibit 1, tab 4, page 20, notes of a telephone conversation between A.F. and J.T., the testator's lawyer, are recorded by J.T. on March 2, 2013. Among other things, these notes record a request for J.T. to take instructions from the testator, a desire by the testator while in hospital to change his Will, and a statement that J.T. would interview the testator in hospital to determine his competence to change his Will.
- [44] At Exhibit 1, tab 4, page 21, are notes made by J.T. of a meeting on April 25, 2013, with the testator and A.F. J.T. requested that A.F. leave the room. The testator said "No", he wanted A.F. in the room and she remained. There were a variety of discussions recorded over the next three pages of the Exhibit, including the existing inequality of prior gifts, particularly

the \$100,000 given to A.P., which needed to be equalized, and a discussion of the work provided by P.F. to help the testator modernize his house. J.T. raised the issue of undue influence at this time. The notes also record instructions for gifts of \$25,000 each to the testator's grandchildren.

- [45] The notes reflect that "after much consideration", a variety of scenarios for the sale and division of the proceeds of sale of the testator's house were discussed. These discussions concluded with instructions to divide the proceeds of sale of the Okanagan Property, 65% to P.F. and 35% to the plaintiff, with additional gifts of \$100,000 to A.F. to equalize the contribution of the testator to the plaintiff to buy a condominium earlier, as well as the two \$25,000 gifts to his grandchildren, provided they survived him.
- [46] These latter instructions are summarized in J.T.'s handwritten instructions to her legal assistant (at Exhibit 1, Tab 4, page 24) for the preparation of a new Will for the testator.
- [47] Although J.T. drafted the Will, she had no involvement in the actual execution of the Will.
- [48] The 2014 Will had three provisions which were of significance. Paragraph 3(c) on page 2 reads: "Provided she survives me, to transfer and deliver the sum of one hundred thousand (\$100,000) to my daughter, A.F., without interest, for her own use absolutely, to equalize the gift to my [eldest daughter], at the time [eldest daughter] bought her house".
- [49] Paragraphs 3(d) and 3(e) provide that each of the testator's grandsons would receive \$25,000. A.B.F. and S.C.F. are the grandsons of the testator. The testator was very interested in their upbringing and development. The only evidence presented concerning these young men was that their grandfather loved and doted on them. He enjoyed seeing their progress and wanted them to accomplish much in their lives.
- [50] At the time of trial, A.B.F. was working to install smart metres for a Hydro company. He has taken training as a pilot. The testator paid for flying lessons for A.B.F. His younger brother, S.C.F., is working to become a professional hockey player, presently in the Western Hockey League, and in his off-season, is working in beverage production in the Okanagan area of British Columbia. The testator assisted S.C.F. by paying for enrolment in a hockey academy, travel expenses for hockey tournaments, and hockey equipment. The testator attended many of the 72 hockey games played by S.C.F. per season.
- [51] Paragraph 6 on page 4 reads: "I hereby declare that I am fully cognizant of the nature and value of the assets of my estate and I have been advised of the provisions of the Wills Variation Act, R.S.B.C. 1996, c. 490, and being so cognizant and advised and understanding the same, I have made specific provisions under the Will for my natural children, and for my son-in-law [P.F.] due to his time and effort to modernize my property at [Okanagan Property]. It is my sincere desire that the Will not be altered in this regard." The 2014 Will provided for P.F. to receive a 65% interest in the Okanagan Property, with the plaintiff receiving the remaining 35% interest.

[52] In response to further questioning in cross-examination, Mr. B., a person who witnessed the Will, testified that during a conversation conducted at a New Years' Eve get-together at the 2013-2014 New Year, the testator told Mr. B. about P.F.'s construction and plumbing work on the Okanagan Property and the testator's property in Ontario. Mr. B. testified, as follows, in relation to P.F.:

A. "Yeah, he's done a pile of work for me too. He's kept my house from falling down

Q. Mm Hmm.

A. - - "as well as a lot of work out at the cabin in Ontario", or what do they call them out there? Camps.

Q. Right.

A. Camp in - Now, I don't know what he did out in the camp, but I'm not -

Q. Well, don't speculate.

A. Yeah

Q. So tell us more about the conversation.

A. Well, he said he had to and intended to compensate [P.F.] for all his efforts.

Q. Mm hmm.

A. He said, "I've got a first-class son-in-law."

Q. Right.

A. And he said, "I have to - - I have to make provision for him." And he even specifically said, "I'm considering leaving part of the house in OK Falls to [P.F.], just to recognize him personally."

[53] Mr. B. also testified that the testator "had to and intended to compensate [P.F.] for all his efforts. And it really sticks in my mind because I thought, wow, what a generous gesture, you know." [Transcript August 26, 2016, p. 64, lines 39 to 47 to p. 65, lines 1 to 15]

[54] Mr. B. was cross-examined originally on August 26, 2016, and again when the trial recommenced on June 3, 2019. None of the above statements attributed to the testator were challenged or otherwise the subject of any question during the remainder of cross-examination of Mr. B.

[55] The statements of the testator to Mr. B. at the New Years event make it clear the testator's expressed intention was to provide a testamentary benefit for the considerable work provided by P.F. to the testator on two residential properties.

Medical History of the Testator

- [56] From a general health perspective, the testator was diagnosed with and treated for a number of conditions, including high blood pressure and kidney failures. It should be noted that the only medical opinion tendered as evidence in this case was evidence from the doctor of the testator, Dr. O'Neill, tendered by the defendants. The plaintiff was made aware before the death of the testator that both J.T. and Dr. O'Neil considered that as of the date of the execution of the July 2014 Will, the testator was considered competent to execute a Will. The plaintiff did not tender any medical opinion evidence during her case. While testamentary capacity is a legal concept, not a medical one, evidence from a family doctor can sometimes be the most reliable indicator of cognitive abilities and capacity: *Halliday v. Halliday*, 2019 BCSC 554, at paras. 154-155.
- [57] It is also worth noting that starting in 2013, efforts were made to prepare an enduring power of attorney to be signed by the testator naming both of his daughters as attorneys. The power of attorney was executed twice by A.F.; once when the document contained an obvious error and secondly after the error was removed. Had the plaintiff signed the power of attorney after she was repeatedly requested to do so, her access to bank and financial records would have been complete, particularly after the testator was found to have significant mental disability in the fall of 2014. The power of attorney was not in effect until the testator was determined to be incapable. It was the plaintiff's decision not to sign the power of attorney, and the resulting lack of access to financial and banking records prior to the death of the testator, unfortunately became a matter of some controversy in this proceeding.
- [58] In the direct examination of the elder daughter, she expressed the view that in 2012, the testator was becoming more and more argumentative because he became more confused "because of the dementia". In addition, she testified:
- He had great difficulty walking. He sat most of the time. He went for long periods without eating. He was being medicated for high blood pressure at that point, a condition that had been diagnosed in 2010 at Thunder Bay Hospital. He neglected his blood pressure medication. He had a predilection to repeating stories he had just told you. He was becoming short tempered.
- She spoke in testimony of a "remarkable decline in the summer of 2013".
- [59] The daughters arranged for the testator to receive We Care meals in his home. He was admitted to hospital in late May 2014 in Penticton and had a stroke while in hospital on June 5, 2014. He was in hospital for approximately one month.
- [60] In submissions concerning hospital records, the plaintiff submitted that "medical records contained notes from various medical practitioners, none of whom provided expert reports or gave evidence".

- [61] One of those medical practitioners was Dr. O'Neil, whose expert report was submitted to the court as an exhibit, Exhibit. 3. That document was submitted by plaintiff's counsel during the in-chief testimony of the plaintiff and she was asked questions during that testimony to confirm the correctness of those reports and statements of fact in those reports. At Transcript, August 24, 2016, page 95, the plaintiff was asked by her then counsel, "You are aware that the defendants have tendered two letters by Dr. Ross O'Neil as expert reports in this case, correct?" Her response was that she had read the expert reports of Dr. O'Neil. The plaintiff was then asked by her counsel, "Do you agree with them?" Her answer was, "Part of them". The plaintiff was then asked questions concerning three separate paragraphs in Dr. O'Neil's report and she indicated her agreement about the contents of the three paragraphs. It is passing strange that having had the plaintiff confirm in her testimony the correctness of statements of fact contained in Dr. O'Neil's reports, plaintiff's counsel then questioned in submissions the facts and assumptions upon which the opinion of Dr. O'Neil is based. The plaintiff appears to be approbating and reprobating at the same time, conduct which is rarely allowed.
- [62] The plaintiff was also asked if those same observations, made by Dr. O'Neil, persisted right up until the time of the death of the testator. In other words, she was asked if the factual observations were true. Counsel for the plaintiff did not at that time record when the plaintiff had an ability or opportunity to observe the testator after July 24, 2014 up to December 6, 2014. As a result, it is difficult to assess the weight, if any, to give to the latter statement by the plaintiff.
- [63] Finally on this point, the plaintiff was served by counsel for the defendants in accordance with the Supreme Court Civil Rules, Rule 11-6(3), with the opinions of Dr. O'Neil on May 27, 2016 (Transcript, August 24, 2016, page 23, lines 12 through 17). No written objection was forthcoming from the plaintiff in relation to those reports. At a subsequent trial management conference, held July 18, 2016, Cole J. made a series of orders including, "[t]he Plaintiff and Defendants will exchange written briefs setting out the particulars of any objections to any expert reports fourteen (14) days before the Trial. The Plaintiff and the Defendants will exchange reply briefs to the particulars of objections seven (7) days before Trial".
- [64] The plaintiff filed no objection to the reports of Dr. O'Neil pursuant to Rule 11-6(11), nor any brief setting out objections to the expert report of Dr. O'Neil as required by the order of Cole J.
- [65] The plaintiff further did not demand, within 21 days after service of the report prior to the trial pursuant to Rule 11-7(2), or any other time prior to the commencement of the trial, the attendance of Dr. O'Neil for the purpose of cross-examination. As a result of the lack of such demand, the defendants relied upon Rule 11-7 to the effect that Dr. O'Neil need not attend the trial. The Court ruled against an oral application to cross-examine Dr. O'Neil brought mid-trial without any written materials or other explanation for the failure of the plaintiff to comply with the requirements of the cited Rules of Court or of the specific provisions of the

Order of Cole J. made herein on July 18, 2016.

- [66] Clinical notes under the signature of Dr. O'Neil appear at Exhibit 1(A) page 131, and appear to be notes of the referral by Dr. O'Neil of the testator from an acute care hospital, Penticton General Hospital, into a community care rehabilitation program. Dr. O'Neil notes the presenting medical condition as chronic renal or liver failure. The past medical history is stated as "an upper GI bleed". I take the reference to GI as a reference to the gastrointestinal tract. Past medical history also includes hypertension, a reference to atrial fibrillation (often a high heart rate), and a CVA or cerebrovascular accident. A CVA is a stroke. The notes also refer under the heading "cognitive status" to receptive and expressive aphasia: MMSE 21/30 May 30/2014. The word "aphasia" describes a condition involving difficulty with language, but I would be loathe to begin interpreting such references without the aid of a qualified witness.
- [67] At page 64 of the clinical records, a Discharge Summary signed by Dr. O'Neil apparently dictated on July 24, 2014 states the following:
- [The testator] at a prolonged admission to hospital that lasted from May 27 to June 25. He was admitted on an acute delirium on dementia, with no significant identifiable cause of delirium, other than his renal failure. He had a small stroke in hospital, which resulted in some significant word-finding difficulties and some confusion. This did resolve mostly to a satisfactory level. He was discharged home, under the care of his daughter, in reasonable spirits.
- [68] In the report authored by Dr. O'Neil, dated August 4, 2015, Dr. O'Neil notes that he has been the testator's family physician since June 2010, and got to know the testator very well. Dr. O'Neil describes the testator as having multiple issues that gradually worsened over the last five years. He noted the testator suffered a stroke after the admission to hospital in June 2014. The testator was said to been in hospital because he had transient delirium. The report notes "[i]t is not uncommon for a person with vascular dementia to have transient delirium". Dr. O'Neil notes that the testator was discharged from hospital at the end of June 2014 "in a recovered cognitive state".
- [69] The month of July 2014, Dr. O'Neil records, was spent observing and following up for complications, including anemia and renal failure. Dr. O'Neil records that he had a visit with the testator on July 15, 2014, and at that time he was able to have a coherent discussion and was communicating thoughts and opinions consistent with previous wishes. Dr. O'Neil concluded that the testator seemed confident to make medical and legal decisions".
- [70] As noted in other documents, he was referred for a discussion of dialysis to the local renal clinic. Dr. O'Neil noted that he had discussions with the family regarding the testator's transient competency at a time when there was a growing concern of dispute between the two daughters of the testator. Dr. O'Neil asked for the assistance of another doctor to provide a second opinion about the competency, however, prior to that opinion being prepared, in October 2014, the testator had a further decline in function with resulting delirium returning.

- [71] In the second opinion letter dated May 25, 2016, Dr. O'Neil focused his opinion on specific questions relating to the testator's competency on July 25, 2014. Dr. O'Neil references the physical examination conducted by him while the testator was in hospital in June 2014. Dr. O'Neil noted that time the testator had transient delirium on top of the "mildly progressive baseline vascular dementia". Dr. O'Neil stated that the testator demonstrated disorientation, confused speech, and hallucinations.
- [72] The doctor then discussed the baseline functioning of the testator, stating that his mild vascular dementia included transient times of mild to moderate memory loss with acute illnesses and stressors. The doctor suspected that at times of acute illness and stress, the testator would have difficulties with memory loss that could affect his day-to-day living. Dr. O'Neil stated "the occurrences in which I witnessed this were always during the hospital admissions, which in my professional opinion by a personal anecdotal experience in scientific literature review, is a common phenomenon". By way of personal observation, Dr. O'Neil stated that he did not observe any difficulties in the testator performing "familiar tasks" of daily living. The doctor also referred to the testator as having an excellent command of language and that he was very articulate. Dr. O'Neil noted that during the acute delirium in June 2014 while hospitalized, the testator demonstrated some difficulty with language. The doctor stated that this difficulty "resolved to a very reasonable and baseline state before discharge from hospital".
- [73] Dr. O'Neil further reported that he witnessed disorientation and impairment of judgment while the testator was suffering an acute delirium in hospital. However, the doctor was very clear that he saw no signs of disorientation or impairment of judgment after the testator was discharged in follow-up appointments, including meeting the testator in his office on July 15, 2014. Dr. O'Neil finally opines that following a review of his clinical notes, while discussing with the testator both medical care plans and health decisions with the testator over the years, he was competent on July 15, 2014, August 1, 2014 and August 13, 2014.
- [74] In Exhibit 1(A), at pages 132 and 133, occupational therapy assessment documents were prepared by Jacqueline Jones, an occupational therapist. A good deal of the material in the assessment is clearly not first-hand information or observations of Ms. Jones. She did make observations of the testator having some difficulty moving from his bed that she felt was too low or his legs were too long. She also observed the testator struggling to get up from the couch and holding an apparently flimsy plastic rail in the bathroom to help him leave the bathtub. That said, there is not a single reference failure to respond to questions other than a disinclination to participate in the interview process at all. There is no mention of cognitive failure in these notes.
- [75] The Interior Health records contain a number of pages in handwriting which are illegible in part and are entitled "Progress Notes". At page 143, there is a distinct note that the testator was discharged to home on June 25, 2014.

- [76] The progress notes after June 25, 2014 include discussions about various home support programs, including geographical changes from Oliver to Penticton, which apparently upset the plaintiff. There were also notes that the plaintiff inadvertently ended home support services for the testator effective July 21, 2014 without realizing the care plan would be removed from the testator's home. There was also reference to the involvement of the Public Guardian and Trustee, who had become involved at the request of the plaintiff. The recorded notes indicate that the Public Guardian and Trustee's office was waiting for a psychological evaluation, which was not forthcoming. A power of attorney had been prepared but the plaintiff would not sign it because she did not feel her father was capable.
- [77] The progress notes indicate that a bed was available at Prairie Valley Lodge in Summerland, BC. However, complications had been caused by the freezing of bank accounts because of the involvement of the Public Guardian and Trustee, which made paying for accommodation difficult. Telephone calls from the plaintiff to members of the home support staff were noted as requiring her involvement in her father's care, notwithstanding that she refused to sign the power of attorney.
- [78] On October 24, 2014, Dr. O'Neil dictated a document entitled HCC referral from Acute, marked as Exhibit 1(A), page 156, in which Dr. O'Neil recorded a visit with the testator at the time of his second discharge from hospital. The noted reason for the visit was "Dementia/confusion/unable to cope at home". The "condition on referral" was psychiatric discord.
- [79] A Discharge Summary dictated by Dr. O'Neil dated November 17, 2014, advised that the testator had been admitted again to the hospital on October 16, 2014 and was discharged on October 24, 2014. The report states:
- [the testator] has suffered a slow, gradual onset of dementia including two recent strokes. He was a communications specialist within the federal government, which has helped him protect him against his dementia for quite some time. He has been living independently with the assistance of his daughter in OK Falls. He was found wandering and quite confused and required admission on acute delirium on dementia. He resolved very slightly in hospital and did not return to independent function and it was determined his dementia has probably likely progressed to the point that he requires placement he has been placed in Prairie Valley [Lodge] out in Summerland and we have been increasing his dose of antipsychotic Olanzapine to assist with his sundowning and aggressive behaviour while he transitions to the new location. I will continue to be his GP and his daughter is going to attempt to bring him to my office for visits. If this proves difficult or a challenge, given the locale of Summerland, I will transfer him to a local Physician in Summerland. At this point, our last discussion, he was stabilizing and starting to sleep at night although my suspicion will be that we will need to further titrate the Olanzapine or switch to Seroquel.
- [80] Clearly there had been adverse changes in the medical condition of the testator by October 16, 2014, and later in November 2014, which were carefully noted in the Penticton Regional Hospital records by Dr. O'Neil.

- [81] These repeated references to documents executed or prepared by Dr. O'Neil, which because of his personal observations of the testator are admissible for the truth of their contents, demonstrate that the submission of the plaintiff at para. 60 above is not accurate and does not support the case of the plaintiff.
- [82] The elder daughter testified that after the testator was discharged from the hospital on June 25, 2014, she lived with the testator for approximately six weeks until July 24, 2014, the day before the 2014 Will was executed. This statement is also repeated several times in a looking forward style on page 33 of the Interior Health Records. This statement was repeated as history in the plaintiff's submissions in para. 5.15 thereof. This statement is clearly not accurate as there are only four weeks between June 25 and July 24 in any year.
- [83] The plaintiff testified she did not discuss the 2014 Will with her sister during that time period. The plaintiff testified concerning a mini memory state exam said to have been conducted by Ms. Quig on June 27, 2014. Ms. Quig apparently conducted the assessment in the presence of the plaintiff and A.F. The Assessment Notes of that date indicate Ms. Quig received historical information from the plaintiff and A.F. The raw data from the test collected by Ms. Quig is contained in an exhibit; however, it is of little assistance to this court when interpreted by the plaintiff in the course of her giving evidence without any expertise. Ms. Quig was not called as a witness and whatever was described by the plaintiff is simply hearsay. There was no evidence put before the court that Ms. Quig was not available to testify as a witness.
- [84] The plaintiff testified about her father's condition in late June or July of 2014 as follows:
- a) She described her father as becoming "increasingly irascible";
 - b) She reported incidents where he had attempted to make a phone call with the wrong part of the phone and threatened to call the police;
 - c) That he appeared at one point with an axe; and
 - d) There was an incident where he had a shotgun beside him on a bed.
- [85] This led to the observation by the court that the content of what was said by the plaintiff of conversations between the two daughters respecting concerns about their father had been testified to only by the plaintiff in her evidence. No such conversation or comment had been put to the other daughter when she was testifying before this court. Counsel for the plaintiff admitted this to be a breach of the so-called rule in *Browne v. Dunn*, 1893 CanLII 65 (U.K.H.L.). As the younger sister had no opportunity to comment on this evidence, I cannot give the plaintiff's evidence on this point any weight: see *R. v. Podolski*, 2018 BCCA 96, at paras. 145 and 146, and *R. v. Quansah*, 2015 ONCA 237, at para. 79.
- [86] Both of the daughters agreed that the testator had some level of cognitive decline. They very much disagreed on what that level was and how it progressed. The younger daughter wrote to the elder daughter in March 2014 to the effect that the testator had missed a doctor's

appointment, saying he forgot despite reminders, that he was not taking medication regularly, that he was not bathing or cutting his hair and was wearing unpleasant clothes, that he had not used email for over a year, that he was eating very little and he was "going out rarely".

Credibility and Reliability of the Plaintiff

- [87] The profound difficulty in the case at bar is the quality of the evidence given by the plaintiff, who was the sole witness on her behalf. As noted below, the plaintiff's evidence about the testator's reading ability is inconsistent with the evidence of the witnesses to the July 2014 Will, the evidence of Ms. B. visiting the testator in hospital and obtaining a newspaper at the request of the testator, the evidence of L. B. at the Prairie Valley Lodge concerning the supply of newspapers to the testator, as well as the plaintiff's own letter to hospital staff asking to ensure that the testator received a newspaper. The plaintiff did not present evidence that the gift to the testator's grandchildren was anything but appropriate.
- [88] The plaintiff put in writing that on November 1, 2014, the testator was "capable of lengthy, deep, and meaningful conversations" on the telephone and was conversing by telephone with friends and relatives across Canada. These statements, which are consistent with the testator having a high level of mental competence in November 2014, are entirely inconsistent with a submission that the testator was incompetent in July 2014.
- [89] Where there is a conflict between the evidence of the plaintiff and the evidence of the witnesses referred to in paragraphs immediately above, including Mr. and Ms. B., I accept the evidence of the witnesses and reject the evidence of the plaintiff. I also find the plaintiff's statement that the testator was capable of lengthy deep and meaningful conversations and was in telephone communication with friends and relatives in conflict with the evidence of medical personnel, including Dr. O'Neil for the same November time period; I accept the evidence of Dr. O'Neil and other care givers and reject the evidence of the plaintiff.
- [90] I find that the plaintiff has not been a credible or reliable witness in this case.

Law and Analysis

Validity of the Will

Evidence

- [91] The first witness called by the defendants in this case to deal with the signing of a Will on July 25, 2014 by the testator was Mr. B. His evidence-in-chief began on August 26, 2016 and concluded on that date. The cross-examination of Mr. B. began on August 26, 2016 and concluded on June 3, 2019.

- [92] Mr. B. and his wife are neighbours of P.F. and A.F. Mr. B. characterized his relationship in 2014 with A.F. and P.F. as "not close". Mr. B. and his wife live on a ten-acre lot approximately 500 yards from the home of P.F. and A.F. Mr. B. is a graduate of UBC with a degree in Economics, followed by a two-year Faculty of Commerce Licentiate, the previous equivalent to a Masters of Business Administration degree.
- [93] Mr. B. is a self-employed businessman with various commercial real estate interests in shopping centres, condominiums, an industrial park, an irrigation business and a grocery store, as well as interests in a trucking businesses in the Okanagan area of British Columbia.
- [94] There was a single commercial dealing between the testator and Mr. B., which was an annual pre-winter contract, in the amount of \$45, to blow out water in the lines of the irrigation system installed on the Okanagan Property to prevent freezing water from damaging the irrigation system.
- [95] A.F. asked Mr. B. and his wife to witness the Will of the testator, which was signed on July 25, 2014. For his own edification, Mr. B. researched "on the internet" the procedure for the execution of a Will, determining in that process that a Will had to be read to or by the testator prior to signing.
- [96] Mr. B. had known the testator for at least ten years at that date. Mr. B. and his wife saw the testator three to eight times each year at small family barbecues or other holiday events in the neighbourhood. They also attended Western Hockey League games in the local events centre where S.C.F. played ice hockey.
- [97] Mr. B. testified that both he and the testator were "news junkies". Mr. B. was in the habit of reading two or three newspapers every day. This interest, coupled with the media background of the testator, led to lively conversations and as such, the two men enjoyed the company of one another and had a very good relationship.
- [98] During cross-examination, Mr. B. stated he was aware that the testator, as he aged, had problems with his kidneys and blood pressure. Mr. B. was aware that the testator had a stroke, but did not consider the subsequent symptoms as more than the testator then being a year older and "a touch slower". Because of business activities, Mr. B. had not been able to attend the hospital while the accused was there and had the stroke, but his wife, Ms. B., had visited the testator in the hospital at that time.
- [99] Mr. B. was asked in cross-examination if the testator spoke about his grandchildren in the last two years of his life. Mr. B. testified that the testator spoke about his grandchildren all the time, stating that he loved them. The testator bragged about his grandchildren and the potential of their careers. The testator told Mr. B. that he had paid for a hockey academy for one grandchild and flying lessons for the other grandchild.

[100] Mr. B. testified that he and his wife arrived at A.F.'s family home to witness the Will of the testator between 4:00 pm and 5:00 pm on July 25, 2014. Prior to the witnessing of the Will, Mr. B. had last seen the testator several months earlier before his stroke. Mr. B. took an opportunity to speak to the testator to settle any concerns that he might have had about the competency of the testator. Mr. B. testified he approached the issue of the ability of the testator to execute a Will with "an open mind".

[101] When they arrived, the testator was sitting on the couch in the living room reading a newspaper. Mr. B. approached the testator and related the following conversation in his testimony under cross-examination:

Q. Ok, so don't imagine. So what happened after you went and sat beside him?

A. So I sat down and I said "Hey, you know, what's going on? I haven't seen you since your stroke. How are you feeling," that sort of thing. And his response was, "Well, you know, not so great but not so bad considering." And I says, "Well you're not looking too bad." And he goes, "Yeah, well, thank you, thank you." He says "Nice to see you." So clearly he recognized me.

Q. What kinds of subjects, if any did you talk about?

A. How--the same stuff we talked about all of the time. You know, would start with hockey, local hockey, how the Veas were doing, but of course this is - it was just getting started with training camp so there wasn't too much to talk about there except for the prospects ."

[Transcript August 26, 2016, page 67, lines 28 to 45]

[102] By 2014, Mr. B. observed that the testator's physical movements had slowed following the stroke. Mr. B. testified that he saw no mental diminishment in the testator. He maintained his sense of humour and the speech patterns which Mr. B. had come to know over ten years of contact with the testator. Mr. B. testified that the speech patterns of the testator were "remarkably good".

[103] The subjects of conversation continued to politics and the unfolding senate scandal and the persons involved, some of whom were friends of the testator. Mr. B. described the conversation with the testator exhibiting the same speech patterns seen over the last ten years, although slower. The conversation, according to Mr. B., was typical of previous conversations about politics. The testator displayed his dry, witty humour "all the time". The conversation went on for twenty or thirty minutes. At the end of the conversation, Mr. B. testified that he had no concerns about witnessing the Will of the testator, and that while his physical stature had deteriorated and he was moving slower, the testator as "firing on all eight cylinders upstairs."

[104] Mr. B. was aware that the elder daughter had been at the home of the testator at some time prior to the signing of the Will, but was not at all sure of the dates she was there or when she left.

- [105] An Interior Health document dated June 24, 2014 (Exhibit 1, page 172) was read, in part, to Mr. B. The document stated "Writer's first impression is that the Client is not safe to remain at home without live-in support. Client is unable to navigate independently and safely [sic] through the day and make safe and reasonable decisions for self." Mr. B. stated this was not the condition of the testator when he saw him on July 25, 2014, a month later.
- [106] Mr. B. brought the conversation with the testator to an end as he had other business matters that he had to attend later that day. At that point in time, Mr. B. asked Ms. B. to join them, which she did, sitting beside the testator on the couch. Then Mr. B. asked the testator to read aloud the first page of the Will. Then Mr. B. asked the testator if he understood and agreed with everything on that page, and that the intent of the contents of the page just read was correct. The testator replied, "This is everything that I discussed with my lawyer." Then both Mr. B. and Ms. B. placed their initials on the bottom of the page. They went through a similar process for the remaining pages of the Will. The testator signed the Will as his Last Will and Testament and the witnesses, Mr. B. and Ms. B., listed their names as witnesses to the Will.
- [107] Mr. B. disagreed with suggestions during cross-examination that the testator on July 25, 2014 (1) had incoherent speech; (2) could not read; (3) could not write his signature; (4) had a repetitive speech pattern; (5) did not know where he was; or, (6) was in an almost infantile state.
- [108] During cross-examination, a document (Exhibit 2, Tab 23) entitled Statement of Facts of [Mr. B. and Ms. B.] was shown to Mr. B. He confirmed he gave the statement of facts on April 20, 2015 and that the statement was signed by he and his wife on that date before a witness. The portion of the statement read into the record was as follows:
- Both [Mr. B. and Ms. B.] noticed that [the testator] did show some small signs of having had a stroke. His mental acuity was quite fine, but his speech was, occasionally slower than it had been beforehand. [The testator] still displayed the awareness of current events and acuity of judgement as he had before the stroke. He was aware of time and place and still had his dry sense of humour."
- [109] Mr. B. agreed the Statement of Facts reflected his observations of the testator on July 25, 2014. Mr. B. did not agree that on July 25, 2014 the testator demonstrated signs of a stroke, but may have demonstrated some residual effects of a stroke that took place months earlier. His speech may have been slightly slower, but his speech was clear.
- [110] A number of questions were put to Mr. B. about whether he asked the testator about what the date and time was; where he was; questions about names of children or grandchildren; questions about the bank accounts, their types and amounts on deposit; questions about real estate owned, its value and debts outstanding; or the purpose or effect of a Will. Mr. B. expressed the view that the testator knew where he was and the identity of Mr. and Ms. B. The testator knew he had children and grandchildren; and that the testator's banking arrangements or amounts on deposit were none of Mr. B.'s business. He did not believe A.F.

was in the room when the Will was signed.

- [111] In re-examination, Mr. B. stated that he knew that the testator was changing his Will because of the conversation that he and the testator had at New Years to the effect that the testator was going to provide for P.F. in his Will and had not yet done so.
- [112] The conclusions of Mr. B. were based on his ten years of experience of "knowing the man". Mr. B. did not have a legal or medical checklist which he followed.
- [113] Ms. B. also gave evidence concerning the signing of the Will of the testator. She signed the Will as a witness.
- [114] Ms. B. is an office administrator. She considers herself as a good friend of A.F., whom she has known since 1994 or 1995. She does not know P.F. as well. Her relationship with the testator was more than acquaintances, but not close friends. They would talk with each other if they met casually and would discuss hockey games. They had also met at family dinners or barbecues. In the last three years of his life, they would meet three to five times each year.
- [115] A.F. had previously told Ms. B. that her father had had a stroke.
- [116] On July 25, 2014, she received a phone call from A.F. asking her to witness the testator's Will that evening. Ms. B. left work at 4:00 pm. She went to the home of A.F. sometime between 4:00 pm and 5:00 pm
- [117] She could not recall her most recent prior meeting with the testator.
- [118] The testator was sitting in the living room when Mr. and Ms. B. arrived and Mr. B. began talking to the testator. Ms. B. testified that the testator was "completely aware" of why Mr. and Ms. B. attended that afternoon; that is, the testator was aware that they were to witness his Will. She remained nearby while the two men carried on a conversation. She heard the testator talking about sports and politics all with a dry sense of humour. She was clear in her mind that the testator was capable of communicating verbally in the manner he had used for the time she had known him, notwithstanding he had a stroke months earlier.
- [119] After the conversation, Mr. B. asked the testator to read each page of the Will out loud, which the testator did. After he read each page out loud, Mr. B. asked the testator if he understood what he had just read. The testator said he understood completely and had discussed the contents of the Will with his lawyer and "that was the way it was supposed to be".
- [120] While the pages of the Will were being read and initialled, the testator was sitting in a chair in the living room and Mr. B. and Ms. B. were sitting side-by-side on a couch opposite him. The testator read the Will carefully and methodically and "his speech was fine".

- [121] Ms. B. identified her initials and signature on Exhibit 2, Tab 1, the 2014 Will of the Testator. She also confirmed that she was present and watched the testator sign the same document on July 25, 2014. She then indicated where her signature appears on the fourth page of that document.
- [122] Later, Ms. B. went with A.F. to visit the testator, who was then in hospital, and they visited with him there on an outdoor deck. Before she left the hospital she asked him if she could get anything for him. He asked for a newspaper which she obtained from a vendor at the hospital. When she delivered the newspaper to the testator, she saw him open the newspaper immediately and begin reading it.
- [123] Mr. and Ms. B. were witnesses who have no interest of any kind in the present case. Both gave evidence in a straightforward manner. I accept their evidence as honest, credible and reliable.
- [124] Having made that finding, it is necessary to deal with evidence given by the plaintiff. The plaintiff testified that any suggestion that her father was capable of reading at the time the Will was signed in July of 2014, was an "absurd claim" (Transcript August 25, page 69, line 31). I appreciate that the use of the word "absurd" is a conclusion and not a statement of fact, but this conclusion reflects on the credibility and reliability of the plaintiff. On November 1, 2014, the plaintiff wrote in an email sent to one of the testator's care providers concerning a telephone in her father's room at a senior's facility that her father relies on the telephone "to stay in touch with his numerous friends and family members, most of whom live in other parts of the country". The letter continues: "In spite of his diagnosis and damage to his short term memory from the stroke, he is capable of lengthy, deep, and meaningful conversations". The description of a person capable of lengthy, deep and meaningful conversations is wholly inconsistent a person without mental capability.
- [125] The plaintiff was challenged in cross-examination as to the source of information, apart from her own belief, that the testator was not capable of reading. Her answer was the lack of reading ability was drawn from "my father's medical diagnosis" or "the medical report from Interior Health." [Transcript, August 25, 2016, page 69, lines 42 to 47 to page 70, lines 1-13].
- [126] No medical diagnosis nor a medical report from Interior Health was identified by the plaintiff which referred to reading.

Analysis

- [127] The defendants seek to convince the court of the validity of the July 2014 Will. The governing law governing the validity of a Will is contained in the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA] as follows:

37(1) To be valid, a will must be

- (a) in writing,
- (b) signed at its end by the will-maker, or the signature at the end must be acknowledged by the will-maker as his or hers, in the presence of 2 or more witnesses present at the same time, and
- (c) signed by 2 or more of the witnesses in the presence of the will-maker.

[128] In the case at bar, the formalities of the execution of the Will dated July 25, 2014 have been met and the Will is therefore valid.

[129] In these circumstances, once statutory formalities are satisfied and the Will is found to have been duly executed, having been read over by the testator who appeared to understand the contents of the Will, a presumption that the testator knew and approved of the contents of the Will and had testamentary capacity arises: *Devore-Thompson v. Poulin*, 2017 BCSC 1289, at para. 57, citing *Vout v. Hay*, [1995] 2 S.C.R. 876, at para. 26. This presumption arises in the case at bar.

Suspicious Circumstances

[130] The plaintiff alleges there are suspicious circumstances surrounding the signing of the Will of the testator on July 25, 2014. In the case of *Re Singh Estate*, 2019 BCSC 272, MacDonald J. provided a very helpful discussion about suspicious circumstances and the evidence which must, at the end of the day, raise a "specific and focused suspicion."

B. Suspicious Circumstances

1. Law

67 Testamentary capacity means that the will-maker is:

...sufficiently clear in his understanding and memory to know, on his own, and in a general way (1) the nature and extent of his property, (2) the persons who are the natural objects of his bounty and (3) the testamentary provisions he is making; and he must, moreover, be capable of (4) appreciating these factors in relation to each other, and (5) forming an orderly desire as to the disposition of his property.

68 This summary of testamentary capacity is from *Re Schwartz* (1970), 10 D.L.R. (3d) 15 (Ont. C.A.) at 32, wherein Laskin J.J.A. (dissenting on other grounds) provided a modern restatement of the test from the seminal case of *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549 (Eng. Q.B.) [Banks]. This restatement has been adopted by this Court: see *Laszlo* at para. 188.

69 To rebut the presumption of testamentary capacity by establishing suspicious circumstances, the contestor of the will must raise: (1) suspicious circumstances surrounding the preparation of the will; (2) circumstances tending to call into question the capacity of the will-maker; or (3) circumstances tending to show that the free will of the will-maker was overborne by acts of coercion or fraud: *Vout* at para. 25.

70 The contestor must demonstrate that there is some evidence "which, if accepted would tend to negative knowledge and approval or testamentary capacity": Vout at para. 27, see also Peterson v. Welwood, 2018 BCSC 1379 [Peterson] at para. 102. This test is akin to the prima facie test in other legal contexts.

71 In Peterson at para. 102, Dardi J. suggested that the requisite evidence for rebutting the presumption is that which "excites the suspicion of the court." Justice Dardi cited Clark v. Nash (1989), 61 D.L.R. (4th) 409 at 425 (B.C.C.A.) for the proposition that a "general miasma of suspicion that something unsavoury may have occurred" is insufficient to rebut the presumption of validity; the evidence must raise a 'specific and focused suspicion'.

[131] The list of suspicious circumstances alleged by the plaintiff includes a reference to a diagnosis of dementia. Dementia, as medical documents in this case reveal, is a diagnosis which covers a number of diseases which attack the aging brain in a variety of ways.

[132] One of the documents referenced in the case at bar was page 7 of the Interior Health records, dated November 17, 2014, apparently prepared for an assessment for future placement of the testator in a care home. In this document, reference is made to the testator being brought into hospital in late May 2014, where he was treated for a gastric bleeding ulcer and declining kidney function, both monitored by the general practitioner of the testator. During the hospital stay, he suffered a CVA which resulted in a significant decline in cognitive ability and memory. It is not stated where the author of the contents of page 7 obtained the facts stated in that document, except for the reference to two of the three daughters being present with the client (the testator) when the assessment occurred. On the evidence presented to this court, the testator only had two daughters. The assessment prepared for home support purposes concludes with the statement "Client has poor memory and moderate to severe impairment with understanding others and expressing himself. Due to recent CVA it is hoped this will eventually get better." The word "dementia" does not appear in this document.

[133] A document dated May 30, 2014, at page 126 of the Interior Health documents, notes: "Our client has dementia. He is suspicious and likes his privacy". The source of this information is not disclosed in the document.

[134] Another document dated June 24, 2014 notes a family planning meeting held on ward with the testator and his two daughters as well as other individuals from the hospital. The report says "Client is now medically stable has been cleared for discharge by general practitioner Client is resistive to moving to a facility but needs guidance with the activities of daily living."

[135] Page 105 contains an Interior Health Authority document which indicates that the testator is to be discharged back to his own home on June 25, 2014:

A daughter from out of town will be able to stay with him for approximately six weeks before she has to return to the lower mainland. Client is in need of assessment for funded residential care. Writer has only met the client once but initial impression shows client will not be safe living independently in the community. Cognition is impaired and requires cueing for all activities of daily living ("ADLs"). He is unable to summon help in an emergency and is not able to safely navigate throughout the day. Daughter is wanting client to return home and facilitate placement from the community rather than wait in the hospital.

[136] At page 61 of the Clinical Records, Dr. O'Neil, the family practitioner for the testator, discusses the admission of the testator to hospital on October 16, 2014 and discharge on October 24, 2014. In that document Dr. O'Neil refers to the testator as suffering from:

slow, gradual onset of dementia, including two recent strokes. He was a communication specialist within the federal government, which has helped him protect against his dementia for quite some time. He has been living independently with assistance of his daughter in Okanagan Falls. He was found wandering and quite confused and required admission for acute delirium on dementia.

[137] In a letter dated November 1, 2014, the plaintiff wrote the following as part of a request for a phone to be installed in the testator's room:

My father and I have enjoyed a very close relationship which is heavily dependent on being able to speak with each other. In spite of his diagnosis and damage to his short-term memory from the stroke, he is capable of lengthy, deep, and meaningful conversations. To deprive him of conversations with his relatives and friends is to further endanger his mental capacity, and I have no doubt, his spirit spiritual and psychological well-being.

[138] On October 17, 2014 the plaintiff again wrote to the hospital liaison at the Penticton Regional Hospital noting that her father had been readmitted to hospital on October 16, 2014, and that he had "expressed a strong desire to leave Penticton and move to Vancouver where I live".

[139] At Exhibit 1, tab 7, page 93 in the Interior Health medical records, there is a long-term care referral by Dr. O'Neil on October 19, 2014, wherein Dr. O'Neil refers to the reason for his visit to meet with the testator as "dementia/confusion/unable to cope at home, chronic diseases listed or hypertension, dementia and other." The reasonable conclusion from these records is that the cognitive decline of the plaintiff had become more pronounced so that by October 2014, Dr. O'Neil, a physician who had followed the medical condition of the testator for more than a decade, changed his earlier opinion about the ability of the testator to care for himself or make decisions affecting his life.

- [140] The next document from the Penticton hospital records is an Interior Health assessment dated October 23, 2014. Its progress notes refer to a phone call from the plaintiff in which the plaintiff requested that the testator have a newspaper delivered to the testator's room at Penticton Regional Hospital. Ms. T. informed the plaintiff that the hospital had already been bringing the plaintiff a newspaper on a daily basis.
- [141] The plaintiff stated in the same message that the testator had begged her to take him to Vancouver to live with her and have her take care of him. Ms. T. informed the plaintiff that the testator had not expressed a desire to move to Vancouver or to remain in Penticton. Instead, Ms. T. reported when he is questioned as to where he wants to live, he will repeatedly answer he wants to return home to Thunder Bay, Ontario. No other witness supports the suggestion that the testator was begging to be taken to Vancouver to live with the elder daughter. No such suggestion was put to the younger daughter when she was in the witness stand, again contrary to a rule which anticipates confrontation on such statements.
- [142] The plaintiff also testified that Mr. B. was hired by the testator to irrigate his lawn. This statement is patently untrue. Mr. B. had no such contract. P.F. installed the irrigation system on the Okanagan Property. The only role that Mr. B. has, according to his unchallenged testimony, was that Mr. B. has an annual contract to blow out water at the end of the season to prevent ice damage. Yet the plaintiff persisted with evidence that this was not accurate or confirmed by any other evidence.
- [143] As described above, the plaintiff has submitted that there are suspicious circumstances in this case. There is a submission about the nature of the signature of the testator on the July 2014 Will, which is without merit given the findings above concerning the execution of the Will. There was an acknowledgement that the testator suffered from some short-term memory problems, but those were not sufficient to support a finding at the time the Will was executed in July that the testator was not competent to execute a Will.
- [144] Further, the claim that the testator had without varying since 2001 decided to divide his estate between his daughters has been discussed above. It is noted that the plaintiff did not know what an equal division would entail; she seemed unaware that she had received substantially more of the largess of the testator than her sister while the testator was alive.
- [145] The testator was not required as a matter of law to divide his estate equally between independent children. The testator from 2013, as discussed above, had taken into account a need to make equal the division of the estate, recognize the valuable contribution to that estate and its value by the work of P.F., and the presence of two grandchildren, with whom the testator had no relationship in 2001, but had developed a strong relationship by 2013.

[146] Taking into account all of the evidence and submissions of counsel together with the cases cited therein, I find there are no suspicious circumstances in the case at bar that would cause the court to refuse to accept the July 2014 Will as an accurate expression of the testamentary wishes of the testator.

Undue Influence

[147] Where undue influence or fraud is alleged in relation to the execution of a Will, the party opposing probate bears the legal burden of proving on a balance of probabilities the affirmative defence of undue influence: Vout, at para. 28. In the case at bar, apart from a statement by the plaintiff that her father complained about attempts by the younger daughter to have him change his Will in her favour, no other evidence was presented to demonstrate that the July 2014 Will was somehow the product of undue influence. That statement by the plaintiff was not supported by any other evidence, nor was it put to the younger daughter during her testimony as a statement made by her father.

[148] There was never a complaint of any significance in the entire course of the evidence that any of the work done by P.F. was not properly done or that it was not otherwise of significant value to the home belonging to the testator at the time of his death. For instance, the front stairs were constructed of large stone slabs which would no doubt be extremely durable and not in need of replacement for a number of decades.

[149] It was clear the younger daughter provided significant and very caring and proper assistance to her father as he aged. He decided to move to a location near his younger daughter's home and enjoyed the company of A.F., P.F., and his two grandchildren.

[150] The testator, by his conduct, demonstrated his support for the activities of his grandchildren, assisting in the partial payment of hockey school tuition for one grandson, and partial payment for the flying lessons taken by the other grandson. The testator would often attend hockey games with A.F., P.F. and other neighbours, and sometimes enjoyed meals at the games.

[151] These activities continued as the testator aged, but in no way could any of these activities be considered the basis for a legal finding of undue influence. If such were the case, no modern will where families were involved in the support and companionship of elders would be sustainable. While A.F. may have been in a position to unduly influence the testator, that coercive power must actual be exercised to constitute undue influence: Maddess v. Racz, 2008 BCSC 1550, at para. 324, aff'd 2009 BCCA 539.

[152] It must also be noted that in the case at bar, the testator resided with the elder daughter for the month prior to the execution of the July 2014 Will. There was no evidence nor suggestion that during that period of time any influence whatsoever was exercised by the younger daughter or any member of her family.

[153] Given the evidence of J.T., the question of undue influence was of concern to her, and J.T. repeatedly requested that the testator give her instructions out of the presence of the younger daughter, who was then providing chauffeur services to the testator. On occasion, the younger daughter was not present for all or part of the time that the testator spent with J.T. The testator made it clear, in the opinion of J.T., that the contents of his proposed will was his attempt to equalize contributions previously made to both daughters, with great generosity, and to properly include his grandchildren. The evidence of Mr. B. and Ms. B. further supports that the testator remained able to act freely, and that the contents of the Will accurately reflected the instructions which the testator gave to legal counsel.

Wills Variation

[154] Section 60 of WESA provides:

Maintenance from estate

60 Despite any law or enactment to the contrary, if a will-maker dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the will-maker's spouse or children, the court may, in a proceeding by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the will-maker's estate for the spouse or children.

[155] In *Public Guardian and Trustee of British Columbia v. Johnston*, 2016 BCSC 1388, at paras. 83-84, the court noted that generally it is improper to include a wills variation claim in an action for proof of will in solemn form because a valid will is necessary for a variation claim. However, the court noted that these claims have occasionally been heard together rather than being severed. Given the length and expense of these proceedings, the information already before me, and my above finding that the Will is valid, I find it is in the interests of justice to decide the plaintiff's wills variation claim.

[156] In *Dunsdon v. Dunsdon*, 2012 BCSC 1274, at para. 134, Ballance J. reviewed the factors which inform the existence and strength of a testator's moral duty to independent children:

- relationship between the testator and claimant, including abandonment, neglect and estrangement by one or the other;
- size of the estate;
- contributions by the claimant;
- reasonably held expectations of the claimant;
- standard of living of the testator and claimant;
- gifts and benefits made by the testator outside the will;
- testator's reasons for disinheriting;

- financial need and other personal circumstances, including disability, of the claimant;
- misconduct or poor character of the claimant;
- competing claimants and other beneficiaries.

[157] The plaintiff in written submissions advanced the proposition that as a matter of fact the value of gifts received by the family of the younger daughter exceeds the value of gifts to the plaintiff under the disputed Will. With great respect, this submission lacks merit. Each of the daughters received one of the cottage properties or camps in Ontario. The younger daughter did not receive any cottage property pursuant to the disputed Will. In fact, the evidence in this case clearly demonstrates that the younger daughter was a joint owner of the cottage property as at the date of the testator's demise. In those circumstances, the property was conveyed to the younger daughter by operation of law and not "under the disputed Will".

[158] It is of some interest to note that the plaintiff submits the value of the property which moved to the younger daughter under the jointure was alleged to be \$140,000 when the property owned by the elder daughter transferred from her father was \$137,000. [Exhibit 2, Tab 35, Property Tax Bill for 2016].

[159] It is not clear where the \$140,000 valuation submitted by the plaintiff is sourced.

[160] The assessed value of the two lots which moved from the jointure to A.F. shown in the 2016 Property Assessment Notice fixes the value of those lots at \$112,000 (Exhibit 2, Tab 16). Based on the comparison of the two values, it appears arguable that the lots owned by A.F. have a lower value than the lot owned by the plaintiff. That said, it is not necessary for this court to decide that issue. It is sufficient to note that the difference in value of these two properties is not significant, but is a further demonstration of the generosity of the testator towards his two daughters.

[161] The evidence before the court clearly demonstrated that the testator was aware he had advanced as a gift more than \$100,000 to the elder daughter, which is described in detail above, and out of his sense of fairness, the testator sought to equalize that gift to the elder daughter, at least in part. The testator chose to do that under the July 2014 Will. On the facts, this gift does not provide an additional advantage to the younger daughter; this gift simply allowed her to catch up to her elder sister.

[162] With respect to the division of the proceeds of sale of the Okanagan Property, the court was not provided with the actual amount of the proceeds of sale, which apparently occurred. The evidence described above indicates the testator's desire to compensate P.F. for the extensive work done on both the Okanagan Property and the Ontario Camp property, for which P.F. had not been otherwise compensated. It is noted that despite a considerable duration of time for research or reviews of bank documents of the testator, there was no bank record or cheque stub, for example, that might support a finding that P.F. had been paid for a very substantial volume of work for a number of years.

- [163] Given the nature and considerable extent of that work, particularly on the Okanagan Property, there can be little doubt that the work increased the value of the Okanagan Property to a degree, which in the state of the evidence cannot be accurately determined.
- [164] It is not clear how the plaintiff came to the figure of \$550,000 as the value of the Okanagan Property referred to the written submissions. Assuming the valuation of \$550,000 provided by the plaintiff is accurate, after real estate commissions and legal fees, approximately \$530,000 would be available for distribution. If there were no debts of the estate which would take priority over this distribution, then the plaintiff would be entitled to \$185,000 and P.F. would, on the same assumption, be entitled to receive \$344,500, a difference of approximately \$160,000.
- [165] The gifts of \$25,000 to each of two grandchildren are gifts to two now-adult persons, separate from A.F. or P.F. The testator had relationships with each of these young men independent of their parents, and supported and took an interest in their education and training.
- [166] Reviewing the factors set forth in Dunsdon, I note the following:
- (a) the elder sister and the young sister had positive relationships with their father. There were not aspects of abandonment, neglect and estrangement by one or the other;
 - (b) the parties have provided the court with limited information about the value of the estate and have separate proceedings dealing with the estate accounting;
 - (c) the contributions of the plaintiff to the value of the estate are not evident;
 - (d) the plaintiff has said the testator promised that she would receive half of the estate, but that is not a promise binding in law. The testator decided to change the distribution of his estate to accommodate more beneficiaries but the plaintiff still received a substantial bequest. The plaintiff acknowledged that she was aware in 2014, before the execution of the July 2014 Will, that the testator intended to change the provisions of his Will. At para. 136 of Dunsdon, the following appears:

The law imposes no requirement that children be treated equally by a testator: *Re Lukie et al. and Helgason et al.*, 72 D.L.R. (3d) 395, [1976] B.C.J. No. 1393 (C.A.); *Price v. Lypchuk Estate* (1987), 37 D.L.R. (4th) 6, [1987] 4 W.W.R. 128 (B.C.C.A.). Therefore, the mere fact that an independent child has not been given the same provision under a will as the testator's other children will not necessarily establish a moral claim. In a variety of situations, the courts have accepted an unequal distribution of an estate as being fair and adequate. *Tataryn* itself is an example of an unequal distribution even after the court varied the terms of the will.

- (e) the standard of living of the plaintiff is self described as "middle-class";

- (f) as noted above, the testator made substantial gifts to the plaintiff during the course of his life, which include the approximately \$170,000 noted above, and the plaintiff has also received a one-half interest in the RIFF of the testator upon his death;
- (g) the plaintiff has not been disinherited and the Will provides a generous gift for her which includes 35% of the proceeds of the sale of the Okanagan Property and one-half of the residue of the estate;
- (h) the plaintiff has not demonstrated financial need, nor other personal circumstances such as disability, which might give rise to a moral claim. She works as a university professor in Vancouver, British Columbia, is compensated appropriately, and owns a valuable interest in a home in a residential area in that city;
- (i) misconduct or poor character of the plaintiff has no apparent role in this case; and
- (j) from 2013 forward, the testator expressed to his lawyer among others that he felt the need to equalize the \$100,000 gift he had made earlier to his elder daughter by paying a like sum to his younger daughter, which is one of the provisions of the Will. In the same timeframe, the testator expressed a desire to compensate P.F. for extensive and unpaid construction and plumbing work performed by P. F. on the Okanagan Property and the Ontario Camp. There is little doubt this work enhanced the value of the Okanagan Property and hence the value of the estate of the testator. The testator also developed relationships with his two grandsons, encouraging their activities and supporting their training and advancement in their fields of interest. It is perfectly valid for grandchildren to be considered by a testator with sufficient means to do so.

[167] Having considered the foregoing factors, I am satisfied that the approach adopted by the testator in his July 2014 Will provided prima facie fair treatment of the beneficiaries of this estate.

Conclusion

[168] In all of the circumstances, and after a careful review of the evidence and findings thereon together with the submissions of counsel and the case authorities cited therein, this court is satisfied that the testator had testamentary capacity to execute the Last Will and Testament in the name of the testator dated July 25, 2014 and that the testator knew and approved of the contents of the said Last Will and Testament.

[169] As noted above, the evidence heard herein does not support a finding of suspicious circumstances or that the testator was unduly influenced to execute the said Last Will and Testament.

[170] This court declares that the Last Will and Testament of the testator executed on July 25, 2014 is the valid Last Will and Testament of the testator and that Will may be admitted for a Grant of Probate in this court.

[171] As agreed by the parties, there will also be an order that the funds from the sale of the testator's Chevrolet Traverse, the boat, and the "Dad's Care" account are included in assets of the estate of the testator.

[172] The action of the plaintiff in this file is hereby dismissed.

[173] As requested by counsel, the court did not address the issue of costs in this action. If the parties are unable to agree on the resolution of costs, the parties have liberty to apply for the court to hear submissions and deal with that issue.

"Ball J."

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